Opinion issued February 17, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00656-CV

NATHAN GOFF CORRICK, Appellant

V.

MELINDA LYNNE CORRICK, Appellee

On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Case No. 49076

MEMORANDUM OPINION

This is an appeal of a property division in a divorce case. In two issues, appellant Nathan Goff Corrick contends that the trial court abused its discretion in dividing the community estate and ordering Nathan to make installment payments

"as alimony" to effectuate a 55%–45% property division in favor of appellee Melinda Lynne Corrick. In particular, Nathan argues that the trial court's decision to deduct an approximately $80,000 projected tax liability from Melinda's share of the community estate was unsupported by the evidence, as was the trial court's decision to order him to make installment payments "as alimony" to equalize the property division.

The record does not support including a contingent tax liability as part of the division of the community estate. We therefore reverse the portions of the divorce decree pertaining to the trial court's division of the community estate, including the court-ordered installment payments, and we remand for further proceedings regarding division of the community estate.

I. Background

Melinda and Nathan divorced after 27 years of marriage. At the time of their divorce, they had no minor children. After the separation, Melinda moved in with her elderly and infirm parents. She had primarily been a homemaker for the duration of the marriage, working only occasionally throughout the marriage to supplement the family's income. She had medical problems that impacted her physical and mental health. She testified that she had chronic back and neck pain, that she had undergone surgery for her medical conditions, that she required daily pain medication, and that she suffered from depression. She had a high-school

education, and she testified that she was unable to get a job. She testified that she had only approximately $400 or $500 remaining from the money she withdrew from the couple's joint checking account before they separated. Although Melinda repeatedly testified that she had no money, she also repeatedly said that she wanted to buy a house near her parents' home.

On cross-examination, Melinda was asked if she would rather take a lump-sum settlement from Nathan's pension plan or receive the money when he retires. She testified that she did not know and that she would like to discuss the matter with her attorney. She was not asked if she would prefer a lump-sum payment from Nathan's retirement savings account. She did not offer any testimony or evidence regarding whether she intended to take her share of the retirement savings account in a single distribution.

Nathan worked as a nuclear operations specialist. He had worked for his employer for 21 years and intended to continue to work there. Nathan earned a base salary of approximately $90,000, and with his bonuses he earned in excess of $100,000 per year. Nathan conceded that it would be financially difficult for Melinda to establish her own household, and he testified that he thought a lump-sum settlement would be in her best interest.

The largest community assets, as valued by the court, were Nathan's retirement savings account (worth approximately $267,000), the marital home

(worth approximately $133,000), and Nathan's pension plan (worth approximately $75,000). Both Nathan and Melinda proposed awarding her the larger share of the retirement savings account. There was no specific testimony or evidence about tax consequences of dividing the community estate or any potential tax liability on a distribution from the retirement savings account; however, Nathan acknowledged generally that Melinda would be liable for taxes upon withdrawal.

The trial court granted the divorce on grounds of insupportability. The trial court awarded the house to Nathan, divided the pension plan equally, and divided the retirement savings account, awarding $23,956 to Nathan and $243,138 to Melinda. In addition, in its inventory the trial court reduced the value of property awarded to Melinda by $80,235, reflecting the court's calculation of the tax liability that would be incurred upon Melinda's withdrawal of her share of the retirement savings account, based on a 33% tax rate applied to the entire amount. Finally, under a subheading entitled, "Additional Orders for Property Division," the trial court ordered that Nathan pay Melinda a total of $23,753, for 15.8 months at $1,500 per month, "as alimony."

The trial court filed findings of fact and conclusions of law, which were listed in the following categories: (1) Findings of Fact—Divorce; (2) Findings of Fact—Division of the Marital Estate; (3) Division of the Marital Estate—Factors Considered in Just and Right Division; (4) Findings of Fact as Conclusions of Law;

(5) Conclusions of Law—Divorce; and (6) Conclusions of Law—Division of Marital Estate. As to division of the community estate, the trial court found that Melinda had not been gainfully employed for over 10 years, had medical problems that prevented her from working, was in poor physical and mental health, had only a high school education, had no immediate prospects for employment, and had no skills or education—other than a high school diploma—that would facilitate gainful employment. The trial court found that Nathan earned more than $100,000 per year, was currently employed, and continued to accrue retirement benefits. The trial court considered the following factors in determining that a just and right division of the marital estate should disproportionately favor Melinda:

> (1) Melinda . . . would have received ongoing benefits from the continuation of the marriage;
>
> (2) There is a disparity of earning power of the spouses and their ability to support themselves, such that Nathan . . . is significantly more able to support himself after the divorce of the parties;
>
> (3) The health issues of the parties support a disproportionate award of the community estate in favor of [Melinda];
>
> (4) The education and future employability of the parties supports a disproportionate award of the community estate in favor of [Melinda]; and
>
> (5) The disparity of earning power, business opportunities, capacities, and abilities of the parties supports a disproportionate award of the community estate in favor of [Melinda].

Nothing in the divorce decree, the trial court's statements in open court, or the findings of fact and conclusions of law mentions spousal maintenance. Nathan requested additional findings of fact pertaining to spousal maintenance and the valuation of the contingent tax liability that the trial court credited to Melinda. The trial court declined to file any additional findings of fact or conclusions of law.

In two issues, Nathan contends that the trial court abused its discretion in ordering alimony and in dividing the property of the martial estate because the evidence was legally and factually insufficient to support its findings.

II. Standard of review

An appellate court reviews for abuse of discretion a trial court's division of community property of the marital estate. *Dunn v. Dunn*, 177 S.W.3d 393, 396 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (spousal maintenance); *Alsenz v. Alsenz*, 101 S.W.3d 648, 654–55 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (division of property). A court of appeals presumes that the trial court properly exercised its discretion, *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981), and will find an abuse of discretion only if the trial court has acted arbitrarily, unreasonably, without reference to any guiding rules and principles, or without sufficient supporting evidence. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998); *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex.

1985); *Raymond v. Raymond*, 190 S.W.3d 77, 83 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

In an appeal from a bench trial, the court of appeals reviews de novo a trial court's conclusions of law and will uphold them on appeal if the judgment can be sustained on any legal theory supported by the evidence. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *Hailey v. Hailey*, 176 S.W.3d 374, 383 (Tex. App.—Houston [1st Dist.] 2004, no pet.). However, when, as here, the appellate record includes the reporter's record, the trial court's factual findings, whether express or implied, are not conclusive and may be challenged for sufficiency of the evidence supporting them. *Tucker v. Tucker*, 908 S.W.2d 530, 532 (Tex. App.—San Antonio 1995, writ denied). Therefore, under the abuse-of-discretion standard of review, legal and factual sufficiency of the evidence are not independent grounds for asserting error: they are relevant factors in assessing whether the trial court abused its discretion. *Dunn*, 177 S.W.3d at 396. Because of the overlap between the abuse-of-discretion and sufficiency-of-the-evidence standards of review, this court engages in a two-pronged inquiry to determine whether the trial court (1) had sufficient information on which to exercise its discretion and (2) erred in its application of that discretion. *Stamper v. Knox*, 254 S.W.3d 537, 542 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

With regard to the question of whether the trial court had sufficient information, we utilize the traditional sufficiency review. *See id.* When conducting a legal-sufficiency review, the court determines whether the evidence would enable reasonable people to reach the judgment being reviewed. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). The court of appeals considers favorable evidence if a reasonable fact finder could and disregards contrary evidence unless a reasonable fact finder could not. *Id.* When conducting a factual-sufficiency review, the appellate court considers and weighs all the evidence that was before the trial court. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Raymond*, 190 S.W.3d at 80. We may not, however, merely substitute our judgment for that of the fact finder. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). "If the division of marital property lacks sufficient evidence in the record to support it, then the trial court's division is an abuse of discretion." *Raymond*, 190 S.W.3d at 83.

With regard to whether the trial court erred in its application of discretion, the appellate court determines whether, based on the evidence, the trial court made a reasonable decision. *Stamper*, 254 S.W.3d at 542 (citing *Zeifman*, 212 S.W.3d 582, 588 (Tex. App.—Austin 2006, pet. denied). "Once reversible error affecting the 'just and right' division of the community estate is found, the court of appeals

must remand the entire community estate for a new division." *See Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex. 1985).

III. Division of the community estate

In a decree of divorce, the court shall order a division of the community estate in a manner that the court deems just and right, having due regard for the rights of each party. TEX. FAM. CODE ANN. § 7.001 (West 2006); *Rafferty v. Finstad*, 903 S.W.2d 374, 376 (Tex. App.—Houston [1st Dist.] 1995, writ denied). Trial courts have wide latitude and discretion in dividing community property. *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998). A "just and right" division does not require a trial court to divide the marital estate into equal shares. *Murff*, 615 S.W.2d at 698–99 & n.1 (recognizing that community property need not be equally divided). When dividing community property, the trial court may consider many factors, including each party's earning capacity, abilities, education, business opportunities, physical health, financial condition, age, and size of separate estates, as well as any future needs for support, expected inheritance, custody of any children, reimbursements, gifts to a spouse during marriage, fault in the breakup of the marriage, length of the marriage, attorney's fees, and a spouse's dissipation of the estate. *See Murff*, 615 S.W.2d at 699; *Hailey*, 176 S.W.3d at 380; *Alsenz*, 101 S.W.3d at 655. With respect to tax consequences, the Family Code specifically provides that "[i]n ordering the division of the estate . . . the

court may consider: (1) whether a specific asset will be subject to taxation; and (2) if the asset will be subject to taxation, when the tax will be required to be paid." TEX. FAM. CODE ANN. § 7.008 (West 2006).

Prior to the 2005 enactment of Family Code section 7.008, some caselaw suggested that a trial court would err by considering future tax liability in the just and right division of a community estate, particularly to the extent such a determination rested upon "speculation or surmise." *E.g.*, *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 847–48 (Tex. App.—Texarkana 1996, writ denied); *Harris v. Holland*, 867 S.W.2d 86, 88 (Tex. App.—Texarkana 1993, no writ). Regardless of whether these cases would have been decided differently after enactment of section 7.008, we note that the Family Code now specifically authorizes a trial court's consideration of future tax liability. TEX. FAM. CODE ANN. § 7.008(2). The problem here is not that the liability considered by the trial court was contingent on future events; rather, it is that there was insufficient evidence to support the trial court's conclusions that the tax would be incurred and the amount of tax at issue. Notably in this regard, the trial court's judgment assumes that the entire amount of Melinda's share of the retirement savings account would be taxed at a rate of 33%. Federal income tax rates are progressive and impose higher rates of taxation on marginally higher amounts of income. *See* 26 U.S.C. § 1 (federal income tax rates). Nothing in the record supports a

conclusion that Melinda anticipated enough other income for her effective average rate of taxation to be 33%. *See id.*

In his second issue, Nathan contends that the trial court did not divide the property in a just and right manner because, among other alleged errors, the trial court sua sponte accounted for a tax liability of approximately $80,000 on Melinda's share of the retirement savings account, despite the lack of evidence of such a liability. Melinda did not testify as to any plans to liquidate her share of the retirement savings account; she did not testify about the amount she might withdraw or the timing of such a withdrawal. These factors would be essential to the determination of any resulting tax liability. She did testify about her desire to buy a house, and her apparent lack of other assets with which to do so may have led the court to infer that she intended to liquidate her share of the retirement savings account. The only evidence adduced at trial regarding any tax consequences of such a withdrawal from the retirement savings account came from Nathan, who agreed that Melinda would be required to pay taxes on a withdrawal. But because Melinda's contingent tax liability depends on the amount and timing of the withdrawal, the trial court had no evidence upon which to base its assessment of Melinda's liability. Because of this disposition, we need not resolve whether the trial court erred in its calculation, including the question of whether the trial court took appropriate judicial notice of prevailing rates of taxation.

Melinda contends in her surreply brief that she can likely remedy this absence of proof with minimal additional proceedings on remand. And that may be so. We note, however, that an award of anticipated tax liability is not the only means of addressing problems arising from the division of illiquid assets. The trial court can fashion a decree that is conditioned upon future events which may trigger a tax liability. *See, e.g.*, *Robbins v. Robbins*, 601 S.W.2d 90, 92 (Tex. App.—Houston [1st Dist.] 1980, no writ) (finding no abuse of discretion when husband ordered to hold wife harmless with respect to percentage of future capital-gains-tax liability for sale of house). Moreover, a trial court may also consider the liquidity of assets in the estate when making its just-and-right division. *See, e.g.*, *Alsenz*, 101 S.W.3d at 655 (considering illiquidity of estate's assets as factor justifying disproportionate award of community assets); *Smith v. Smith*, 836 S.W.2d 688, 693 (Tex. App.—Houston [1st Dist.] 1992, no writ) ("a trial court's failure to award sufficient liquid assets to one spouse could constitute an abuse of discretion in certain circumstances"); *see also Young v. Young*, 609 S.W.2d 758, 760 (Tex. 1980) (approving language relying upon liquidity of assets as valid consideration quoted from *McKnight v. McKnight*, 535 S.W.2d 658 (Tex. Civ. App.—El Paso), *rev'd on other grounds*, 543 S.W.2d 863 (Tex. 1976), and *Horlock v. Horlock*, 533 S.W.2d 52, 61 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd w.o.j.)).

Melinda argues that Nathan did not object to the trial court's inclusion of the tax liability at the trial court and that his appellate complaint is limited to the lack of evidence of the applicable tax rate. We disagree with both of these contentions. Although Nathan did not object at the time the trial court announced its decision, he did include complaints about the lack of evidence to support the tax liability in his motion for new trial. In addition, on appeal Nathan specifically argues that there was "absolutely no evidence that Melinda would withdraw the entirety of any award to her," that there was no evidence of the applicable tax rate, and that there was no evidence of the tax liability.

We conclude that there was no evidence upon which the trial court could have based its assessment of tax liability on a withdrawal from the retirement savings account. For this reason, we sustain Nathan's second issue.

IV. Spousal maintenance

In his first issue, Nathan argues that the trial court abused its discretion by awarding spousal maintenance because there was insufficient evidence to support such an award and because, as a matter of law, a trial court abuses its discretion by awarding maintenance in lieu of an interest in community property. Melinda, in response, argues that the evidence was sufficient to support the trial court's award of spousal maintenance, though she does not dispute the legal proposition that an award of spousal maintenance to equalize a marital property division is improper.

See O'Carolan v. Hopper, 71 S.W.3d 529, 533–34 (Tex. App.—Austin 2002, no pet.). Although both parties have briefed this issue as pertaining to spousal maintenance, the first question to be answered here is not whether the trial court abused its discretion in awarding spousal maintenance, but whether the trial court actually awarded spousal maintenance. This inquiry requires us to construe the divorce decree.

We interpret the language of a divorce decree as we do other judgments of courts. *Hagen v. Hagen*, 282 S.W.3d 899, 901 (Tex. 2009) (citing *Shanks v. Treadway*, 110 S.W.3d 444, 447 (Tex. 2003)). We construe the decree as a whole to harmonize and give effect to the entire decree. *Id.*; *see Constance v. Constance*, 544 S.W.2d 659, 660 (Tex. 1976). If the decree is unambiguous, the appellate court must adhere to the literal language used. *Hagen*, 282 S.W.3d at 901. If the decree is ambiguous, it is interpreted by reviewing both the decree as a whole and the record. *Id.* Whether a divorce decree is ambiguous is a question of law. *Id.* at 901–02.

Although the parties have briefed this issue as one involving spousal maintenance, nothing in the divorce decree, the trial court's statements in open court, or the findings of fact and conclusions of law mention spousal maintenance. The trial court did not file any additional findings of fact or conclusions of law in response to Nathan's request on the issue of spousal maintenance. There is no

reference to Chapter 8 of the Family Code, which governs awards of spousal maintenance, in the divorce decree, the findings of fact and conclusions of law, or the trial court's statements when announcing its judgment to the parties in open court. *See* TEX. FAM. CODE ANN. §§ 8.001–.305 (West 2006). Rather, the trial court called the order requiring Nathan to make periodic cash payments to Melinda, "Additional Orders for Property Division." In addition, the sum of $23,753 was calculated based on the trial court's division of the parties' community property, not in reference to the parties' resources and needs. *See* TEX. FAM. CODE ANN. § 8.052 (West 2006).

We decline to read the word "alimony" in isolation and construe the trial court's award as an award of spousal maintenance. *See Hagen*, 282 S.W.3d at 901. Rather, construing the divorce decree as a whole, we conclude that the trial court's award of periodic cash payments was in the nature of installment payments to equalize the division of the community property to the 55%–45% division the trial court sought to achieve. *See, e.g., Stubbe v. Stubbe*, 733 S.W.2d 132, 133 (Tex. 1987) ("Court ordered alimony, available in most other jurisdictions, is not available in Texas as it contravenes Texas public policy."). Because we conclude that the trial court did not award spousal maintenance, we offer no opinion on whether spousal maintenance would be proper in this case.

Having held that the trial court committed reversible error in dividing the community estate, we must reverse and remand for a new division of the community estate. *See Jacobs*, 687 S.W.2d at 733. Having concluded that the trial court's award of periodic cash payments was part of the division of the community estate, we need not rule on Nathan's first issue, whether the trial court's award of periodic payments "as alimony" was supported by sufficient evidence.

CONCLUSION

We reverse the portions of the divorce decree pertaining to the trial court's division of the community estate, and we remand for further proceedings regarding division of the community estate.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.