Affirmed in Part; Reversed and Rendered in Part and Memorandum Opinion filed August 16, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00139-CV

IN THE MATTER OF THE MARRIAGE OF JOSEPH EMANUEL MURGOLA AND KIMBERLY ANN BLYTHE

On Appeal from the 507th District Court
Harris County, Texas
Trial Court Cause No. 2019-12994

MEMORANDUM OPINION

Joseph Emanuel Murgola appeals from a final decree of divorce dissolving his marriage to Kimberly Ann Blythe. In two issues, Murgola asserts the trial court abused its discretion (1) by characterizing real property as Blythe's separate property; and (2) by signing temporary orders pending appeal requiring Murgola to pay $10,000 in Blythe's attorney's fees incurred prior to the appeal. We affirm the trial court's divorce decree. Concluding attorney's fees were not authorized, we reverse the portion of the trial court's temporary orders that awards attorney's fees

incurred prior to the appeal.

BACKGROUND

The parties were married April 4, 1997. Murgola filed an original petition for divorce on February 21, 2019, and Blythe filed a counter-petition. At the time the petitions were filed there were no minor children of the marriage. Both parties requested disproportionate shares of the parties' marital estate.

The parties' primary dispute at trial was the characterization as separate property of a building purchased by Blythe in August 1997 after the parties were married in April 1997. In 1990, Blythe signed a five-year lease for a building located at 600 W. Gray in Houston (the Property). In 1995 Blythe renewed the lease. In August 1997, after the parties were married, Blythe purchased the building in which she operated a pub. Blythe testified that she signed a written lease in 1995, which gave her the option to purchase the Property. She testified that by the time of trial she had lost the written leasing document.

In 2017 Blythe sold the Property through a Special Warranty Deed. The deed began, "That KIMBERLY BLYTHE, joined pro forma by her husband, JOSEPH MURGOLA, since this property is her separate property and not part of their homestead . . ." The deed contains Murgola's signature underneath a recitation that, "This Deed is joined pro forma by Kimberly Blythe's husband, Joseph Murgola, since the Property is Kimberly Blythe's separate property and not a part of their homestead."

Jeannie McClure, a valuation expert, testified based on her report, that the Property was Blythe's separate property. As evidence that the Property was Blythe's separate property McClure reviewed several documents including "multiple documents wherein the business property owned is in [Blythe's] personal name, and

not joined by her spouse." McClure relied on the Special Warranty Deed executed by Blythe when she sold the Property in 2017. That deed reflected that Murgola signed under a recitation noting that the Property was Blythe's separate property. According to McClure, the net proceeds of the 2017 sale were $510,430. McClure traced the proceeds of the sale to a Fidelity account in Blythe's name.

After hearing evidence and the parties' arguments, the trial court orally rendered judgment granting the parties' divorce. The trial court subsequently signed a final decree of divorce dividing the parties' assets and debts. As relevant to this appeal, the trial court determined that the Property at 600 W. Gray and the proceeds from the sale of the Property were Blythe's separate property.

ANALYSIS

I. Division of the Marital Estate

In Murgola's first issue he asserts the trial court abused its discretion by characterizing the Property at 600 W. Gray as Blythe's separate property.

In a divorce decree, the trial court "shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." Tex. Fam. Code § 7.001. A "just and right" division does not require a trial court to divide the marital estate into equal shares. *See Murff v. Murff*, 615 S.W.2d 696, 698–99 (Tex. 1981). We review the trial court's property division for an abuse of discretion; to disturb a trial court's division of property, a party must show the trial court clearly abused its discretion by a division or an order that is manifestly unjust and unfair. *Stavinoha v. Stavinoha*, 126 S.W.3d 604, 607 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Under this abuse of discretion standard, the legal and factual sufficiency of the evidence are not independent grounds of error, but are merely relevant factors in assessing whether

the trial court abused its discretion. *Id.*

The Family Code defines separate property as property owned or claimed by a spouse before marriage, acquired during the marriage by gift, devise, or descent, or as a recovery for personal injuries sustained during the marriage. Tex. Fam. Code § 3.001; *Barnett v. Barnett*, 67 S.W.3d 107, 111 (Tex. 2001); *see also* Tex. Const. art. XVI, § 15 ("All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property . . . ."). Community property consists of the property, other than separate property, acquired by either spouse during marriage. Tex. Fam. Code § 3.002; *Barnett*, 67 S.W.3d at 111. The characterization of property as either community or separate is determined by the inception of title to the property. *Smith v. Smith*, 22 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Inception of title occurs when a party first has a claim to the property by virtue of which title is finally vested. *Id*. All property possessed by either spouse during or upon dissolution of the marriage is presumed to be community property. Tex. Fam. Code § 3.003(a).

To overcome the community property presumption, a spouse claiming assets as separate property must establish their separate character by clear and convincing evidence. Tex. Fam. Code § 3.003(b); *Stavinoha*, 126 S.W.3d at 607 (Tex. App.—Houston [14th Dist.] 2004, no pet.). "Clear and convincing" evidence means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002); *see also* Tex. Fam. Code § 3.003(b).

The trial court found that the Property at 600 W. Gray was Blythe's separate property and awarded certain funds that comprised what was remaining of the

proceeds of the sale to Blythe as her separate property. The trial court also divided the marital assets, including funds in several bank accounts, horses, household items, jewelry and personal effects, and vehicles. The trial court further entered an equalizing judgment against Blythe because there were insufficient community assets to provide for a just and right division of the estate.

We employ a two-part test when reviewing alleged characterization errors. *In re Marriage of Harrison*, 557 S.W.3d 99, 140 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). Under this test, Murgola must show both a characterization error and harm—i.e., a division or an order that is manifestly unjust and unfair. *See id*. Thus, we need not reverse a trial court's division of property when the party claiming a mischaracterization fails to show how the erroneous characterization of community property as separate property caused the trial court to abuse its discretion in dividing the marital estate. *See Lynch v. Lynch*, 540 S.W.3d 107, 133 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *In re Marriage of McNelly*, No. 14-13-00281-CV, 2014 WL 2039855, at *7 (Tex. App.—Houston [14th Dist.] May 15, 2014, pet. denied) (mem. op.) ("Mischaracterization of community property as separate property is harmful and requires reversal only if the mischaracterization affects the just and right division of the community estate.").

Assuming Murgola is correct that the trial court mischaracterized the Property as Blythe's separate property, the record does not support Murgola's assertion that the trial court's ruling resulted in an overall division of the marital estate that was not "just and right." *See* Tex. Fam. Code § 7.001. To determine whether the trial court divided the community estate in a "just and right" manner, we must have the trial court's findings on the value of those assets. *Harrison*, 557 S.W.3d at 141. "Without findings of fact, we do not know the basis for the division, the values assigned to the community assets, or the percentage of the marital estate that each

party received." *Id*. (quoting *Vasudevan v. Vasudevan*, No. 14-14-00675-CV, 2015 WL 4774569, at *4 (Tex. App.—Houston [14th Dist.] Aug. 13, 2015, no pet.) (mem. op.). Here, the trial court did not file findings of fact and conclusions of law reflecting the value the court assigned to each community asset or liability, the value of the community property, or the factors the trial court considered in dividing the marital estate.

Because we have no findings of fact, Murgola has not made the requisite showing that the purported mischaracterization of the property led to a division of the marital estate that was not just and right. *See Harrison*, 557 S.W.3d at 141–42 ("Although [wife] characterizes as material the difference between the overall community estate's value if seventy percent of the home is [husband's] separate property versus the estate's value if the house is one hundred percent community, without evidence of the value of all the community assets we have no way to determine whether the trial court's award to [wife] of other community assets did not result in a just and right division given the totality of the circumstances.").

In asserting that the trial court's alleged mischaracterization of the Property was harmful error Murgola cites *Evans v. Evans*, 14 S.W.3d 343, 347 (Tex. App.—Houston [14th Dist.] 2000, no pet.). In *Evans*, this court determined that the mischaracterization of the parties' house as separate property affected the just and right division of the community estate. *Id.* at 346–47. The facts in *Evans* are distinguishable from today's case in that, in *Evans*, the trial court filed findings of fact, which reflected that the house was the main asset of the marital estate. *Id.* at 347. Here, we do not have such findings, nor can we determine from the record alone whether the Property was the main asset of the marital estate.

Murgola further asserts this court's holding in *Harrison* does not apply to this case because (1) he was not required to request findings of fact and conclusions of

law; and (2) the trial court made findings of fact in the judgment with regard to the Property. Murgola misinterprets this court's holding in *Harrison*. In *Harrison*, we held that we cannot determine the harm, if any, from the mischaracterization of community property as separate property if we do not have findings of fact reflecting the value the trial court assigned to each community asset or liability, the value of the community property, or the factors the trial court considered in dividing the estate. *See In re Marriage of Rangel & Tovias-Rangel*, 580 S.W.3d 675, 683 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (applying the holding in *Harrison* even though findings of fact and conclusions of law were requested but not filed). Whether Murgola was required to request findings of fact and conclusions of law in order to appeal the divorce decree does not bear on our review of the harm, if any, of the mischaracterization of community property.

Murgola points to the trial court's finding in the rendition and in the decree that the Property was Blythe's separate property. Murgola argues that no separate findings of fact and conclusions of law were required. As stated above, the trial court's finding on one of the parties' assets does not aid in our determination of harm from the alleged mischaracterization of property. Without findings reflecting values assigned to each community asset or liability, the value of the community property, or the factors the court considered in dividing the community estate, we cannot determine if the mischaracterization of the property caused an unjust division of the marital estate. *See Harrison*, 557 S.W.3d at 141–42 In that regard, the court's finding on the value of the separate property does not inform our analysis of harm as it relates to a just and right division of the marital estate.

Because Murgola failed to show harm in the alleged mischaracterization of the Property as Blythe's separate property, we overrule Murgola's first issue.

II. Temporary Orders

In Murgola's second issue he asserts the trial court abused its discretion by awarding Blythe attorney's fees in connection with temporary orders pending appeal. Challenges to post-decree temporary orders may be raised in the appeal of the decree. *See Benoit v. Benoit*, No. 01-15-00023-CV, 2015 WL 9311401, at *14 n.5 (Tex. App.—Houston [1st Dist.] Dec. 22, 2015, no pet.) (mem. op.). We therefore address this issue in Murgola's appeal of the divorce decree.

The trial court signed the final divorce decree on February 10, 2021. On December 30, 2020, the trial court signed a document titled, "Judge's Rendition on Final Divorce." That document, while not a final decree, listed the property division and equalization judgment in favor of Murgola. On January 3, 2021, Murgola filed a motion for temporary orders pending appeal. *See* Tex. Fam. Code § 6.709(a) ("In a suit for dissolution of a marriage, on the motion of a party or on the court's own motion, after notice and hearing, the trial court may render a temporary order as considered equitable and necessary for the preservation of the property and for the protection of the parties during an appeal"). Murgola requested that the trial court preserve the funds during the appeal by either (1) suspending the court's decree as it related to the proceeds from the sale of the Property; (2) extending the temporary orders entered before the decree; or (3) ordering Blythe to file a supersedeas bond.

Less than two weeks later, on January 14, 2021, Murgola filed a petition for writ of mandamus in this court complaining of the trial court's failure to rule on his motion for temporary orders and asserting his right to temporary orders pending appeal. Citing fear that the disputed funds would "vanish," Murgola filed an emergency motion in this court asking this court to stay submission of the final decree for the court's signature until we ruled on the petition for writ of mandamus. On January 14, 2021, we granted Murgola's motion for stay and requested a

response to the petition from Blythe.

The next day, January 15, 2021, the trial court held a hearing on Murgola's motion for temporary orders pending appeal. At the hearing Murgola identified $792,924.56 in disputed funds and asked that the trial court's temporary order freezing those funds be extended pending appeal. At the hearing, the trial court stated that it would issue temporary orders pending appeal freezing the disputed funds.

On January 22 and 27, 2021, the trial court continued the post-trial hearing on the entry of temporary orders pending appeal. During the hearing on January 27, the trial court stated its intent to freeze the funds, which reflected the remaining proceeds from the sale of the Property. On January 28, 2021, Murgola supplemented his petition for writ of mandamus "to inform the Court of developments in the proceedings below" and again asking this court to order the trial court to grant his motion for temporary orders pending appeal.

On February 10, 2021, the trial court further continued the hearing on Murgola's request for temporary orders pending appeal. During this hearing Blythe asked the court to award her attorney's fees required to respond to Murgola's post-trial motions. Blythe's attorney, John "Bo" Nichols, testified that up to January 20, 2021, his fees were $18,750 excluding his time spent on the three post-trial hearings. Nichols testified that $25,000 would be a reasonable and necessary fee, including the time spent in the post-trial hearings.

Following the hearing, the trial court on February 13, 2021 signed temporary orders as follows:

> - IT IS ORDERED that all funds in Bank of America account ending XXXX9331 shall be released/unfrozen and Respondent, Kimberly Blythe, shall be allowed full access to and authority over same, without any restrictions.

- IT IS ORDERED that up to $400,000.00 in Fidelity Accounts ending XXXX1482 and/or XXXX0687 are hereby frozen and said $400,000.00 corpus in said accounts shall not be disbursed until further order of the Court.
- IT IS ORDERED that any interest earned or gained on the above referenced $400,000.00 in Fidelity Accounts ending XXXX1482 and/or XXXX0687 shall be paid or otherwise disbursed to Respondent, Kimberly Blythe, during the pendency of appeal.
- IT IS ORDERED that Petitioner, Joseph Murgola, shall post a supersedeas cash bond of $400,00.00 to cover the above referenced frozen funds.
- IT IS ORDERED that Petitioner, Joseph Murgola, pay (via cashier's check or money order) to Respondent's attorney . . . $10,000.00 in attorney fees by 5:00 p.m. on February 26, 2021.

Murgola supplemented his petition for writ of mandamus with a copy of the court's order challenging the trial court's temporary orders. We denied mandamus relief. *In re Murgola*, No. 14-21-00034-CV, 2021 WL 4852221, at *1 (Tex. App.—Houston [14th Dist.] Oct. 19, 2021, orig. proceeding) (mem. op.).

After this appeal was filed, Murgola filed a motion to stay the portion of the trial court's temporary orders that required him to post a supersedeas bond, and to pay Blythe's attorney's fees of $10,000 on February 26, 2021. This court granted the motion in part, staying the attorney's fees award until mandate issues in this appeal.

On appeal, Murgola asserts the trial court abused its discretion in awarding attorney's fees pursuant to section 6.709 of the Family Code. Specifically, Murgola asserts the attorney's fees are: (1) not authorized under section 6.709; (2) not supported by sufficient evidence; and (3) improper as awarded because they were not conditioned on a successful appeal. We agree with Murgola's first contention that the fees were not authorized by section 6.709 of the Family Code.

Section 6.709 of the Family Code authorizes a trial court to "render a

temporary order as considered equitable and necessary for the preservation of the property and for the protection of the parties during an appeal, including an order. . . requiring the payment of reasonable and necessary attorney's fees and expenses[.]" Tex. Fam. Code § 6.709(a)(2). Any award of appellate attorney's fees should be conditioned on an unsuccessful appeal and an unconditional award is improper. *In re Christensen*, No. 01-16-00893-CV, 2017 WL 1485574, at *3 (Tex. App.—Houston [1st Dist.] Apr. 25, 2017, orig. proceeding) (mem. op.)

Because section 6.709 requires that fees be necessary for the preservation of property or protection of the parties *during the appeal*, the trial court erred by awarding fees not incurred during the appeal. *See In re Fuentes*, No. 01-16-00951-CV, 2017 WL 3184760, at *9 (Tex. App.—Houston [1st Dist.] July 27, 2017, orig. proceeding) (mem. op.) ("As long as there is a credible showing of the need for [appellate] attorney's fees in the amount requested and the ability of the opposing spouse to meet that need, the trial court has authority by temporary orders to require payment of such fees.") (quoting *Halleman v. Halleman*, 379 S.W.3d 443, 454 (Tex. App.—Fort Worth 2012, no pet.)).

Blythe concedes in her brief that section 6.709 only authorizes the trial court to award appellate attorney's fees conditioned on an unsuccessful appeal. Blythe argues, however, that she presented sufficient evidence of reasonable and necessary attorney's fees and that her failure to segregate appellate fees from those fees incurred prior to the appeal is remediable. We disagree.

The record reflects exhibits, including Blythe's attorney's affidavit and invoice to Blythe for attorney's fees. According to Nichols' affidavit, he was retained August 4, 2020 to represent Blythe. Blythe sought attorney's fees for Nichols' representation in response to Murgola's request for temporary orders. Nichols submitted invoices beginning January 14, 2021 through January 20, 2021.

Those invoices reflected preparation for the hearings on temporary orders, not for appeal. Notice of appeal was filed March 10, 2021.

Recovery of attorney's fees under section 6.709 requires proof that the awarded fees were reasonably incurred or necessary for defense of the divorce decree on appeal. *See In re Fuentes*, 2017 WL 3184760, at *8. Absent such proof, the trial court abused its discretion in awarding $10,000 in attorney's fees to Blythe. Because the fees testified to by Blythe's attorney were incurred before the appeal, section 6.709 does not authorize the award. *Id.* at *9 ("Because section 6.709 requires that fees be necessary for the preservation of property or protection of the parties during the appeal, the trial court erred by awarding fees not incurred during the appeal."). We sustain Murgola's second issue.

CONCLUSION

We affirm the trial court's divorce decree. We reverse the portion of the trial court's post-judgment February 13, 2021 temporary orders that awards attorney's fees and render judgment that Blythe is not entitled to the attorney's fees awarded.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Bourliot, Zimmerer, and Spain.