

Opinion issued April 12, 2018.



In The
Court of Appeals
For The
First District of Texas

NO. 01-16-00735-CV

TROY LEE CHRISTENSEN, Appellant
V.
CHRISTINA CHRISTENSEN, Appellee

On Appeal from the 246th District Court
Harris County, Texas
Trial Court Case No. 2015-43169

MEMORANDUM OPINION

This is an appeal from a reformed decree of divorce and property division rendered after a bench trial. In his first, second, and third issues, appellant, Troy Lee Christensen, argues that the trial court abused its discretion by dividing the marital property between appellee, Christina Christensen, and himself because the division

was not a fair and equitable apportionment of the community estate and it was manifestly unjust and unfair. In his fourth and fifth issues, Troy argues that there is no evidence or, alternatively, insufficient evidence supporting the trial court's division of the marital property. We affirm the reformed final divorce decree.

Background

Troy and Christina were married in August 2008. Christina filed for divorce on July 24, 2015, after she discovered escort and dating websites on the couple's home computer and Troy's cellphone. Troy filed a counter petition on August 24, 2015. Christina amended her petition in May 2, 2016, adding a ground for divorce based on Troy's alleged adultery. Christina also sought a disproportionate division of the community estate based upon several factors, including Troy's fault in the breakup of the marriage, Troy's wasting of community assets, and Troy's gifting of community assets during the marriage, as well as claims of actual or constructive fraud by Troy.

A. Trial

A two-day bench trial began on June 6, 2016. Christina testified that she was working as a pharmacist for Rite Aid in North Carolina when she and Troy married in 2008. Christina quit her well-paying job and relocated to Houston in 2011 after Troy was offered a position with a large energy company. Christina was laid off from

her most current pharmacy job a week before trial while Troy was gainfully employed with an income of over \$200,000 a year, plus bonuses.

The record reflects that Troy and Christina have numerous financial accounts, retirement accounts, investment and brokerage accounts, credit cards and loans, and a home. The couple maintained separate bank accounts and placed funds into a joint account only when necessary to pay ongoing expenses. Specifically, Christina deposited her income into a Wells Fargo account and Troy deposited his income into a Fidelity account. Christina testified that she allowed Troy to manage her separate property investment accounts and that she had no information with regard to any accounts, aside from the Wells Fargo account.

Christina testified that Troy provided her with a “Net Worth” statement when they separated in October 2015 that he claimed identified all of their accounts. The “Net Worth” statement, which was admitted into evidence, identifies assets including \$60,000 in Knowlegent stock and a T. Rowe Price account valued at \$15,584. Christina testified that she did not know how many shares of Knowlegent stock Troy acquired when he joined Knowlegent and that the only documentary information she received from Troy, aside from the “Net Worth” statement, was a 1099 reflecting Troy’s sale of 6,000 shares of Knowlegent stock for \$1,200 in September 2015. Christina also testified that she had not received any documentation

regarding the T. Rowe Price account other than the “Net Worth” statement. [2 RR 75]

Troy testified that he worked for Knowlegent from November 2014 until August 2015. According to Troy, Knowlegent, which is not a publicly traded company, “gave” him 6,000 shares of stock when he joined the company and “made him spend” \$1,200 to obtain them. He claimed, when he left the company nine months later, he was required to sell the shares back for the same amount. Troy testified that he had sold the stock back before he gave Christina the “Net Worth” statement and that the \$60,000 value he had assigned to the stock was as an old value that he had put into a Fidelity program that had not been updated. He also provided a 1099 form reflecting that he had sold 6,000 shares of Knowlegent stock for \$1,200 in September 2015.

Troy testified that his Knowlegent 401k plan funds were held by T. Rowe Price and that he rolled those funds over into a Fidelity account after he left Knowlegent in August 2015. Although he claimed to have given his counsel documentation supporting this transaction, Troy did not offer any such documents into evidence at trial.

Christina testified that she believed that Troy had taken out a loan during the marriage that was tied to a Prosper 401k retirement account, but she did not have any documentation to support her belief. Troy denied having a Prosper 401k account,

but he acknowledged that he took out a \$20,000 Prosper loan in February 2016 and Troy's documentary evidence reflects that the loan had a balance of \$18,022.65 as of May 2016.

To support her claims for waste and fraud, Christina testified that she had reviewed the documents that Troy produced during discovery and she found more than \$640,000 in unexplained or questionable financial transactions or expenses by Troy using financial accounts and credit cards that he controlled. The spreadsheet she created detailing these expenditures was admitted into evidence. Christina grouped many of these questionable and unexplained transactions and expenses into three categories—sexual expenses, gift expenses, and travel expenses—and created spreadsheets summarizing these categories of expenses that were also admitted into evidence. She considered these unexplained or questionable financial transactions and expenses a waste of community assets.

Among his other questionable and unexplained expenses, Christina determined that Troy had paid an interior decorator approximately \$19,000 to decorate the apartment he rented after they moved out of their residence. Christina also learned during discovery that Troy had taken a trip to Hawaii with a woman and her son and had paid his companions' expenses with community assets. Christina identified these expenses on her spreadsheets, along with two separate \$1,000 payments to the

woman from Troy. Christina testified that she suspected that Troy and the woman were having an affair.

Christina also testified that the approximately \$10,500 in sexual expenses included in her spreadsheets—which included recurring charges for an international online dating site and multiple visits to local massage parlors—provided no benefits to the community estate. Her gift expenses spreadsheet shows \$186,696.55 in payments that Troy made to his parents, to his adult children, or for their benefit. The majority of these transactions are college tuition payments for his children. Christina testified that she never consented to the use of community funds to pay for Troy's children's tuition or for gifts to his family. She understood that Troy had saved for his children's tuition and that he would be paying those expenses with his separate funds.

Troy offered limited explanations regarding Christina's summaries of unusual or unexplained expenditures. Troy admitted that he paid \$19,000 to decorate his two bedroom apartment, along with an additional \$35,000 to furnish his rented residence. He also testified that the woman who accompanied him to Hawaii was his masseuse. Although he admitted that he had taken her and her son on vacation with him, Troy denied that he was having an affair with her. He also explained that the two \$1,000 payments were for massages and that he normally paid her in cash for massages every other week. Troy admitted to subscribing to an international dating site that

charged him \$399 to exchange a letter and photos with women, and that he had done this fifty or sixty times. The charges for these transactions are included on Christina's spreadsheet.

Troy denied that he had agreed to pay for his children's college tuition costs from his separate property. He testified that Christina knew that he was sending money to his children and that she never put a limit on the amount of money he could send them. Troy testified that he believed it was fair for Christina to help pay for this expense from her share of the community estate.

B. Divorce Decree and Findings of Fact and Conclusions of Law

The trial court signed a Reformed Final Decree of Divorce on August 17, 2016, and issued findings of fact and conclusions of law at Troy's request on August 17, 2016. Among its findings, the trial court found that a T. Rowe Price account had been valued by Troy as of June 20, 2015, and that Troy had not provided any documentation that countered that value, other than his testimony, which the court found was not credible. The court also found that the Knowlgent stock was community property and that the last value for this stock that Troy had provided to Christina during discovery was \$60,000. The court found that the 1099 form provided by Troy reflected a sale of Knowlgent stock for \$1,200 in September 2015, but there was no evidence of the number of shares that Troy had originally

held, or any evidence to counter the \$60,000 value provided by Troy in discovery in June 2015.

With regard to Christina's waste and fraud claims against Troy, the trial court found that Christina had introduced spreadsheets of unexplained transactions into evidence and that Troy had either refused to account for such transactions or did not dispute them. The court also found that Troy had: (1) gifted over \$186,600 of community assets to his adult children from another marriage and to his parents without Christina's consent, (2) spent over \$10,500 of community assets on "dating sites and other sites involving escorts and massage parlors," (3) used community property to pay "the expenses for a woman and her son to accompany him to Hawaii on vacation" without Christina's consent, (4) paid an interior decorator approximately \$19,000 in community assets to decorate his rented apartment without Christina's consent, and (5) "failed to offer any evidence accounting for, explaining, justifying and/or refuting the nature and/or amount of the waste and fraud allegation raised by [Christina's] evidence during trial." The trial court further found that, based on these findings, Troy had "committed constructive fraud on the community estate and that [his] conduct in this regard, supports the award of a disproportionate division of the community estate to [Christina]."

Further, the trial court made additional findings supporting its decision to award of a disproportionate division of the community estate to Christina. The trial

court found that Troy had committed adultery and that Troy's annual income was over twice Christina's annual income. The trial court also found that Troy, who did not dispute or account for many of the questionable financial transactions included in Christina's spreadsheets, had "failed to produce numerous documents relating to the nature and/or value of community assets and/or liabilities, necessitating court intervention to compel discovery and unnecessarily increasing the costs of litigation," and that he had "failed to provide an updated inventory and appraisal, and other documents required by Harris County Family Court Division Local Rule 4.4."

Troy argues that the trial court's division of the community property resulted in an 80/20 split in Christina's favor, whereas Christina contends that the community property was divided 75/25 in her favor. Christina, however, acknowledges that, in either case, "the division is clearly disproportionate in Christina's favor."

C. Standard of Review

We review a trial court's division of marital property for an abuse of discretion. *See Barras v. Barras*, 396 S.W.3d 154, 164 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). The trial court has broad discretion when dividing the marital estate at divorce, and we must indulge every reasonable presumption in favor of the trial court's proper exercise of its discretion. *See Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981). "To disturb a trial court's division of property, a party must

show that the court clearly abused its discretion by a division or an order that is manifestly unjust or unfair.” *Barras*, 396 S.W.3d at 164. A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without any reference to guiding rules and principles. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). Each spouse has the burden to present sufficient evidence of the value of the community estate to enable the trial court to make a just and right division. *Finch v. Finch*, 825 S.W.2d 218, 221 (Tex. App.—Houston [1st Dist.] 1992, no writ).

In family law cases, legal and factual sufficiency challenges do not constitute independent grounds for asserting error, however, they are relevant factors in determining whether the trial court abused its discretion. *Syed v. Masihuddin*, 521 S.W.3d 840, 847 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing *Niskar v. Niskar*, 136 S.W.3d 749, 753 (Tex. App.—Dallas 2004, no pet.)). To determine whether a trial court abused its discretion because the evidence is legally or factually insufficient to support its decision, we consider whether the trial court (1) had sufficient evidence upon which to exercise its discretion and (2) erred in its application of that discretion. *Syed*, 521 S.W.3d at 847; *see also Lynch v. Lynch*, ___ S.W.3d ___, No. 01-16-00573-CV, 2017 WL 4054167, at *15 (Tex. App.—Houston [1st Dist.] Sept. 14, 2017, pet. filed). We conduct the applicable sufficiency review when considering the first prong of the test. *See Syed*, 521 S.W.3d at 847. We then determine whether, based on the evidence, the trial court made a reasonable

decision. *Id.* 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. *Id.* (citing *Wilson v. Wilson*, 132 S.W.3d 533, 537 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)).

When conducting a legal sufficiency review, an appellate court reviews all the evidence in a light favorable to the finding, crediting favorable evidence if a reasonable fact finder could do so and disregarding contrary evidence and inferences unless a reasonable fact finder could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). If the evidence would enable reasonable and fair-minded people to differ in their conclusions, then the fact-finder must be allowed to do so. *Id.* A reviewing court cannot substitute its judgment for that of the fact finder so long as the evidence falls within this zone of reasonable disagreement. *Id.*

To determine whether the evidence is factually sufficient, we must consider, weigh, and examine all of the evidence that supports or contradicts the fact finder's determination. *Raymond v. Raymond*, 190 S.W.3d 77, 82–83 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986)). We may set aside a verdict only if the evidence supporting it is so contrary to the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. *Cain*, 709 S.W.2d at 176.

We defer to the trial court's factual resolutions and any credibility determinations that may have affected those resolutions, and we may not substitute

our judgment for the trial court's in those matters. *See Murff*, 615 S.W.2d at 700; *see also Coleman v. Coleman*, 109 S.W.3d 108, 111 (Tex. App.—Austin 2003, no pet.). This is, in part, because the trial court is in a better position, having faced the parties and their witnesses, observed their demeanor, and had the opportunity to evaluate the claims made by each spouse. *See Coleman*, 109 S.W.3d at 111.

D. Applicable Law

Family Code section 7.001 requires the trial court to divide community property in a “just and right” manner. TEX. FAM. CODE ANN. § 7.001 (West 2006). However, mathematical precision in dividing property in a divorce is usually not possible. *Murff*, 615 S.W.2d at 700. Equal division of property is not required, but the division must be equitable. *Chafino v. Chafino*, 228 S.W.3d 467, 473 (Tex. App.—El Paso 2007, no pet.).

If the evidence demonstrates a reasonable basis for doing so, a trial court may order a disproportionate division of the community property. *Murff*, 615 S.W.2d at 698–99. Various factors are relevant and may properly be considered in dividing the community-property estate under Family Code section 7.001. *See id.* at 699. These non-exclusive *Murff* factors include: (1) the nature of the property; (2) the disparity of incomes or earning capacities; (3) the parties’ business opportunities; (4) the parties’ relative financial condition and obligations; (5) the parties’ education and physical condition; (6) the disparity in ages; (7) fault in the break-up of the marriage;

(8) the benefit the innocent spouse would have received had the marriage continued; (9) the size of any separate estates; and (10) the probable need for future support. *See id.* The value of a community asset on which there is disputed evidence is a question of fact. TEX. FAM. CODE ANN. § 6.711(a)(2) (West Supp. 2017).

A trial court may also take fault into consideration when dividing an estate. *Nowzaradan v. Nowzaradan*, No. 01-05-00094-CV, 2007 WL 441709, at *7 (Tex. App.—Houston [1st Dist.] Feb. 8, 2007, no pet.) (mem. op.) (citing *Murff*, 615 S.W.2d at 698). In a fault-based divorce, the trial court may consider the conduct of the errant spouse when making a disproportionate distribution of the marital estate. *See In re Marriage of C.A.S.*, 405 S.W.3d 373, 384 (Tex. App.—Dallas 2013, no pet.); *see, e.g., In re K.R.C.*, No. 05-13-01419-CV, 2015 WL 7731784, at *4 (Tex. App.—Dallas Dec. 1, 2015, pet. denied) (mem. op.) (affirming trial court’s disproportionate division of community property based on adultery finding). The trial court may also consider that a spouse unfairly depleted or dissipated community assets. *Nowzaradan*, 2007 WL 441709, at *7.

E. Sufficiency of the Evidence

Because the legal and factual sufficiency of the evidence are relevant factors in determining whether the trial court abused its discretion by dividing the marital property, we address Troy’s fourth and fifth issues challenging the sufficiency of the evidence first.

Troy argues that there was no evidence or insufficient evidence that the community's assets at the time of the divorce included Knowligent stock valued at \$60,000 or a T. Rowe Price account valued at \$15,854, and there is no evidence or insufficient evidence that Troy wasted community assets or defrauded the community. Troy also claims that there is no or insufficient evidence that would have allowed the trial court to disregard and fail to include the \$18,022.65 Prosper loan balance as a community debt.

Christina and Troy provided different values for the Knowligent stock and the T. Rowe Price account. Specifically, Troy testified that neither the Knowligent stock nor the T. Rowe Price account was an asset of the community estate at the time of the divorce, and he assigned no value to either alleged asset. Troy testified that Knowligent had required him to sell back the stock when he left the company in 2015 and he had rolled over the Knowlegent 401k plan funds that were held by T. Rowe Price into a Fidelity account around the same time. Christina testified that she had no information regarding these accounts other than what Troy had provided to her, including the Net Worth statement, and that she had no documents supporting Troy's claims that he sold all of the Knowlegent stock and rolled the funds in the T. Rowe Price account into a Fidelity account in 2015.

The value of a community asset on which there is disputed evidence is a question of fact. TEX. FAM. CODE ANN. § 6.711(a)(2). Although the value of

community assets is generally determined at the date of divorce or as close to it as possible, nearness in time is a matter left to the discretion of the trial court. *See Quijano v. Quijano*, 347 S.W.3d 345, 349–50 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (trial court did not abuse its discretion by considering six-month-old statement to assess value of checking account when that was best evidence of record concerning value of account).

As the trier of fact, it was the trial court’s role to judge the credibility of the witnesses, weigh the testimony, accept or reject any testimony, and resolve conflicts in the evidence. *City of Keller*, 168 S.W.3d at 819; *Murff*, 615 S.W.2d at 700. The trial court found that Troy’s testimony was not credible and it relied heavily upon the Net Worth statement provided by Troy when determining the value of the Knowlegent stock and the T. Rowe Price account. The values assigned to these properties fell within the range of values testified to at trial. As the sole judge of the credibility of the witnesses, the trial court was free to believe Christina’s testimony over Troy’s testimony and we will not substitute our credibility determinations for the trial court’s determinations. *Murff*, 615 S.W.2d at 700; *see also Syed*, 521 S.W.3d at 848.

Troy also complains that the trial court failed to include the \$18,022.65 balance on the Prosper loan as a debt, and there is no evidence, or insufficient evidence, that would have allowed the trial court to disregard and fail to include the

loan as a debt. The record, however, reflects that the trial court did include the Prosper loan in its division of community property and it allocated the debt to Troy. Christina testified that she believed that Troy had taken out a loan during the marriage that was tied to his Prosper 401k retirement account, but she did not have any documentation to support her belief. Troy denied having a Prosper 401k account, but he acknowledged that he took out a \$20,000 Prosper loan in February 2016 and Troy's documentary evidence reflects that the loan had a balance of \$18,022.65 as of May 2016. The reformed judgment reflects that the trial court assigned the Prosper loan to Troy when it divided the community debts between the parties, and the court ordered Troy to pay "the balance due on the Prosper Loan." The trial court did not make any specific findings of fact with regard to the loan, including the loan's value and Troy did not request additional or amended findings with regard to this issue. *See generally* TEX. R. CIV. P. 298.

With respect to Christina's claims that Troy wasted community assets and defrauded the community, the trial court found that Christina had introduced into evidence spreadsheets of unexplained transactions and that Troy had either refused to account for such transactions or did not dispute them. Troy argues that there is legally and factually insufficient evidence to support the trial court's waste and fraud findings because Christina's evidence of waste and fraud amounts to no more than speculation, conjecture, and rumors.

A waste of community assets occurs when a spouse wrongfully depletes the community's assets without the other spouse's knowledge or consent. *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998). "A fiduciary duty exists between a husband and a wife as to the community property controlled by each spouse." *Zieba v. Martin*, 928 S.W.2d 782, 789 (Tex. App.—Houston [14th Dist.] 1996, no pet.). Therefore, a presumption of constructive fraud—i.e., waste—arises when one spouse disposes of the other spouse's interest in community property without the other's knowledge or consent. *Id.*

We addressed an argument similar to that advanced by Troy in *Puntarelli v. Peterson*, 405 S.W.3d 131 (Tex. App.—Houston [1st Dist.] 2013, no pet.). The husband in that case argued that there was legally and factually insufficient evidence to support the trial court's waste judgment because the wife "presented no more than 'a mere suspicion that there may have been a transfer out of the community estate.'" *Id.* at 137. We held that the wife's evidence that community assets were missing from an account that the husband controlled was enough to raise a presumption of constructive fraud, which shifted the burden to the husband to prove the fairness of the disposition of the assets. *Id.* at 138. We further held that the trial court did not abuse its discretion by finding that the husband had wasted community assets because the husband did not meet his burden of proof. *Id.*

Christina testified that she and Troy handled their day to day finances out of separate accounts within their individual control and that they placed funds into a joint account when necessary to pay ongoing expenses. According to Christina, she used her Wells Fargo account to manage some of her income during the marriage and Troy controlled or managed all of the couples' other accounts. It was within the trial court's discretion to determine that Troy controlled the accounts in which the unexplained transactions and expenses occurred, and it was Troy's burden to prove the fairness of the disposition of the assets. Troy offered explanations for some of the disputed claims, but the trial court did not find Troy's testimony credible, and we will not substitute our credibility determinations for the trial court's determinations. *Murff*, 615 S.W.2d at 700; *see also Syed*, 521 S.W.3d at 848.

We overrule Troy's fourth and fifth issues challenging the sufficiency of the evidence regarding the property division.

Division of Marital Property

In his first, second, and third issues, Troy argues that the trial court abused its discretion by dividing the marital property because the division was not an equitable apportionment of the community estate and was manifestly unjust and unfair.

Troy argues that the trial court's division of marital property was manifestly unjust and unfair because it resulted in an 80/20 (or 75/25) split in Christina's favor and was not supported by sufficient evidence. We have already resolved Troy's

sufficiency challenges against him. Further, we note that courts have upheld divisions of community estates in which one spouse received 100% of the estate or received a greatly disproportionate share of the estate based on evidence similar to Christina's evidence in this case. *See Lynch*, 2017 WL 4054167, at *17; *see, e.g., Taylor v. Taylor*, No. 14-09-00012-CV, 2010 WL 2542549, *2–4 (Tex. App.—Houston [14th Dist.] June 24, 2010, no pet.) (mem. op.) (upholding award to wife that husband characterized as being more than 100% of community estate based on finding that husband had been at fault for divorce and consideration of *Murff*-factor evidence); *In re K.N.C.*, 276 S.W.3d 624, 630 (Tex. App.—Dallas 2008, no pet.) (affirming wife's award of 100% of community estate when evidence showed husband had used community assets for his own personal benefit for which wife derived no benefit).

In this case, the trial court relied on several of the *Murff* factors when it determined that Christina was entitled to a disproportionate share of the community property. Specifically, the trial court found that Troy had committed adultery and was at fault for the break-up of the marriage, Troy's annual income was over twice Christina's annual income, and that Troy had wasted community assets. We further note that Troy does not challenge the trial court's finding that Christina was entitled to a disproportionate share of the community property because Troy had committed

adultery. *See In re K.R.C.*, 2015 WL 7731784, at *4 (holding finding of adultery alone can support disproportionate distribution of community property).

Having determined that the trial court had sufficient evidence to support the exercise of its discretion, we cannot say that the trial court erred under the facts presented by this case. *See Syed*, 521 S.W.3d at 847. We overrule Troy's first, second, and third issues challenging the trial court's division of marital property.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Keyes, Brown, and Lloyd.