Affirmed in Part, Reversed and Remanded in Part, and Opinion filed February 6, 2025.

In The

Fourteenth Court of Appeals

NO. 14-23-00726-CV

GREGORY ANTHONY KEY, Appellant

V.

STEPHANIE MICHELLE KEY, Appellee

On Appeal from the 309th District Court
Harris County, Texas
Trial Court Cause No. 2021-76136

OPINION

In this appeal from a final decree of divorce, several issues are raised, all of which represent challenges to the trial court's division of community property. We sustain one of the issues and overrule the others.

BACKGROUND

Gregory and Stephanie were married in 1992. In 2021, after nearly thirty years of marriage, Stephanie left the marital home without any prior notice to Gregory.

She then filed a petition for divorce and requested a disproportionate division of the community estate. After a bench trial, and a finding that Gregory had committed a fraud on the community, the trial court granted Stephanie her requested relief.

In both its final decree and its findings of fact and conclusions of law, the trial court determined that the reconstituted community estate had assets of more than $1.8 million and debts of more than $87,000. The trial court allocated more than 52% of the assets and more than 75% of the debts to Stephanie, for a net estate of more than $920,000. The remaining assets and debts were allocated to Gregory, for a net estate of more than $888,000. Based on these figures, Stephanie's share of the reconstituted community estate was 50.96% and Gregory's share was 49.04%.[1]

DIVISION OF COMMUNITY PROPERTY

I. Standard of Review

In a divorce decree, a trial court must order a "just and right" division of the estate, having due regard for the rights of each party. *See* Tex. Fam. Code § 7.001. A just and right division need not be equal, but it must be equitable. *See Marin v. Marin*, No. 14-13-00749-CV, 2016 WL 1237847, at *2 (Tex. App.—Houston [14th Dist.] Mar. 29, 2016, no pet.) (mem. op.).

We afford the trial court wide discretion when making this equitable division. *See Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998). We also presume that the trial court exercised that discretion properly, and we will only disturb the trial

[1] Stephanie's brief contains a chart with slightly different figures (51.6% and 48.4%, respectively). We can trace that disparity to two items: (1) the chart lists a debt for $89.40 that—though referenced in the record—does not appear to have been addressed in either the decree or the findings of fact; and (2) the chart lists a separate debt for $25,787.11 that—though addressed in both the decree and the findings of fact—was not apparently included in either the chart's calculation of net debts or the trial court's calculation of the reconstituted community estate. These discrepancies are not the subject of any issue in this appeal.

court's decision upon a showing that the trial court clearly abused its discretion. *See Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981); *Willis v. Willis*, 533 S.W.3d 547, 551 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

We engage in a two-pronged inquiry when deciding whether the trial court abused its discretion: first, we consider whether the trial court had sufficient evidence upon which to exercise its discretion; and second, we consider whether the trial court erred in its application of that discretion. *See Cruz v. Cruz*, No. 14-19-00016-CV, 2019 WL 2942630, at *3 (Tex. App.—Houston [14th Dist.] July 9, 2019, no pet.) (mem. op.).

The first prong draws on our traditional standards for legal and factual sufficiency review. Under the legal sufficiency standard, we credit all evidence and inferences favorable to the trial court's decision if a reasonable factfinder could, and we disregard all evidence contrary to that decision unless a reasonable factfinder could not. *See City of Keller v. Wilson*, 168 S.W.3d 802, 828 (Tex. 2005). The evidence is legally insufficient if the evidence at trial would not allow reasonable and fair-minded people to find the fact at issue. *Id.* at 827. Under the factual sufficiency standard, we examine all of the evidence in a neutral light and consider whether the trial court's decision is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See Dow Chem. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam).

With the second prong, we consider whether the trial court made a reasonable decision based on the admitted evidence. *See In re M.C.K.*, No. 14-17-00289-CV, 2018 WL 1955065, at *4 (Tex. App.—Houston [14th Dist.] Apr. 26, 2018, no pet.) (mem. op.). Stated inversely, we must determine whether there is some basis for concluding that the trial court's decision was neither arbitrary nor unreasonable. *Id.* If there is no evidence in support of the trial court's division of the community estate,

or if the division is manifestly unjust and unfair, then we must conclude that the trial court abused its discretion. *Id.*

II. Stephanie's Pension

The trial court valued the community interest of Stephanie's pension at $400,939.25. The trial court also awarded the entirety of that community interest to Stephanie. Gregory does not specifically contend that he should have received a share of Stephanie's pension, but he does challenge whether the evidence was sufficient to support the trial court's valuation of the pension, and by extension, whether the trial court abused its discretion in the overall division of the community estate.

Stephanie contends that the trial court did not abuse its discretion because its valuation was within the range of evidence presented. She refers to her own sworn inventory, in which she claimed that, as of the three months immediately preceding the date of divorce, her pension was worth $407,500.

Gregory contends that the community portion of Stephanie's pension was worth much more than the amount asserted in her sworn inventory. He refers to the undisputed testimony that Stephanie was vested in her pension; that she was eligible at the time of trial for retirement with full benefits; and that when she eventually does retire, she will receive generous matching contributions to her pension from her employer.

Several exhibits addressed these matching contributions. The first exhibit was a retirement estimate from Stephanie's pension system, dated in 2022, just a year before the divorce. That retirement estimate indicated that if Stephanie were to retire at the end of 2025, then her pension would have a balance of more than $513,000,

that she would receive matching contributions from her employer of more than $1.1 million, and that the total estimated value for her pension would exceed $1.6 million.

There were also exhibits from two experts. One expert retained by Stephanie filed a report opining that, if Stephanie had retired in 2022, one year before the divorce, then the community interest in her pension would have a discounted present value of more than $1.7 million. Another expert retained by Gregory opined in a separate report that, as of 2022, Stephanie's pension was worth more than $2.4 million.

Neither one of these experts testified during the trial. And Stephanie asserts that the expert reports do not demonstrate that the trial court abused its discretion because the experts' values "were based off some payout of the account over a variable number of years (neither of which was less than 25 years)." But that assertion overlooks the statement from Stephanie's own expert, who opined that her valuation of more than $1.7 million represented a discounted "present" value of the pension. The same expert also projected that Stephanie's life expectancy was an additional twenty-eight years, and that she would receive a monthly payment under her pension of $8,850. If the expert's actuarial calculations were correct, and if Stephanie's annuity payments remained constant, then the pension would pay out approximately $3 million over the course of Stephanie's lifetime—far more than just $1.7 million.

Pension rights constitute a contingent interest in property and a community asset subject to consideration along with other property in the division of the marital estate, even when those pension rights are prior to accrual and maturity. *See In re J.Y.O.*, No. 22-0787, — S.W.3d —, 2024 WL 5250363, at *4 (Tex. Dec. 31, 2024). Here, the trial court does not appear to have factored in the matching contributions from Stephanie's employer in its division of the community estate; or if it did, then

the trial court significantly undervalued the community portion of Stephanie's pension. By not factoring in the matching contributions, or by undervaluing those contributions, we conclude that the trial court abused its discretion when it determined that the community portion of Stephanie's pension was only worth $400,939.25. *See Herring v. Blakeley*, 385 S.W.2d 843, 846–47 (Tex. 1965) (holding that a pension plan, which included both the husband's contributions and the matching contributions of his employer, was community property and subject to division, even though no funds were yet available at the time of divorce).

And while we cannot be certain of the value of the matching contributions, given all of the conflicting evidence, that evidence nonetheless indicates that the value is sizeable. Indeed, if there is any merit to the retirement estimate prepared by Stephanie's pension system, then the matching contributions are worth more than half of what the trial court calculated for the entire reconstituted community estate. We therefore conclude that the trial court's failure to consider the matching contributions, or its undervaluation of those contributions, probably caused the rendition of an improper judgment. *See* Tex. R. App. P. 44.1. We likewise conclude that the case must be remanded so that the trial court may consider a whole new division of the community estate. *See Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex. 1985) ("Once reversible error affecting a 'just and right' division of the community estate is found, the court of appeals must remand the entire community estate for a new division.").

The division of retirement benefits can be "difficult." *See Shanks v. Treadway*, 110 S.W.3d 444, 446–48 (Tex. 2003). This difficulty stems not only from the mixed character of the asset when it is comprised of both separate and community property, but also from the uncertainty that might attend the health of the participating spouse and the resulting payout of an annuity. Owing to this difficulty, the trial court has

wide discretion when fashioning a just and right division. That division might involve a complete partition to the participating spouse; a partition that assigns a percentage or dollar amount for the benefit of each spouse; a money judgment; or some combination thereof—though our court has expressed a preference that, wherever possible, the asset should be divided into shares or interests. *See Hanson v. Hanson*, 672 S.W.2d 274, 278 (Tex. App.—Houston [14th Dist.] 1984, no pet.) ("We agree with the principle that if an estate can be divided equitably by partitioning the assets in kind, this method should be used instead of a money judgment."); *e.g.*, *Hudson v. Hudson*, No. 04-05-00475-CV, 2006 WL 228828, at *2 (Tex. App.—San Antonio Feb. 1, 2006, no pet.) (mem. op.) (the final decree awarded the wife "one-half of all sums" from the husband's retirement plans).

In light of the foregoing holdings, we do not address Gregory's remaining challenges relating to Stephanie's pension, such as whether the trial court properly considered Stephanie's sworn inventory, and whether Stephanie was qualified to testify about the substantive rules of her pension. *See* Tex. R. App. P. 47.1.

III. Other Valuations

In the interest of judicial economy, we also address several of Gregory's remaining challenges, which touch on other aspects of the community estate.

Within the same argument section in which he challenges the trial court's valuation of Stephanie's pension, Gregory also makes two cursory complaints about an asset and a debt.

For the asset, Gregory asserts in a single sentence that "furthermore, the Court failed to account for the values of the Whole Life Insurance of the Appellee as she testified to a value in the record at R.R. II:122."

And for the debt, Gregory writes the following: "Additionally, an error was made as the Court considered the debt of the Appellant in the just and right division without allowing testimony as to how much of that debt was attached [to] things like furniture and household items purchased by the Appellant as a result of the move of the Appellee as indicated in her party admission that she bought new furniture when she left the Appellant. R.R. II: 103 Line 7. Thus, while the debt was considered, the value of the property that was financed was not, which made the valuation of the Appellee's assets incomplete and incorrect."

Gregory does not explain how the whole life insurance should have been considered in the trial court's just and right division. Similarly, Gregory does not explain how the valuations of the debt and household items should have been different. Absent proper argument, we overrule these points as inadequately briefed. *See* Tex. R. App. P. 38.1(i).

IV. Fraud on the Community

In her live pleading, Stephanie alleged that Gregory had wasted community assets and that he had committed actual or constructive fraud. All of these allegations focused on a series of withdrawals that Gregory had made from his joint accounts with Stephanie.

Gregory admitted to making the withdrawals. He testified that when he discovered that Stephanie had left him, he withdrew $10,000 in cash from one of their joint accounts. He also testified that he wrote two separate checks for the benefit of his mother: one in the amount of $65,707.19, and the other in the amount of $95,601.31. Gregory admitted that he had not been in debt to his mother. He explained that he had given the money to his mother simply because he did not know what was happening with regards to his marriage. Gregory also testified that he

eventually directed his mother to send Stephanie a check for $50,000 to help with her separate living expenses, and that his mother complied.

In its decree and findings of fact and conclusions of law, the trial court found that Gregory had committed a fraud on the community in the amount of $171,308.50—which is the sum of the cash withdrawal and the two checks described above. The trial court did not order Gregory to pay any damages for that fraud. *See* Tex. Fam. Code § 7.009(c) (providing that a court may award a money judgment to the wronged spouse as a remedy for fraud on the community). Instead, the trial court treated that fraud amount as an illusory asset in the reconstituted community estate. And in its just and right division of that illusory asset, the trial court awarded Stephanie the $50,000 that she had already received from Gregory's mother, while awarding Gregory the remaining balance of $121,308.50.

Gregory now raises a series of complaints about the trial court's finding of fraud.

He first complains that the trial court failed to specify whether the fraud was actual or constructive. Gregory did not raise this complaint in his motion for new trial. Nor can we determine that he ever timely objected in the trial court. But even if we assumed for the sake of argument that Gregory had preserved this issue for appellate review, we would still conclude that it lacks merit. The trial court stated in both its decree and its findings of fact and conclusions of law that the fraud amount was being divided as part of Stephanie's "waste claim"—and waste is simply another term for constructive fraud. *See Boothe v. Boothe*, 681 S.W.3d 916, 924 (Tex. App.—Houston [14th Dist.] 2023, no pet.) ("Waste, or constructive fraud, is one form of fraud on the community . . . .").

Gregory argues next that the evidence is legally and factually insufficient to support the trial court's finding of fraud.

Fraud is presumed whenever one spouse disposes of the other spouse's one-half interest in community property without that other spouse's knowledge or consent. *See Orzechowski v. Orzechowska*, No. 14-20-00055-CV, 2021 WL 3202679, at *4 (Tex. App.—Houston [14th Dist.] July 29, 2021, no pet.) (mem. op.). This presumption can arise not only by evidence of specific transfers or gifts of community assets outside of the community, but also by evidence that community funds are unaccounted for by the spouse in control of those funds. *Id.* Once the presumption of fraud arises, the burden shifts to the disposing spouse to prove the fairness of the disposition. *Id.*

Here, Gregory admitted that he transferred community assets outside of the community. He wrote two checks to his mother, drawing on accounts that he jointly owned with Stephanie. And he wrote the checks independently, without Stephanie's knowledge or consent, as she had already left the marital home. Those transfers gave rise to a presumption of fraud, which meant that Gregory assumed the burden of proving the fairness of their disposition.

The trial court was free to determine that Gregory did not satisfy that burden. Gregory admitted that he did not owe any debts to his mother. Gregory stated he made the withdrawals because Stephanie left without notice. When he came home from work, "half the house was gone, her cars [sic] was gone, she was gone." Gregory continued, "So at this point, you know, I don't know what's going on." The trial court could have reasonably concluded from this testimony that Gregory wrote the checks to his mother because he was concerned that Stephanie might otherwise deplete their joint accounts, just as she had left with their other property.

The cash withdrawal was also made from a joint account. Gregory testified that he spent this cash on "lawyer fees, bills, credit cards, [and] household items," but he did not corroborate this testimony with any documentation. Absent

corroborating evidence, the trial court was free to reject Gregory's explanation. We therefore conclude that the evidence was legally and factually sufficient to support the trial court's finding of fraud. *See Cantu v. Cantu*, 556 S.W.3d 420, 431 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (holding that the evidence was sufficient to support a finding that the husband had committed a fraud on the community by making cash gifts to his paramours, and recognizing that the trial court was not required to credit the husband's bare testimony that the cash gifts were actually loans).

Gregory contends next that the trial court failed to offset the fraud amount with the liabilities that fell entirely upon him upon Stephanie's leaving, like property taxes, upkeep, and homeowner's insurance. But Gregory does not explain how these expenses relate to the fraud amount. He does not suggest, for instance, that the money he gave to his mother was ever reclaimed and used for these expenses. Moreover, even if Gregory was entitled to an offset, he has not identified the amount of his claimed expenses, which was his burden. *See* Tex. R. App. P. 38.1(i).

Gregory contends next that the trial court abused its discretion by making its finding of fraud because Stephanie did not reveal either her theory of fraud or its factual basis in her mandatory disclosures. Gregory lodged a similar objection during the trial, when the examination turned to the subject of his withdrawals. He cited to Stephanie's Third Amended Disclosures and asserted "it doesn't say anything in here about any type of fraud or any type of waste or reimbursement."

Stephanie responded that the claim was in her live pleading. She also referred to the same set of disclosures, which stated that she would call an expert witness to testify about the "wasting of the community assets."

Gregory countered that the expert's report was already in evidence, and that it contained no mention of fraud. He also emphasized that the expert herself was absent.

The trial court opined that Gregory had received fair notice of the fraud claim and overruled Gregory's objection. We review that ruling for an abuse of discretion. *See Arshad v. Am. Express Bank, FSB*, 580 S.W.3d 798, 807 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, unless the court finds that there was good cause for the failure or the failure will not unfairly surprise or unfair prejudice another party. *See* Tex. R. Civ. P. 193.6(a). The trial court here opined that Gregory had notice of Stephanie's fraud claim, which is akin to finding that, even if she somehow failed to make a mandatory disclosure about that claim, he was not unfairly surprised or unfairly prejudiced. The record amply supports that finding.

V. Cruelty

During the trial, Stephanie began a line of testimony in which she indicated that Gregory and his family had been cruel to her. Gregory objected to this line of testimony on the grounds that she had neither alleged cruel treatment in her live pleading, nor disclosed any facts about cruel treatment in her mandatory disclosures. The trial court sustained Gregory's objection and the topic of discussion shifted back to Gregory's withdrawals.

Gregory now complains on appeal that Stephanie did not disclose all of the bases for her claims or plead any factors under *Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981), which can be considered by the trial court in making a just and right division

of the community estate. Though Gregory does not reference cruel treatment in his argument, he cites to the same section of the record where he lodged his objection about Stephanie's purported theory of cruel treatment. But because the trial court sustained his objection, Gregory never obtained an adverse ruling. We accordingly conclude that no complaint has been preserved for appellate review. *See* Tex. R. App. P. 33.1; *Mencer Parks v. HSBC Bank USA*, No. 14-18-00982-CV, 2020 WL 1025656, at *5 (Tex. App.—Houston [14th Dist.] Mar. 3, 2020, no pet.) (mem. op.) (holding that no appellate complaint was preserved as to an evidentiary issue in which the complaining party's trial objection was sustained).

CONCLUSION

We affirm the portion of the trial court's judgment that dissolves the marriage between Stephanie and Gregory, but we reverse the portion that divides the community estate, and we remand the case to the trial court for additional proceedings consistent with this opinion.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Wise and Boatman.