Affirmed and Memorandum Opinion filed March 29, 2016.

In The

Fourteenth Court of Appeals

NO. 14-13-00749-CV

JANELL SUE MARIN, Appellant

V.

JOEL JOSEPH MARIN, Appellee

On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Cause No. 56502

M E M O R A N D U M O P I N I O N

Janell Sue Marin ("Janell") appeals the division of community property in a final decree of divorce contending the trial court disregarded a community debt. We affirm.

I. BACKGROUND

Joel Joseph Marin ("Joel") sued for divorce alleging that his marriage to Janell had become insupportable because of discord or conflict of personalities that

destroyed the legitimate ends of the marriage relationship and prevented any reasonable expectation of reconciliation, and that Janell had committed adultery. Janell answered and filed a counterpetition alleging that the marriage had become insupportable, Joel was guilty of cruel treatment, and Joel had committed adultery.

Both Joel and Janell filed an Inventory and Appraisement listing stock in a company called Ameriwaste as an asset. Janell was the president and founder of Ameriwaste. Together, their stock holdings represented 82% of Ameriwaste's outstanding stock; Janell owned 51% and Joel owned 31%. To the 82% of the outstanding Ameriwaste stock, Janell assigned a value of $940,000, and Joel attributed a value of $2,096,000.

In her inventory, Janell listed a $380,000 loan from Ameriwaste as a community debt. The $380,000 loan was a portion of the total amount necessary to discharge Janell's personal liability under what the parties refer to as "IESI judgment" in the amount of $502,000. The judgment was the result of a lawsuit by IESI TX Corp. against Janell, in which a jury found that she, *inter alia*, breached her fiduciary duty to her former employer (IESI) and committed fraud, conversion, and forgery.[1] Joel paid $122,000 towards satisfaction of this judgment, and Janell borrowed $380,000 from Ameriwaste to satisfy the remaining amount owed under the judgment. The $380,000 debt is evidenced by two promissory notes signed by Janell in favor of Ameriwaste. In his inventory, in a section entitled "Waste Claim Against Janell Marin," Joel listed the IESI judgment and assigned a value of $502,000. He did not include a specific reference to the $380,000 loan from Ameriwaste to Janell.

[1] *See Marin v. IESI TX Corp.*, 317 S.W.3d 314, 319, 336 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

The parties agreed to trial by a special judge pursuant to Section 151.001–.013 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 151.001–.013 (West 2011). The agreed order of referral stated that the "special judge shall hear all issues in this case, specifically, the trial on the merits of the parties' divorce case" and contained no limitation on the special judge's authority. After a four-day trial, the special judge advised the parties of his division of property, and signed the Final Decree of Divorce.

Janell filed a motion for new trial, alleging that the division of property "inadvertently omitted" the debt of $380,000 to Ameriwaste. Janell attached to her motion a document, which Janell refers to as a spreadsheet, assigning assets and liabilities to Joel and Janell, the "Inventory and Proposed Division of Property of Joel Marin (Scenario #1)," and Janell's affidavit. Approximately one month later, the special judge denied Janell's motion for new trial. Janell filed her notice of appeal, and the special judge signed findings of fact and conclusions of law.

II. STANDARD OF REVIEW

Section 7.001 of the Texas Family Code provides that the trial court must divide community property in a "just and right" manner, having "due regard for the rights of each party." *See* Tex. Fam. Code Ann. § 7.001 (West 2006). A trial court may exercise wide discretion in ordering a property division. *See Zieba v. Martin*, 928 S.W.2d 782, 786 (Tex. App.—Houston [14th Dist.] 1996, no writ) (citing *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981)). Equal division of property is not required, but the division must be equitable. *See Chafino v. Chafino*, 228 S.W.3d 467, 473 (Tex. App.—El Paso 2007, no pet.). We review the division of marital property for an abuse of discretion. *See Murff*, 615 S.W.2d at 700. Absent abuse of discretion, we will not disturb the trial court's property division. *Id*. "An abuse of discretion does not occur where the trial court bases its decision on

conflicting evidence or where some evidence of a substantial and probative character exists to support the trial court's division." *Zieba*, 928 S.W.2d at 786. Under this standard, sufficiency of the evidence is a relevant factor in assessing the trial court's discretion. *See Marriage of O'Brien*, 436 S.W.3d 78, 82 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *In re T.J.L.*, 97 S.W.3d 257, 266 (Tex. App.—Houston [14th Dist.] 2002, no pet.)). To prevail on a complaint about property division, an appellant bears the burden to demonstrate, based on the evidence in the record, that the division was so unjust and unfair as to constitute an abuse of discretion. *See id*.

We review the trial court's findings of fact for legal sufficiency of the evidence by the same standards by which we review the evidence supporting a jury's finding. *See Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). When reviewing legal sufficiency, we consider only the evidence and inferences tending to support the trial court's findings, disregarding all contrary evidence and inferences. *See Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001).

We employ a two-pronged analysis to review the division: (1) did the trial court have sufficient information on which to make its determination; and (2) did the trial court abuse its discretion by making a manifestly unjust or unfair property division. *See Evans v. Evans*, 14. S.W.3d 343, 346 (Tex. App.—Houston [14th Dist.] 2000, no pet.). A trial court abuses its discretion when it rules without supporting evidence. *Id*. A trial court is authorized to consider a variety of factors, commonly referred to as the "*Murff*" factors. *See Murff*, 615 S.W.2d at 699. In making a just and right division, a trial court may also take into account "wasting of community assets." *Schlueter v. Schlueter*, 975 S.W.2d 584, 598 (Tex. 1998).

III. ANALYSIS

Janell presents four issues for review. In general, issues one and two relate to complaints regarding the special judge, its verdict, and Janell's motion for new trial. Issues three and four relate to Janell's claim that the trial court abused its discretion by failing to account for a community debt, resulting in a disproportionate division of property.

A. Complaints related to Texas Civil Practice and Remedies Code sections 151.011–.013.

Janell's first issue challenges whether the special judge lacked authority to issue a final decree of divorce. Because section 151.013 provides "an appeal is from the order of the referring judge's court as provided by the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure," we abated the appeal with instructions to Janell to obtain a final judgment, and we dismissed the appeal when no final judgment was filed. *See* Tex. Civ. Prac. & Rem. Code Ann. § 151.013; *Marin v. Marin*, No. 14-13-00749-CV, 2015 WL 1262287, at *1 (Tex. App.—Houston [14th Dist.] March 17, 2015) (mem. op.). Janell filed a motion for rehearing providing the "Order Memorializing the Finality of this Case and Approving and Adopting the Final Decree of Divorce Filed on June 5, 2013." We granted Janell's motion for rehearing and allowed the appeal to proceed. Therefore, we need not consider Janell's first issue.

In her second issue, Janell argues that the trial court erred by not granting her motion for new trial because the special judge did not timely submit the verdict within sixty days of the adjournment of trial as required by section 151.011 of the Texas Civil Practice and Remedies Code. Section 151.011 provides:

> The special judge's verdict . . . stands as a verdict of the referring judge's court. Unless otherwise specified in an order of referral, the

> special judge shall submit the verdict not later than the 60th day after the day the trial adjourns.

Tex. Civ. Prac. & Rem. Code Ann. § 151.011. Section 151.012 provides:

> If the special judge does not submit the verdict within the time period provided by section 151.011, the court *may* grant a new trial if: (1) a party files a motion requesting the new trial; (2) notice is given to all parties stating the time and place that a hearing will be held on the motion; and (3) the hearing is held.

Id. § 151.012. (emphasis added). Janell argues that section 151.012 mandates or requires the trial court to grant a new trial if these three requirements of the statute are met. We disagree. When, as here, the statute (section 151.012) uses "may," not "shall," it creates discretionary authority. *See* Tex. Gov't Code Ann. § 311.016(1) (West 2013). Under the general rule of statutory construction, "may" is given a permissive construction. *Inwood N. Homeowner's Ass'n v. Meier*, 625 S.W.2d 742, 744 (Tex. App.—Houston [1st Dist.] 1981, no writ). Thus, the clear language of the statute does not "mandate" the granting of a new trial; rather, it gives the trial court discretion to do so. Janell cites no authority for her position that section 151.012 mandates a new trial, and we find none.

Additionally, Janell is not entitled to a new trial under section 151.012 because the record does not contain evidence that Janell complied with all of the requirements of section 151.012; specifically, the record does not reflect that Janell gave notice of the time and place that a hearing will be held on the motion for new trial. *See* Tex. Civ. Prac. & Rem. Code Ann. § 151.012. The record also does not reflect that Janell requested the trial court to set the motion for hearing and that a hearing was held. *See id.*

Janell also complains that the motion for new trial should have been ruled on by the presiding judge of the court, not the special judge. *See id.* Here, the order denying the motion for new trial was signed by Thomas Stansbury on August 22,

2014 as the "presiding judge," not the special judge. We assume for argument's sake that Judge Stansbury was not assigned as the presiding judge, acted as a special judge, and had no authority to rule on the motion for new trial under section 151.012. Even with these assumptions, Janell cannot prevail because she waived this complaint by not presenting it to the presiding judge. As a prerequisite to presenting a complaint for appellate review, the record must show: (1) the party presented a timely request, motion, or objection to the trial court sufficient to make trial court aware of complaint, and (2) the trial court ruled or refused to rule and the complaining party objected to the refusal. *See* Tex. R. App. P. 33.1(a); *Priddy v. Rawson*, 282 S.W.3d 588, 597 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (holding appellants waived complaint because did not expressly present it to the trial court). The record does not show that Janell argued to the presiding judge that Judge Stansbury lacked authority to rule on the motion for new trial or that Janell requested the presiding judge to set aside the order denying the motion for trial for that reason.

Moreover, even if it is assumed that Judge Stansbury's denial of the motion for new trial was ineffective because he lacked authority, the motion for new trial was overruled by the trial court by operation of law. *See* Tex. R. Civ. P. 329b(c).

We overrule Janelle's second issue.

B. "Just and right" division

In her third and fourth issues, Janell contends the trial court abused its discretion by "failing to award and account for" the $380,000 debt and requiring her to pay the $380,000 debt twice—as debt service to Ameriwaste and in the waste claim to Joel. Janell asserts that the $380,000 debt to Ameriwaste is a debt of the community because it was incurred by Janell during the marriage by and for the benefit of the community estate, and that the special judge was required to

award it to her as part of the division of community property. Janell states that, after trial concluded, the special judge provided the parties with his conclusions via email,[2] providing a spreadsheet referred to as Exhibit A, and, after making adjustments for waste claims, determined that a "50/50" division was appropriate. Janell argues that spreadsheet assigning the division of property did not include the $380,000 loan to Janell from Ameriwaste. Janell does not attack the special judge's methodology used or valuation set by the special judge.

Joel does not dispute the characterization or existence of the loan. He disputes that Ameriwaste had a business purpose in loaning the money to Janell and whether Janell would be required to repay Ameriwaste. Joel further asserts that the special judge did not abuse his discretion by not specifically "awarding" the $380,000 loan because there was evidence to support the division. He contends the finding of the value of the 82% of the outstanding shares in the Ameriwaste stock and the assignment to Janell of all of it demonstrates the court's consideration of the debt.

1. The decree and findings of fact

The Final Decree of Divorce awarded to Janell the 82% of shares of stock in Ameriwaste. It also awarded Joel a money judgment of $341,297 against Janell as

[2] Joel objects to our consideration of the email and the attached Exhibit A, reflecting the special judge's division of property, as not being properly before the court because it is attached only to Janell's appellate brief. The email appears in the record as an attachment to her motion for new trial. There is no indication that the motion was set for hearing; thus, there was no opportunity for the email to be introduced into evidence and become part of the appellate record. *See McMahan v. Greenwood*, 108 S.W.3d 467, 500 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (concluding where order denying new trial does not state court considered the evidence attached to the motion, the evidence is not a part of the appellate record). We agree that the email is not part of the appellate record, and we will not consider it. *See Canton-Carter v. Baylor Coll. of Med.*, 271 S.W.3d 928, 931 n.2 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The spreadsheet, referred to as Exhibit A, was attached to Janell's motion for disclosure and reconsideration; therefore, it is part of the appellate record.

part of the division of community property.[3] Pertinent to this appeal, the special judge made the following findings:

> 11. The division of property as set out in the Final Decree of Divorce is based on the following equitable factors considered by the Court in its division of property and allocation of debts:
>
> a. [Janell]'s adultery and fault in the breakup of the marriage;[4]
>
> b. [Janell]'s fraud on the community;
>
> c. The benefits [Joel] may have derived from the continuation of the marriage;
>
> d. Community indebtedness and liabilities created by [Janell];
>
> e. Wasting of community assets by the (sic) [Janell];
>
> f. Reimbursement claims owed by Janell to the community estate;
>
> g. The amount of attorney's and litigation fees incurred and paid in this case by [Joel] due to the discovery abuses of [Janell];
>
> h. The expenses paid by Joel during the pendency of this case to maintain community property during the pendency of this case;
>
> i. The nature of the property to be divided;
>
> j. The actions of [Janell] that lead to a jury's finding that Janell had committed forgery, misapplication of fiduciary property, fraud, and conversion, within the jurisdictional limits of this court, that have substantially harmed the value of the community estate and [Joel];

[3] Exhibit A, entitled "Inventory and Proposed Division of Property of Joel Marin (Scenario #1)," attached to the findings of fact and conclusions of law reflects that the special judge ordered judgment of $461,297 in favor of Joel. That amount was reduced to $341,297 after Janell agreed to pay the lump sum of $120,000 to reduce the amount of the judgment. In addition, Exhibit A assigns to Janell the entirety of the liability for the $502,000 IESI Judgment in the section entitled "Waste Claim against Janell Marin/Fraud on the Community."

[4] The trial court's findings included the parties' full names.

k. Constructive fraud committed by [Janell]; and

l. The actions of [Janell] that have harmed the value of the community's interest in various business entities.

. . .

12. [Janell] . . . had a fiduciary relationship with and a fiduciary duty to Joel. . . . [Janell] violated her fiduciary duty to [Joel].

13. [Janell] defrauded [Joel] . . . .

14. During the parties' marriage, [Janell] transferred community property outside the community estate . . . .

15. . . . [Janell] squandered community assets by making excessive transfers, loans, or gifts of community assets to her paramour . . . .

16. . . . [Janell] was sued by IESI TX Corporation (hereinafter IESI), alleging that [Janell] had committed forgery, misapplication of fiduciary property, fraud, and conversion. After a jury trial, the [court] rendered judgment against [Janell] . . . . As the judgment stemmed from tortious activity committed by [Janell] during the parties' marriage, all non-exempt community property was subject to this tortious liability and . . . the entirety of the judgment to IESI in the approximate amount of $502,000 was paid with either community funds or funds from the Ameriwaste entities, thereby reducing the value of the businesses. The community estate paid attorney's fees for Janell's defense in an amount that exceeded $150,000 . . . .

17. The conduct of [Janell] . . . caused injury, loss or damage to the community estate and [Joel]. . . . Such amounts and actions were taken into consideration in the division of property in this case and not otherwise.

18. The valuation of each item of property, and each debt, is set out in Exhibit A, which is attached hereto and made a part hereof for all purposes, which includes the value or amount of the community estate's assets, liabilities, claims, and offsets on which disputed evidence was presented.

The conclusions of law state, *inter alia*, that Janell committed adultery, Joel was entitled to a disproportionate division of the parties' community estate as provided in the Final Decree of Divorce, and the "division of the property of Joel and Janell effected by the Final Decree of Divorce is just and right, having due

regard for the rights of each party, irrespective of the characterization of any item of property as either community or separate."

2. Analysis

The division of property is memorialized in the Final Decree of Divorce and is incorporated by reference in the findings of fact and conclusions of law. Exhibit A, attached to the findings of fact, is identified as the "Inventory and Property Division of Property of Joel (Scenario #1), and it bears handwritten notes of the special judge. The "findings of fact recited in an order or judgment will be accorded probative value so long as they are not in conflict with findings recited in a separate document." *See Gonzalez v. Razi*, 338 S.W.3d 167, 175 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (citing *In re Sigmar*, 270 S.W.3d 289, 295 n.2 (Tex. App.—Waco 2008, orig. proceeding) (citing *In re U.P.*, 105 S.W.3d 222, 229 n.3 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)). We confine our review to the contents of the Final Decree of Divorce and the findings of fact and conclusions of law with the attached Exhibit A.

Janell does not identify any conflict between the recitation in the Final Decree of Divorce and the findings of fact. She complains that the special judge had insufficient evidence on which to make his division, but she does not complain that the court failed to give due consideration to the *Murff* factors. *See Murff*, 615 S.W.2d at 699. She argues that no one testified that the loan was anything other than a community debt and that there was not even a "small piece" of evidence which would allow the special judge to omit a specific award of the $380,000 loan in the Final Decree of Divorce, relying on *Wilson v. Wilson*, 132 S.W.3d 533, 537 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

We disagree. In *Wilson*, the trial court divided the parties' property and ordered a money judgment in favor of Veronica Wilson to accomplish an equal

division of the estate. *See id*. at 535–36. Harold Wilson contended that the estate was comprised of his personal-injury settlement and was his separate property. *See id*. at 537–38. The *Wilson* court held that there was insufficient evidence of the amount of the community estate, that Veronica did not identify specific assets or what "the rest of the property" is that she sought to have awarded to Harold. *See id*. at 538. Because there was a "dearth" of evidence identifying and valuing the community estate, the trial court abused its discretion. *See id*. (citing *Schlueter*, 975 S.W.2d at 588).

Here, the special judge heard evidence supporting the findings: Janell's adultery; her actions resulting in the IESI judgment and necessitating the loan to satisfy her personal liability on it; attorney's fees exceeding $150,000, and funds paid by the community estate defending the IESI suit; the servicing of the loan by Ameriwaste, a company she founded; Janell's testimony that she made no principal payments; and how the servicing of the loan caused a monthly loss to Ameriwaste. Joel testified that there was no business purpose for the loan, other than to satisfy Janell's personal liability on the IESI judgment. He also testified that Janell valued the 82% of the outstanding stock in Ameriwaste at over $3 million in an effort to obtain the loan, but that she valued the same stock at $940,000 in the divorce proceedings. This evidence, we conclude, could form the basis for a disproportionate division. *See Schlueter*, 975 S.W.2d at 588; *Murff*, 615 S.W.2d at 699–700.

The Final Decree of Divorce and findings incorporated this evidence in making its disproportionate division of the parties' estate, *inter alia*, Janell's adultery and fraud on the community, community indebtedness and liabilities created by Janell, her wasting of community assets, her actions that lead to the IESI judgment, the attorney's fees and costs defending the IESI suit, the $380,000

loan not being serviced in a manner which demonstrates it is a "legitimate and viable loan" and how the loan was reflected in the valuation of Ameriwaste.

Additionally, the special judge revised the valuation of the 82% Ameriwaste stock from the values the parties assigned. Janell assigned a value of $940,000; Joel assigned a value of $2,096,000. Exhibit A, attached to the findings of fact, reflects that the special judge assigned a value of $1,770,000, and awarded all of the Ameriwaste stock to Janell, despite Joel's request that it be awarded to him. *See Graves v. Tomlinson*, 329 S.W.3d 128, 149 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (concluding the order that each party pay all debts each incurred, unless provided expressly in the decree, incorporated the debt which was not specifically listed in the decree). Janell relies on *Graves* for the proposition that the $380,000 was not *de minimus*, requiring this court to remand for the trial court's further consideration. However, Janell does not complain that the debt was mischaracterized and that the mischaracterization was harmful, which would require us to remand the entire community estate for a just and right division. *See id*.

Lastly, at the June 2013 hearing on the motion to enter judgment, three months after the special judge sent the email with attached spreadsheet on which Janell relies, the special judge stated:

> Okay. My general feeling is I am comfortable with the ruling I made with the values on — the breakdown of values that I used and have presented to counsel. . . . I can't specifically remember why I had added into the typed portion of the rundown [on Exhibit A] that $380,000 and scratched it out. It makes sense to me that I concluded it was subsumed within the values that I attributed to Ameriwaste, but I don't know that. . . .
>
> But as I think we all agree at this point, I can do that pursuant to a motion for new trial. . . .

> For what it's worth again, on Ms. Marin's motion [for disclosure and reconsideration filed in May 2013] I'll simply say you've got a lot better shot in my mind of convincing me that I should revisit the $380,000 than with any of the other things that are listed albeit in general terms, I recognize that, but a roadmap of my thoughts anyway.

Although the above statements indicate that at the hearing, the special judge was uncertain whether he had properly considered the $380,000 debt in making his initial rulings, his subsequent actions indicate that he considered the $380,000 debt and decided not to modify his rulings. Only two days after the hearing on the motion to enter judgment, the special judge signed the Final Decree of Divorce, without making any modification to his rulings based on the $380,000 debt that was brought to his attention at the hearing. Janell then filed a motion for new trial, arguing that the verdict inadvertently omitted the $380,000 debt. It is indisputable that this argument was considered when the order was signed denying Janell's motion for new trial on August 22, 2014..

On the record before us, we conclude that there is sufficient evidence to support the findings of fact and the division of property set forth in the Final Decree of Divorce. *See Murff,* 615 S.W.2d at 698–99. Janell has not met her burden of demonstrating that the division was so unjust and unfair as to constitute an abuse of discretion. *See Marriage of O'Brien*, 436 S.W.3d at 82; *Christian v. Christian*, No. 14-99-00312-CV, 2001 WL 543685, at *3 (Tex. App.—Houston [14th Dist.] May 24, 2001, no pet.). We overrule Janell's third and fourth issues.

We affirm the Final Decree of Divorce.

/s/ John Donovan
Justice

Panel consists of Justices Boyce, Jamison, and Donovan.