

Affirmed and Memorandum Opinion filed August 17, 2023.



In The

Fourteenth Court of Appeals

NO. 14-22-00171-CV

MARIO ROBERSON, Appellant

V.

AMY DANIELS ROBERSON, Appellee

**On Appeal from the 312th District Court
Harris County, Texas
Trial Court Cause No. 2020-03888**

MEMORANDUM OPINION

Appellant Mario Roberson and appellee Amy Daniels Roberson filed competing petitions for divorce. After a bench trial, the trial court rendered a final decree, finding the marriage insupportable due to cruel treatment and dividing the marital assets in favor of Amy.

In six issues on appeal, Mario argues that the trial court erred by: (1) excluding evidence obtained through pretrial discovery and denying his ability to properly present the issue for appeal; (2) denying his motion for continuance;

(3) allowing Amy to admit new evidence prior to trial in violation of Texas Rule of Civil Procedure 194.4; (4) improperly dividing the marital property and assets; (5) issuing findings of facts unsupported by legally-sufficient evidence; and (6) granting the divorce on the ground of cruelty. We affirm.

I. BACKGROUND

Amy and Mario were married in 1997. They have two children together, R.R. and J.R. In January 2020, Amy filed a petition for divorce; Mario filed his answer and counterpetition for divorce in January 2021. In his amended counterpetition, as additional grounds supporting divorce, Mario alleged Amy had committed adultery and was “guilty of cruel treatment towards [Mario].”

In June 2021, in response to a motion filed by Amy, the trial court signed an order compelling Mario to respond to discovery requests; Mario was also ordered to pay reasonable attorney’s fees for failing to timely respond. Several days later, Mario’s counsel filed a motion to withdraw.

In July 2021, Amy filed an amended petition for divorce, amending her grounds for divorce to include claims for adultery, cruel treatment, and abandonment. Later that month, Amy filed a motion for discovery sanctions because Mario still had not responded to discovery requests.

On July 30, 2021, Mario served Amy with interrogatories, requests for production, and requests for admission. Amy objected to the discovery requests, arguing the discovery period had ended because trial, which was scheduled for August 23, was less than 30 days away. *See* Tex. R. Civ. P. 194.4(b) (stating that unless trial court orders otherwise, pretrial disclosures must be made at least 30 days before trial). The trial court sustained Amy’s objection, finding that Mario’s requests were untimely.

Mario's new counsel filed a motion for continuance, which the trial court granted, moving the trial date to September 30. On the day of trial, without filing a written motion, Mario's counsel asked for another continuance, claiming more time was needed to respond to discovery and to review new evidence submitted by Amy; specifically, Mario's counsel alleged that Amy "filed an amended exhibit list with all new exhibit numbers. Everything is numbered differently." The trial court never specifically ruled on the second motion for continuance, and the case proceeded to trial.

During trial, Mario was allowed to introduce an inventory, a financial information sheet, and a proposed property division, but most of his other proposed exhibits were excluded for being filed late. At the conclusion of the trial, the trial court granted Amy's petition for divorce on the ground of cruelty, divided the marital assets disproportionately in favor of Amy, and ordered Mario to pay Amy \$900 a month in child support, in addition to the sums of \$6,250 for attorney's fees and \$500 as a penalty for failing to comply with discovery requests.¹

Mario requested findings of facts and conclusions of law and filed a motion for new trial. The trial court issued findings of fact and conclusions of law but denied the motion for new trial.

II. ANALYSIS

A. Exclusion of evidence

In his first issue, Mario argues the trial court erred in excluding his "evidence in response to discovery prior to trial."

¹ The award of child support was solely for J.R. because at the time of trial, R.R. was over the age of 18, while J.R. was 17 years old.

1. Standard of review & applicable law

A trial court's decision to exclude evidence is reviewed under an abuse-of-discretion standard. *See National Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527–28 (Tex. 2000). A trial court's evidentiary ruling must be upheld if there is any legitimate basis for it. *See Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). Moreover, reversal is not unless the error probably caused the rendition of an improper judgment or probably prevented the party from properly presenting the case to this court. Tex. R. App. P. 44.1(a); *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 225 (Tex. 2005).

In general, to preserve a complaint for appellate review, the record must show that complaining party made a timely and specific objection to make the trial court aware of the grounds for objection (unless the ground is implied by the context of the objection). Tex. R. App. P. 33.1(a). To preserve error specifically regarding the exclusion of evidence, the complaining party must comply with Texas Rule of Evidence 103, which requires the complaining party to make an offer of proof to establish the substance of the proffered evidence, except in certain rare circumstances. *See* Tex. R. Evid. 103(a)(2).

2. Application

Although Mario asserts that the trial court erred by excluding written discovery and interrogatories that were untimely filed, the record before this court does not reflect Mario made a timely request, objection, or motion to inform the trial court of his complaint. The record similarly does not demonstrate that Mario requested to make an offer of proof describing the evidence he sought to introduce. Therefore, we conclude Mario did not preserve error in the trial court as to this issue.

We overrule Mario's first issue.

B. Motion for continuance

In his second issue, Mario complains that the trial court abused its discretion in denying his motion for continuance.

A trial court's order denying a motion for continuance is reviewed under an abuse-of-discretion standard. *See Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). A trial court abuses its discretion when it acts unreasonably or in an arbitrary manner without reference to guiding rules or principles. *See Samlowski v. Wooten*, 332 S.W.3d 404, 410 (Tex. 2011).

Texas Rule of Civil Procedure 251 governs motions for continuance. A motion for continuance shall not be granted without “sufficient cause supported by affidavit, or by consent of the parties, or by operation of law.” Tex. R. Civ. P. 251. Accordingly, motions for continuance generally must be in writing, state the specific facts supporting the motion, and be verified or supported by an affidavit. *In re Marriage of Harrison*, 557 S.W.3d 99, 117 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). When a motion for continuance does not comply with the rules—for example, when the motion is unwritten or unsupported by verified facts—appellate courts generally presume the trial judge did not abuse its discretion in denying the motion. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986); *see also In re S.M.H.*, 523 S.W.3d 783, 797 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Oral requests for a continuance do not preserve error. *In re C.F.*, 565 S.W.3d 832, 844 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

Mario's oral request for a continuance on the day of trial is insufficient to preserve error for our review.

We overrule Mario's second issue.

C. Error in admitting Amy's evidence pretrial

In his third issue, Mario argues that the trial court erred by allowing Amy to admit new evidence before trial in violation of Texas Rule of Civil Procedure 194.4. However, Mario does not identify what “new” evidence the trial court allowed Amy to introduce before trial; Mario simply alleged in his motion for oral continuance that everything on the exhibit list was “numbered differently.” More importantly, we note that Mario did not object to any of Amy’s evidence specifically on 194.4 grounds. Therefore, Mario has not preserved this issue for appellate review. Tex. R. App. P. 33.1(a).

We overrule Mario’s third issue.

D. Division of property

In his fourth issue, Mario argues the trial court erred in dividing the marital property and assets.

1. Standard of review and applicable law

In a decree of divorce, the trial court is required to “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 Ann. § 7.001. The trial court has broad discretion in making a “just and right” division of the community estate, and its discretion will not be disturbed on appeal unless a clear abuse of discretion is shown. *Leax v. Leax*, 305 S.W.3d 22, 34 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). In determining whether the trial court abused its discretion in making the property division, we look to whether the trial court acted arbitrarily or unreasonably, without reference to any guiding rules and principles. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

The Family Code establishes a presumption that property possessed by either spouse during or on the dissolution of the marriage is community property. Tex. Fam. Code Ann. § 3.003. A spouse seeking to overcome this presumption

must prove the separate character of the disputed property by clear and convincing evidence. *Id.*

“Recovery for personal injuries to the body, including mental pain and anguish and physical disfigurement, sustained by a spouse during marriage is considered that spouse’s separate property, but recovery for loss of earning capacity, medical expenses, and other expenses associated with injury to the community estate are community property.” *Thornhill v. Thornhill*, 666 S.W.3d 823, 827 (Tex. App.—Houston [14th Dist.] 2023, no pet.); *see* Tex. Fam. Code Ann. § 3.001(3). If a spouse who received a personal-injury settlement asserts that some or all of it is that spouse’s separate property, it is that spouse’s burden to prove by clear-and-convincing evidence which portion of the settlement is his separate property. Tex. Fam. Code Ann. § 3.003. “Clear and convincing” 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. *Thornhill*, 666 S.W.3d at 827.

2. Application

In challenging the trial court’s division of property, Mario only challenges the trial court’s division of his personal-injury settlement. Specifically, Mario asserts that the personal-injury settlement should have been characterized as his separate property, not community property.

Mario testified at trial that he received a \$190,000 personal-injury settlement during their marriage; he further argued that this settlement should be wholly considered his separate property because Amy presented no evidence to contradict his assertion that the settlement proceeds were his separate property.

However, it was not Amy’s burden to prove it was community property; rather, because Mario received the settlement during the marriage, the entire amount of the settlement was presumed to be community property unless Mario

proved by clear-and-convincing evidence which portion of the \$190,000 constituted his separate property. *See* Tex. Fam. Code Ann. § 3.003.

In the present case, Mario presented no evidence that the \$190,000 was solely his separate property other than his own testimony stating as much. Without providing further evidence, Mario never established what portion of the settlement was for recovery for personal injuries to the body, which would be separate property, and what portion was for recovery for loss of earning capacity and medical expenses, which would be community property. Tex. Fam. Code Ann. § 3.001(3). Accordingly, we conclude that the trial court did not abuse its discretion in finding that Mario did not produce clear-and-convincing evidence to overcome the presumption of community property. *Worford*, 801 S.W.2d at 109.

We overrule Mario's fourth issue.

E. Legal and factual sufficiency

In his fifth issue, Mario argues that the trial court's decree ordering him to pay \$900 per month in child support was not supported by legally-and factually-sufficient evidence.

1. Standard of review and applicable law

On appeal of a judgment in a bench trial, an appellate court reviews the trial court's findings of fact for legal and factual sufficiency of the evidence by the same standard applied to a jury verdict. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996). The trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Benoit v. Wilson*, 239 S.W.2d 792, 796–97 (Tex. 1951). The trial court's findings will not be disturbed if there is evidence of probative force to support them. *See id.*

When an appellant attacks the legal sufficiency of an adverse finding on an issue on which he did not have the burden of proof, the appellant must demonstrate

on appeal there is no evidence to support the adverse finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). In reviewing a “no evidence” point, we must view the evidence in a light that tends to support the finding of the disputed fact and disregard all evidence and inferences to the contrary. *Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001). If more than a scintilla of evidence exists to support the finding, the no-evidence challenge fails. *See Formosa Plastics Corp. USA v. Presidio Eng’rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998). When an appealing party attacks the factual sufficiency of an adverse finding on an issue on which it did not have the burden of proof, that party must demonstrate the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *See Croucher*, 660 S.W.2d at 58. In a factual-sufficiency challenge, all of the evidence in the record, both for and against the finding, is reviewed. *See id.*

Unless the complaining party demonstrates a clear abuse of discretion, we will not disturb child-support findings made by the trial court. *Worford*, 801 S.W.2d at 109. The applicable two-part test is whether the trial court had sufficient information on which to exercise its discretion, and whether the trial court erred in its application of that discretion. *Reagins v. Walker*, 524 S.W.3d 757, 761 (Tex. App.—Houston [14th Dist.] 2017, no pet.). The traditional sufficiency inquiry applies to the first question, and if sufficient evidence exists, we then decide whether the trial court made a reasonable decision that was neither arbitrary nor unreasonable. *Id.*

For an obligor with a single child, the trial court presumptively sets the monthly child support payments at 20% of the obligor’s monthly net resources. Tex. Fam. Code Ann. § 154.125(b).

2. Application

Mario argues there is no evidence to support court-ordered payments of \$900 in child support. However, in its findings of fact and conclusions of law, the trial court found that Mario's net resources available for child support was \$4,500 per month. \$900 is 20% of \$4,500. Thus, the trial court properly applied the presumptive child-support schedule to Mario's monthly net resources.² *See* Tex. Fam. Code Ann. § 154.125(b). We cannot conclude that the trial court abused its discretion in assessing Mario's child support obligation at \$900 a month. *Worford*, 801 S.W.2d at 109.

We overrule Mario's fifth issue.

F. Granting divorce on cruelty grounds

In his sixth issue, Mario argues that there was legally- and factually-insufficient evidence for the trial court to grant Amy's petition for divorce on cruelty grounds.

A court may grant a divorce on the ground of cruel treatment. Tex. Fam. Code Ann. § 6.002. To be considered "cruel treatment," the conduct of the accused

² We note that Mario never specifically challenged the trial court's net resource calculation. Mario filed a motion for new trial, arguing, "The court found . . . [Mario] to be obligated to pay child support of \$900.00 per month, but there was no evidence presented to support that finding." Mario repeated that same argument on appeal, without specifically questioning the net-resource calculation.

As noted above, the trial court issued findings of fact and conclusions of law, stating that it had determined his monthly net resources to be \$4,500. After the trial court issued its findings of fact and conclusions of law, Mario did not request additional findings. *See* Tex. R. Civ. P. 298 (allowing parties to make "a request for specified additional or amended findings or conclusions"). "The failure to request additional findings of fact and conclusions of law constitutes a waiver on appeal of the trial court's lack of such findings and conclusions." *Robles v. Robles*, 965 S.W.2d 605, 611 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

Mario did not preserve error regarding the evidentiary sufficiency of his net resources because he never made that complaint known to the trial court and he did not request additional findings of fact on that issue. Tex. R. App. P. 33.1(a).

party must rise to such a level as to render the couple’s living together insupportable. *Id.* “Insupportable,” for purposes of “cruel treatment,” means incapable of being borne, unendurable, insufferable, or intolerable. *Henry v. Henry*, 48 S.W.3d 468, 473–74 (Tex. App.—Houston [14th Dist.] 2001, no pet.). “Mere trivial matters or disagreements do not justify the granting of divorce for cruel treatment.” *Id.* at 474. Acts occurring after separation can support a finding of cruel treatment. *Id.*

Mario complains that the trial court found cruelty based on one incident in which Amy “broke her fingernail.” R.R. testified in detail concerning the altercation, alleging that Mario had Amy pinned to the ground and Amy was trying to push him off of her. However, the evidence at trial and the findings of fact indicate that the trial court did not find cruelty based on that single instance alone. As indicated in the findings of fact, Amy testified that Mario physically and sexually abused her “throughout the marriage.” She also testified that Mario stalked her, and Mario admitted to placing a tracking device on her vehicle.

Based on the evidence presented at trial, we conclude that the trial court’s cruelty finding is adequately supported by legally- and factually-sufficient evidence. *Croucher*, 660 S.W.2d at 58.

We overrule Mario’s sixth issue.

III. CONCLUSION

We affirm the trial court’s decree.

/s/ Charles A. Spain
Justice

Panel consists of Justices Zimmerer, Spain, and Hassan.