In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00211-CV

PHILIP HAMILTON, Appellant

V.

LORI ANNE (LINEBARGER) HAMILTON, Appellee

On Appeal from the 360th District Court
Tarrant County, Texas
Trial Court No. 360-601049-16

Before Gabriel, Kerr, and Womack, JJ.
Memorandum Opinion by Justice Womack

MEMORANDUM OPINION

I. INTRODUCTION

The trial court signed a judgment divorcing Philip and Lori Anne Hamilton, dividing their property, and changing Lori's name to Lori Anne Linebarger. Dissatisfied with the property division, Philip appealed. In five points, Philip argues:

1. The trial court erred by not entering sufficient findings of fact and conclusions of law in violation of Section 6.711 of the Texas Family Code;

2. The trial court abused its discretion by granting the divorce on grounds of fault because legally and factually insufficient evidence supports the trial court's finding that Philip engaged in cruel treatment;

3. The trial court abused its discretion and failed to comply with Section 7.001 of the Texas Family Code because the property division is not just and right;

4. The trial court erred by not calculating and dividing the parties' Internal Revenue Service tax liability; and

5. The trial court abused its discretion by using the property division to punish Philip in violation of *Young v. Young*, 609 S.W.2d 758, 762 (Tex. 1980), and by discriminating against Philip based on his sex.

We hold that Philip did not preserve his first point and that his remaining four points have no merit. We affirm the trial court's judgment.

II. ARGUMENTS

A. Findings of Fact

In his first point, Philip argues that the trial court erred by not making any asset-value findings as required by the Texas Family Code. *See* Tex. Fam. Code Ann. § 6.711. Without the asset-value findings, Philip contends that he is severely

prejudiced in his ability to show that the trial court abused its discretion when dividing the property. *See Brown v. Wokocha*, 526 S.W.3d 504, 507 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

1. Background

Philip timely requested findings of fact and conclusions of law. He specifically requested characterization and asset-value findings under Section 6.711 of the Texas Family Code. *See* Tex. Fam. Code Ann. § 6.711.

In response to Philip's request, the trial court timely filed its "Findings of Fact and Conclusions of Law." Characterization findings were among those that the trial court made, but asset-value findings were not. Despite the absence of asset-value findings, Philip never requested any additional or amended findings of fact. *See* Tex. R. Civ. P. 298.

2. Discussion

Although Section 6.711(a) requires asset-value findings, Section 6.711(b) incorporates the Texas Rules of Civil Procedure. *See* Tex. Fam. Code Ann. § 6.711(a), (b); *Howe v. Howe*, 551 S.W.3d 236, 253 (Tex. App.—El Paso 2018, no pet.). Under Rule 298 of the Texas Rules of Civil Procedure, if a party does not request additional or amended findings, it cannot later attack the lack of such findings, and this remains true even in the context of Section 6.711(a). *See* Tex. R. Civ. P. 298; *Barton v. Barton*, 584 S.W.3d 147, 156 (Tex. App.—El Paso 2018, no pet.) ("The trial court did not make any express findings on [wife's] [Section 6.711(a)] claims for

reimbursement . . . . [Wife] did not request additional findings from the court. Consequently, [wife] has waived her complaints related to these reimbursement claims."); *Howe*, 551 S.W.3d at 244, 253 ("Because the trial judge made some findings on this issue, and Husband requested no additional findings, we therefore presume any omitted findings that are supported by the evidence. We overrule Issue Three that faults the trial court for failing to value each of the community assets and liabilities."); *see also In re Marriage of C.A.S. and D.P.S.*, 405 S.W.3d 373, 381 (Tex. App.—Dallas 2013, no pet.) ("When a party makes an untimely request for additional findings . . ., the party waives the right to complain [about] the trial court's refusal to enter the additional findings . . . ." Thus, "[w]e cannot conclude [husband] preserved his right to complain . . . about the trial court's failure to make the additional [Section 6.711] findings."); *Goodfellow v. Goodfellow*, No. 03-01-00633-CV, 2002 WL 31769028, at *8 (Tex. App.—Austin Dec. 12, 2002, no pet.) (not designated for publication) ("Because [husband's untimely] request for additional findings and conclusions did not comply with the Texas Rules of Civil Procedure, the trial court was not required to make a specific finding as to the value of the parties' community property, including the house. *See* Tex. Fam. Code Ann. § 6.711(b).").

Because Philip has not complied with Rule 298, he cannot now complain about the absence of asset-value findings under Section 6.711. *See Howe*, 551 S.W.3d at 244 ("When a party fails to timely request additional findings and conclusions, it is deemed to have waived the right to complain on appeal of the court's failure to make

them."); *Villalpando v. Villalpando*, 480 S.W.3d 801, 810 (Tex. App.—Houston [14th Dist.] 2015, no pet.) ("Because [wife] failed to request additional findings of fact and conclusions of law, she has waived her complaint that the trial court erred by failing to make any omitted findings [relating to fraud on the community or her request for the calculation of the reconstituted estate].").

In his reply brief, Philip relies on *Sears, Roebuck & Co. v. Nichols* for the proposition that he has preserved his complaint about the missing findings. 819 S.W.2d 900, 908 (Tex. App.—Houston [14th Dist.] 1991, writ denied). Philip's reliance on *Sears* is misplaced. Philip's complaint is that the trial court erred by not making certain findings. That was not the appellant's complaint in *Sears*.

Also in Philip's reply brief, he cites Rule 299 for the proposition that the trial court's refusal to make a requested finding is reviewable on appeal. *See* Tex. R. Civ. P. 299. Philip misplaces his reliance on Rule 299. Philip's first point attacks the absence of certain findings that the trial court did not put in its original findings and that Philip never asked for in a supplemental request. Rule 298, not Rule 299, governs how a party preserves that complaint. *See Howe*, 551 S.W.3d at 253. If Philip wanted any additional or amended findings, he had to request them. *See* Tex. R. Civ. P. 298; *see also Levine v. Maverick Cnty. Water Control & Imp. Dist. No. 1*, 884 S.W.2d 790, 796 (Tex. App.—San Antonio 1994, writ denied) ("The trial court is required to make additional findings of fact, when they are timely requested, but only on ultimate issues.").

"[A] request for additional findings is in the nature of an objection . . . ." *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 255–56 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Alerting the trial court to an alleged error gives the trial court an opportunity to address and correct any mistake. *See In re Marriage of Tyeskie*, 558 S.W.3d 719, 725–26 (Tex. App.—Texarkana 2018, pet. denied). Rule 298 is the vehicle by which a party preserves its complaint that the trial court's findings and conclusions were inadequate or incorrect. *See Vickery*, 5 S.W.3d at 255–56. "It was incumbent upon [the complaining party] to request additional findings of fact to establish the specific valuation of the various community property assets and liabilities used by the trial court." *Jones v. Jones*, 699 S.W.2d 583, 585–86 (Tex. App.—Texarkana 1985, no writ) (citing Tex. R. Civ. P. 298). Under Section 6.711(b), Philip had to, but did not, comply with Rule 298 to preserve his complaint. *See Howe*, 551 S.W.3d at 253; *Vickery*, 5 S.W.3d at 256 ("We find Vickery did not meet the requirements of Rule 298 because he failed to apprise the trial court of the specific omission he now complains of on appeal.").

We overrule Philip's first point.

B. Cruel Treatment

In Philip's second point, he argues that the trial court abused its discretion by granting the divorce on grounds of fault because legally and factually insufficient evidence supports the trial court's finding that Philip engaged in cruel treatment.

1. Legal Principles

A court may grant a divorce on the ground of cruel treatment. Tex. Fam. Code Ann. § 6.002. To be considered cruel treatment, the accused spouse's conduct must rise to such a level that it renders the couple's living together insupportable. *Id.* For purposes of cruel treatment, "insupportable" means incapable of being borne, unendurable, insufferable, or intolerable. *Ayala v. Ayala*, 387 S.W.3d 721, 733 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (citing *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 granting a divorce on cruel-treatment grounds. *Id.* Or if a spouse suffers only nervousness or embarrassment, cruelty grounds are not merited. *Newberry v. Newberry*, 351 S.W.3d 552, 557 (Tex. App.—El Paso 2011, no pet.).

On the other hand, physical abuse will support granting a divorce on cruelty grounds. *Id.* But cruelty need not be limited to bodily injury. *Id.* For example, adultery may constitute cruel treatment. *Id.* A factfinder may use acts occurring after separation to support a cruelty finding. *Id.* The accumulation of several different acts may constitute sufficient grounds on which to grant a divorce on cruelty grounds. *Id.*

2. Standard of Review

We review most appealable issues in family law cases under an abuse-of-discretion standard. *C.A.S.*, 405 S.W.3d at 382; *Sandone v. Miller-Sandone*, 116 S.W.3d 204, 205 (Tex. App.—El Paso 2003, no pet.). This standard of review applies to a

trial court's granting of a divorce on fault grounds. *C.A.S.*, 405 S.W.3d at 382; *Wells v. Wells*, 251 S.W.3d 834, 838 (Tex. App.—Eastland 2008, no pet.).

When determining whether a trial court abused its discretion, we must decide whether the trial court acted without reference to any guiding rules or principles; in other words, whether it acted arbitrarily or unreasonably. *Loaiza v. Loaiza*, 130 S.W.3d 894, 899 (Tex. App.—Fort Worth 2004, no pet.). The mere fact that we might have decided the issue differently does not establish that the trial court abused its discretion. *Gerges v. Gerges*, 601 S.W.3d 46, 54 (Tex. App.—El Paso 2020, no pet.); *Loaiza*, 130 S.W.3d at 900.

Under an abuse of discretion standard, both legal sufficiency and factual sufficiency are relevant factors. *Loaiza*, 130 S.W.3d at 900. Evidentiary sufficiency complaints are not, however, independent grounds of error. *Id.*; *see Sink v. Sink*, 364 S.W.3d 340, 344 (Tex. App.—Dallas 2012, no pet.); *Boyd v. Boyd*, 131 S.W.3d 605, 611 (Tex. App.—Fort Worth 2004, no pet.). Thus, to determine whether a trial court has abused its discretion because the evidence is legally or factually insufficient to support its decision, we must determine (1) whether the trial court had sufficient evidence on which to exercise its discretion and (2) whether the trial court acted reasonably in applying its discretion to those facts. *Neyland v. Raymond*, 324 S.W.3d 646, 649 (Tex. App.—Fort Worth 2010, no pet.).

Anything more than a scintilla of evidence renders the trial court's findings legally sufficient. *Id.* at 650. In contrast, evidence is factually insufficient only if, after

considering and weighing all of the evidence in the record pertinent to that finding, we determine that the evidence supporting the finding is so weak or so contrary to the overwhelming weight of all the evidence that the answer should be set aside and a new trial ordered. *Id.*

When determining whether the trial court abused its discretion, we view the evidence in the light most favorable to its ruling. *Cypress Creek EMS v. Dolcefino*, 548 S.W.3d 673, 687 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). We must indulge every reasonable presumption that the trial court exercised its discretion properly. *Faram v. Gervitz-Faram*, 895 S.W.2d 839, 844 (Tex. App.—Fort Worth 1995, no writ).

The trial court is in the best position to observe the witnesses and their demeanor. *Gerges*, 601 S.W.3d at 54. It may choose to believe one witness over another. *McKnight v. Calvert*, 539 S.W.3d 447, 459 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (op. on reh'g). A factfinder is not compelled to believe uncontradicted testimony that is suspicious or that comes from an interested or biased source. *Medrano v. Gleinser*, 769 S.W.2d 687, 689 (Tex. App.—Corpus Christi 1989, no writ). Going one step further, as the factfinder, the trial court may believe or disbelieve even uncontradicted, unimpeached testimony from disinterested witnesses. *City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005); *Neurodiagnostic Consultants, LLC v. Nallia*, No. 03-18-00609-CV, 2019 WL 4231232, at *11 (Tex. App.—Austin Sept. 6,

2019, no pet.) (mem. op.). Of course, the factfinders' credibility decisions must be reasonable. *City of Keller*, 168 S.W.3d at 816, 820.

3. Discussion

Lori said that their marriage started to fall apart when Philip's business partnership went bad in 2009 or 2010. She said that Philip no longer gave her any attention and focused, instead, on his various lawsuits. Lori said:

> I tried to be there for him. I . . . tried to encourage him when he'd have a bad day. I was there for him when he . . . would . . . have problems with accounts or family members or . . . his driving record. Whatever it is, I always just tried to be there and support him and just . . . be a loving wife to him.

Neglect and unreciprocated support were not Lori's only concerns.[1]

Lori described Philip as abusive, cantankerous, and unrelenting. She said, "He just needles you and goes on and on and on about a subject . . . and just makes it where it's almost . . . unbearable to live with him." She asserted that Philip had called her a bitch, a slut, and a whore and that he had accused her of being a cheater, something that Lori denied. Lori described one instance when she and their daughter were invited to a girls-only wedding in Florida; Philip made her life so miserable that she became stressed and ill, so she and her daughter were not able to attend. Lori estimated that Philip had been physically violent with her four or five times during their twenty-two-year marriage. Lori denied ever being physically violent with Philip.

[1]At trial Philip also expressed his dissatisfaction with Lori and how it had led to his filing for divorce.

Although Philip accused Lori of calling him "fat ass," Lori stated that she did not recall ever calling him those words.

After Philip filed for divorce, he moved upstairs while Lori remained, for the most part, downstairs. According to Lori, on June 30, 2017, Philip asked Lori to make him some popcorn. When she returned with the popcorn, they argued, and Philip accused Lori of being in his area and told her to get out. Before leaving, Lori tried to get some photos out of a closet, but Philip closed the door on her arm, injuring it and causing her pain. Photos show broken skin above Lori's elbow. Lori called the police, and after the police arrived and spoke to Philip, Philip agreed to leave.

In contrast, Philip maintained that when Lori had left the room, he had closed the door only to have Lori force the door back open and say, "Nobody closes the door on me." Philip asserted that the door had hit him and then had whipped back toward Lori, hitting her elbow. In short, he asserted that her injuries were self-inflicted. Philip said that after the police arrived, he agreed to leave for a few hours to let things cool down. He returned two hours later but decided to leave permanently so that their daughter would not see her parents arguing.

Our review requires us to view the evidence in the light most favorable to the trial court's findings. *See Cypress Creek EMS*, 548 S.W.3d at 687. Lori described Philip's emotionally withdrawing from the marriage. While they still lived together, Philip engaged in what the trial court could have viewed as verbal abuse and relentless

haranguing to the point that Lori became stressed and ill. Philip engaged in what Lori described as physical abuse on several occasions during their marriage, so physical abuse, even if rare, was within the dynamics of Philip and Lori's relationship, and after Philip filed for divorce, his physical abuse is what had led Lori to call the police and what had prompted the police to ask Philip to leave the residence.

As the factfinder, the trial court did not have to believe Philip's version that Lori had injured herself in a fit of rage. *See McKnight*, 539 S.W.3d at 459. Although Lori described acts that had occurred both before and after Philip had filed for divorce, the trial court could consider all of them. *See Newberry*, 351 S.W.3d at 557. On this record, we cannot say that the trial court abused its discretion by finding cruel treatment. Philip's behavior toward Lori went beyond typical squabbling. *See Ayala*, 387 S.W.3d at 733. And Lori described experiencing something more than nervousness and embarrassment. *See Newberry*, 351 S.W.3d at 557. She described physical abuse and illness attributable to Philip's conduct, that is, his verbal abuse and debilitating, relentless haranguing.

More than a scintilla of evidence supports the trial court's cruelty finding, so the evidence is legally sufficient. *See Neyland*, 324 S.W.3d at 650. And after considering and weighing all the evidence, the supporting evidence is not so weak or so contrary to the overwhelming weight of all the evidence that the finding should be set aside; thus, the evidence is factually sufficient. *See id.* Having a factual basis to

support its finding, the trial court acted reasonably and did not abuse its discretion by granting the divorce on grounds of cruel treatment. *See id.* at 649.

We overrule Philip's second point.

C. Just and Right Division

In his third point, Philip contends that the trial court abused its discretion and failed to comply with Section 7.001 of the Texas Family Code because the property division is not "just and right." *See* Tex. Fam. Code Ann. § 7.001. He argues that the evidence is legally and factually insufficient to support the trial court's findings regarding the division of the marital estate.[2]

1. Legal Principles

Considering both parties' rights, a trial court is charged with dividing the community estate in a "just and right" manner. *Id.*; *Watson v. Watson*, 286 S.W.3d 519, 522 (Tex. App.—Fort Worth 2009, no pet.); *Todd v. Todd*, 173 S.W.3d 126, 128–29 (Tex. App.—Fort Worth 2005, pet. denied); *Loaiza*, 130 S.W.3d at 899. The law requires an equitable—not an equal—division of the community estate. *Halleman v. Halleman*, 379 S.W.3d 443, 452 (Tex. App.—Fort Worth 2012, no pet.). That said, some reasonable basis must support a disproportionate division. *Smith v. Smith*, 143 S.W.3d 206, 214 (Tex. App.—Waco 2004, no pet.).

[2]In his reply brief, Philip expanded his arguments supporting his third point. By not presenting these arguments in his opening brief, he waived them. *See Bartlett v. Bartlett*, 465 S.W.3d 745, 751 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

Nonexclusive factors that the trial court may consider include "the spouses' capacities and abilities, benefits which the party not at fault would have derived from continuation of the marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property." *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981). The trial court may also consider one spouse's dissipating, misusing, and defrauding the community estate. *Schlueter v. Schlueter*, 975 S.W.2d 584, 589–90 (Tex. 1998); *Vannerson v. Vannerson*, 857 S.W.2d 659, 669 (Tex. App.—Houston [1st Dist.] 1993, writ denied). Finally, the trial court may consider fault in the breakup of the marriage, but the trial court should not use fault to punish the guilty party when dividing the community estate. *Bradshaw v. Bradshaw*, 555 S.W.3d 539, 543 (Tex. 2018) (citing *Young*, 609 S.W.2d at 761–62). No single factor controls. *Felix-Forbes v. Forbes*, No. 02-15-00121-CV, 2016 WL 3021829, at *2 (Tex. App.—Fort Worth May 26, 2016, no pet.) (mem. op.); *see, e.g.*, *Stafford v. Stafford*, 726 S.W.2d 14, 16 (Tex. 1987), *overruled on other grounds by Price v. Price*, 732 S.W.2d 316, 319–20 (Tex. 1987).

2. Standard of Review

The trial court has broad discretion in making a just and right division; absent a clear abuse of discretion, we will not disturb the trial court's division. *Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex. 1985); *Todd*, 173 S.W.3d at 129. Appellate courts must presume that the trial court exercised its discretion properly. *Murff*, 615 S.W.2d at 698–99; *Loaiza*, 130 S.W.3d at 899. A party complaining about the trial court's

property division bears the burden of showing that the division was so unjust that it constitutes an abuse of the trial court's discretion. *C.A.S.*, 405 S.W.3d at 382; *Loaiza*, 130 S.W.3d at 899; *Zeptner v. Zeptner*, 111 S.W.3d 727, 734 (Tex. App.—Fort Worth 2003, no pet.) (op. on reh'g).

3. Discussion

By Philip's calculations, the trial court awarded 73% of the community estate to Lori. By Lori's calculations, the trial court awarded between 63% and 67% of the community property to her. Because the trial court did not make asset-value findings, we cannot determine the precise percentages, but we acknowledge that the parties agree that the trial court divided the community estate in Lori's favor. And viewing the evidence in the light most favorable to the trial court's ruling, the percentage that the trial court awarded Lori is closer to the two-thirds that Lori argues than the almost three-quarters that Philip contends. *See Cypress Creek EMS*, 548 S.W.3d at 687.

In finding of fact eighteen, the trial court stated:

> The [c]ourt took into consideration the following factors in making a determination of a just and right division of the community estate:
>
> > Fault in the breakup of the marriage
> >
> > Benefits innocent spouse may have derived from the continuation of the marriage
> >
> > Health of the spouses
> >
> > Need for future support
> >
> > Nature of the property involved in the division

> Wasting of community assets by Petitioner
>
> Creation of community property by the efforts or lack thereof of the spouses
>
> Attorney's fees paid
>
> Specifically, the [c]ourt considered the wife's work in building the community estate and the husband's continued use of community funds to bail out his failed business endeavors.

The record shows that both Philip and Lori, at least at one time, earned sizeable incomes. According to Philip's brief, his best year was in 2004, when he earned $87,900, and as recently as 2016, he had earned $72,593. Lori testified that her base salary, before losing her job, was $150,000.

The couple did not keep joint accounts. When it came to paying bills, they had no formal arrangement on who would pay what but had worked it out as they went.

In November 2014, the couple purchased with cash a house that Lori said was worth $375,000. Philip, using his recollection of their relative contributions, put the purchase price at about $380,000. Philip testified that he had contributed roughly $180,000 and that Lori had contributed roughly $200,000.[3] Philip asserted that the house's current market value, using Lori's appraiser, was $560,000.

[3]Philip and Lori purchased their current house in Lori's name only. On the same day, at Philip's suggestion, they put their previous house in Philip's name only so that he could use it in his various businesses. In her inventory, Lori listed the house titled in her name as her separate property. She maintained that Philip had gifted the house to her. The trial court classified the home titled in her name as community property and awarded it to Lori.

At the time of trial, though, both Philip and Lori were experiencing financial difficulties. Philip testified that he had lost his job in February 2018. Since losing his job, Philip had worked three different jobs and had earned roughly $22,000 through the time of the trial in October 2018. Lori lost her job in May 2017 and was still unemployed at the time of trial.

Lori testified to Philip's accessing and consuming community funds. In January 2015, about three months *after* purchasing their current home, Philip had sold the couple's previous house for a profit of about $74,000. Philip never told Lori what he had done with those funds. Lori accused Philip of selling it behind her back and maintained that Philip had told her that he was going to keep their previous home as rental property. At trial, Philip asserted that he had used that money to pay off community debts. Philip also acknowledged that while the divorce suit was pending, he had effectively liquidated his Individual Retirement Account by withdrawing about $30,000. Philip maintained that he had used more than half of that money to pay taxes and the rest to pay for his living expenses after losing his job.

Lori was not the only spouse occasionally left in the dark. When Lori lost her job, she received a lump sum $87,000 severance package. Philip maintained that Lori had never told him about her severance pay. Lori said that since losing her job, she had supported herself and the couple's daughter with this money. And Lori admitted

that a month before trial, she had cashed out her IRA in the amount of $73,000 without telling Philip.[4]

Philip asserted that over the course of their marriage, he contributed 43% of the couple's total income. Thus, he contends that the equities weigh against awarding him only one quarter (the approximate percentage that Philip maintains was awarded to him) of the marital estate.

a. Cruel treatment

Critically, the trial court found grounds for divorce against Philip based on cruel treatment. Appellate courts have affirmed divisions ranging from 73% to 100% when the facts warranted it. *See Lynch v. Lynch*, 540 S.W.3d 107, 116, 129–30 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (awarding 100% to wife); *In re Marriage of Svalesen*, No. 05-13-01151-CV, 2015 WL 4456096, at *4 (Tex. App.—Dallas July 21, 2015, no pet.) (mem. op.) (awarding wife 83%); *Taylor v. Taylor*, No. 14-09-00012-CV, 2010 WL 2542549, at *2–4 (Tex. App.—Houston [14th Dist.] June 24, 2010, no pet.) (mem. op.) (awarding wife what husband characterized as more than 100%); *In re K.N.C.*, 276 S.W.3d 624, 628–30 (Tex. App.—Dallas 2008, no pet.) (awarding wife

[4]In his brief, Philip asserts that he had spent only $50,000 in the past year, whereas Lori had spent $150,000. The record reference that Philip provides does not support that allegation. The record reference shows Philip saying that he had spent only $50,000 in the past year and denying that he had spent $150,000 in the past year. Contextually, one inference might be that Lori had been wasting community funds, but viewing the evidence in the light most favorable to the trial court's ruling, the trial court did not find that Lori had been wasting the community estate. *See Cypress Creek EMS*, 548 S.W.3d at 687; *McKnight*, 539 S.W.3d at 459.

what husband contended was the entire community estate); *Ohendalski v. Ohendalski*, 203 S.W.3d 910, 914–15 (Tex. App.—Beaumont 2006, no pet.) (awarding 81% to wife); *Faram*, 895 S.W.2d at 844 (awarding 72.9% to wife); *Golias v. Golias*, 861 S.W.2d 401, 403 (Tex. App.—Beaumont 1993, no writ) (awarding about 79% to wife); *Oliver v. Oliver*, 741 S.W.2d 225, 228–29 (Tex. App.—Fort Worth 1987, no writ); (awarding 80% to wife); *Rafidi v. Rafidi*, 718 S.W.2d 43, 44–46 (Tex. App.—Dallas 1986, no writ) (awarding 85–90% to wife); *Morrison v. Morrison*, 713 S.W.2d 377, 379 (Tex. App.—Dallas 1986, writ dism'd) (awarding 83.5% to wife); *Jones*, 699 S.W.2d at 585–86 (awarding about 86% to wife); *Campbell v. Campbell*, 625 S.W.2d 41, 42 (Tex. App.—Fort Worth 1981, writ dism'd) (awarding 95.8% to wife); *Huls v. Huls*, 616 S.W.2d 312, 315, 317–18 (Tex. App.—Houston [1st Dist.] 1981, no writ) (awarding 85% to wife). The exact percentages are not determinative. *See Golias*, 861 S.W.2d at 403. Based on the finding of fault alone, the disproportionate property division has factual support. The percentages here, especially when viewed in conjunction with the trial court's finding of cruel treatment, fall within a trial court's discretion. *See id.*

Yet Philip maintains that his conduct was not nearly as bad as the husbands' conduct in other cruel-treatment cases. Perhaps, but that does not mean that it did not qualify as cruel treatment. And the award of about two-thirds of the estate—the percentage when viewing the evidence in the light most favorable to the ruling (and not the approximately three-quarters percentage that Philip uses)—might already

reflect that Philip's cruel treatment was not on a par with those in other cases. *See Cypress Creek EMS*, 548 S.W.3d at 687.

b. Benefits that the innocent spouse may have derived from the continuation of the marriage

Turning to benefits that the innocent spouse may have derived from the continuation of the marriage, Lori's retirement accounts would have remained intact. As part of the property division, the trial court ordered 50% of Lori's pension plan and $283,296.50 of her 401(k) to Philip. Philip had a retirement account too, but he had exhausted his due to his financial condition. Philip did not sacrifice a portion of his retirement account because of the divorce. Lori did.

c. Health of the spouses

Next, regarding the spouse's health, Lori testified that she had stomach problems resulting from prior illnesses that had resulted in hospital stays and that she also suffered from migraine headaches, back issues from a car accident, and dental issues. On balance, the trial court found that Lori had medical expenses that Philip did not. The evidence does not suggest that this finding, standing alone, would have justified the disproportionate award, but consideration of the spouses' relative physical conditions is a valid factor when the court divides the community estate. *See Murff*, 615 S.W.2d at 699.

d. Need for future support

Both Philip and Lori had previously earned sizeable incomes. Philip was currently employed, and Lori was not. The couple's emancipated daughter lived with Lori and attended college. Although the trial court did not specify what prompted it to find a need for financial support, the evidence suggests that the trial court relied on Lori's unemployment.

e. Nature of the property

Turning to the nature of the property involved in the division, the primary assets remaining were the couple's home and Lori's retirement. Awarding the home to Philip would have meant that Lori and the couple's daughter would have had to find new housing. The same would have been true if the court had ordered the property sold so that the proceeds could have been split. The only other sizable asset to trade against the home was Lori's retirement. Lori preferred to keep the home and sacrifice her retirement. Philip wanted the home outright and would concede all the retirement to Lori. Although the house was paid for, the annual property taxes, which ranged from $13,000 to $17,000, were sizeable, and Lori had been paying them. Where, as here, the trial court found Philip at fault for the marriage's breakup, the trial court appears to have respected Lori's preference.

f. Wasting of community assets

Regarding Philip's wasting of community assets, viewing the evidence in the light most favorable to the trial court's ruling, this appears to refer to Philip's selling

the couples' first house and spending the proceeds without Lori's knowledge. Philip maintained that he had spent the proceeds on taxes, but the trial court, as the factfinder, did not have to believe him. *See Medrano*, 769 S.W.2d at 689. Because Lori's taxes—even those for her severance pay—were withheld when her employer had paid her, Lori thought that the tax debts that Philip kept referring to had originated from Philip's businesses.

g. Creation of community property by the efforts or lack thereof of the spouses

Both Philip and Lori contributed to the purchase of their current home, but only Lori had any retirement assets, and only Lori had contributed to her retirement. Philip had a retirement plan, but he had liquidated it. So at the time of trial, the primary contributor to the community estate was Lori.

h. Attorney's fees paid

Lori had incurred around $35,000 in attorney's fees. Lori wanted Philip to pay a share of her attorney's fees because she felt that Philip had unnecessarily prolonged the divorce and thus had unnecessarily run up her attorney's fees. At one point, the trial court had ordered Philip to pay $2,000 in attorney's fees as sanctions, but Philip had never paid them. The judgment shows that the trial court did not order Philip to pay Lori any attorney's fees but did consider attorney's fees when dividing the estate:

> To effect an equitable division of the estate of the parties and as part of the division, each party shall be responsible for his or her own attorney's fees incurred as a result of legal representation in this case. The [c]ourt

considered the issue of attorney's fees in balancing the equities in this case.

i. The wife's work in building the community estate and the husband's continued use of community funds to bail out his failed business endeavors

The trial court's last finding seems redundant of earlier findings. Unlike the others, though, this one faults Philip for his poor business acumen. At the very least, Philip takes umbrage over the trial court's asserting that his business endeavors had failed.

Philip's employer fired him in February 2018 after Philip had allegedly executed a trade in a deceased client's account. Philip's commissions at the time were, he admitted, "super low," which did not help matters.

While Philip was being investigated, he could not work for about three months and lost multiple clients. After eventually getting his license back, Philip discovered that his reputation had been irreparably damaged. Companies that had previously talked to him no longer would.

Based on the liquidation of Philip's retirement account, the trial court appears to have found that Philip's subsequent business efforts were failures in the sense that they were insufficient to meet his financial needs and were causing Philip to consume community assets. We hold that reasonable bases support the disproportionate division. *See Smith*, 143 S.W.3d at 214.

We overrule Philip's third point.

D. The IRS Tax Liability

In Philip's fourth point, he argues that the trial court erred by not disposing of his and Lori's IRS tax liability.

1. Background

While in his brief Philip acknowledges that the "amount of the Hamilton[s'] joint tax liability was not at all clear at trial," he maintains on appeal that he and Lori owed the IRS approximately $56,400. Philip introduced into evidence an IRS notice from February 2015 for the 2013 tax year addressed to both Philip and Lori that stated that they owed roughly $40,300 and another IRS notice from February 2015 for the 2010 tax year addressed only to Lori that stated that she owed roughly $16,100. Philip asserted that he, Lori, and their accountant had spoken to the IRS in 2016 or 2017 about tax liabilities. He acknowledged, however, that he had no documentation from 2017 or 2018 showing that they still owed the IRS any money. When testifying in October 2018, Lori stated that she did not think that they owed the IRS anything. Philip contends that the trial court erred by not resolving this dispute and by not dividing the liability.

2. Discussion

The trial court did not ignore this potential tax liability. The divorce decree provides, "This [c]ourt will defer to the Internal Revenue Service's decision as to the payment of taxes of [t]he parties by and upon the IRS rulings on community property, innocent spouse[,] or any other IRS law or regulation."

Philip contends that this disposition is inadequate because a court may not later amend, modify, alter, or change the division of property made or approved in a divorce decree. *See Pearson v. Fillingim*, 332 S.W.3d 361, 363 (Tex. 2011) (per curiam) (citing Tex. Fam. Code Ann. § 9.007(a)); *Hagen v. Hagen*, 282 S.W.3d 899, 902 (Tex. 2009) (same). These authorities are inapposite. The trial court could have but did not assign this liability to either party. *See Mullins v. Mullins*, 785 S.W.2d 5, 7 (Tex. App.—Fort Worth 1990, no pet.) ("[A] court may take tax liability into consideration in the division of property[] and may even require one party to assume the other's tax liability.").

Instead, the trial court left it up to the IRS to determine whether any taxes were owed, who owed them, and who would pay them. In short, the trial court left that matter for later clarification. Courts may enter orders of enforcement and clarification to enforce or specify more precisely a decree's property division. *Hagen*, 282 S.W.3d at 902 (citing Tex. Fam. Code Ann. § 9.006(a)). If a decree is ambiguous, a court can clarify it. *Pearson*, 332 S.W.3d at 363 (citing Tex. Fam. Code Ann. § 9.006). Assuming that the liability, if any, was joint, and assuming that either Philip or Lori had paid it in full, neither one would be without recourse because "[i]t has long been the law in this State that one who involuntarily pays a joint debt in full is entitled to contribution from other joint debtors of their proportionate share of the joint debt . . . ." *Strange v. Rubin*, 456 S.W.2d 416, 419 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.).

We overrule Philip's fourth point.

E. Punishment and Sexual Discrimination

In his final point, Philip argues that the trial court abused its discretion by using the property division to punish him in violation of Texas Supreme Court authority and that the trial court discriminated against him based on his sex in violation of the Texas Constitution. *See* Tex. Const. art. I, § 3a; *Young*, 609 S.W.2d at 762.

1. *Young*

The Texas Supreme Court has expressly prohibited using the property division to punish a party:

> In considering fault, along with other factors, the trial court is directed . . . to make a property division [that] is "just and fair." The division should not be a punishment for the spouse at fault. That would be an abuse of the trial court's discretion. There is a difference between making a just and right division of the property . . . and punishing the errant spouse. In general, the trial courts in Texas have perceived this distinction. The trial court has broad discretion in determining the disposition of property in divorce actions and this discretion will not be disturbed unless an abuse of discretion is shown.

Young, 609 S.W.2d at 762. Despite *Young*'s assurances to the contrary, what a just and fair division is and when precisely a just and fair division crosses the line to punishment is not always clear. *See Bradshaw*, 555 S.W.3d at 543–44 (Hecht, C.J., plurality op.), 547 (Devine, J., concurring), 551 (Lehrmann, J., dissenting), 555 (Boyd, J., dissenting). Because the standards for dividing a community estate involve the exercise of sound judgment, reviewing courts must accord the trial court's decision much discretion. *Id.* at 543 (Hecht, C.J., plurality op.) (citing *Murff*, 615 S.W.2d at

698), 546 (Devine, J., concurring) (citing *Murff*, 615 S.W.2d at 698), 551 (Lehrmann, J., dissenting) ("The Family Code entrusts the trial court with broad discretion in dividing marital property . . . ."), 553 (Boyd, J., dissenting) (asserting that the issue before the reviewing court is not whether it agrees with the trial court's division but whether the trial court exceeded its discretion).

2. Texas Constitution

The Texas Constitution prohibits sexual discrimination: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative." Tex. Const. art. I, § 3a.

3. Discussion

Philip argues that the "property division is evidence of punishment and discrimination against [him] simply because [he] assumed the 'non-traditional role' of 'stay-at-home' father, and because he was not the [family's] primary breadwinner . . . ." For example, Philip notes that he had worked from home for years to be with the couple's daughter and argues that if a woman had done the same thing, reducing the wife's share for this sacrifice would be unthinkable. Along the same lines, Philip contends that because he had suffered some financial setbacks and had ended up earning less than Lori over the course of their marriage, the trial court's unequal property division punishes him for failing as the family's provider—a typically male role. These arguments require our viewing the record in a decidedly skewed manner that undermines the trial court's property division. We decline to do so.

When determining whether the trial court abused its discretion, we view the evidence in the light most favorable to its ruling and indulge every reasonable presumption that the trial court exercised its discretion properly. *Cypress Creek EMS*, 548 S.W.3d at 687; *Faram*, 895 S.W.2d at 844.

In the same fashion, the record does not support Philip's assertion that the trial court sought to punish him generally. He contends that at one point the trial court "excoriated" him. He points to the following exchange:

> [LORI'S ATTORNEY] Q. Okay. Lori, . . . if the Court does not find that the house is your separate property, are you asking for an unequal division of the estate of you and your husband?
>
> A. Yes.
>
> Q. And why are you asking that?
>
> A. Because of the circumstances that . . . he's presented to me. (Weeping.)
>
> Q. Have you testified . . . to these other reasons in your general testimony today related to your health and so on? And I'm sorry. I didn't see you crying.
>
> A. Yes. (Weeping.) I've tried to be as respectful as I can today.
>
> THE WITNESS: Do you think we could take a little break, please?
>
> THE COURT: Sure.
>
> (Recess from 3:39 p.m. to 3:55 p.m.)
>
> THE COURT: Y'all be seated. You may proceed.
>
> [LORI'S ATTORNEY]: Thank you, Judge.

> Q. (By [Lori's attorney]) Ms. Hamilton, right before we took the break, you got extremely upset. Why was that?
>
> A. Um, just from the smirky looks that Philip has been giving me this whole time.
>
> Q. Okay. And . . . why did that upset you, though?
>
> A. Because it just did. He just --
>
> [PHILIP'S ATTORNEY]: Objection, relevance, Your Honor.
>
> THE COURT: Well, I'm going to ask your client to please do not do that if he is doing that. This is a serious matter. This is the mother of his child. This is his wife of 20-some years, and this is a court of law, and we need to show some respect.
>
> MR. HAMILTON: (Moving head up and down.)
>
> THE COURT: So . . . I suppose it's not relevant in the division of property; it's relevant that that's not how we're going to treat each other in this court.

We disagree with Philip's assertion that this exchange shows the trial court's excoriating him. The trial court implied that it had not seen Philip do anything but, in case he had, admonished him to maintain a decorum of respect. Assuming, without deciding, that the trial court's comments were harsh, a judge's ordinary efforts at courtroom administration are immune from judicial-bias allegations. *See Liteky v. United States*, 510 U.S. 540, 556, 114 S. Ct. 1147, 1157 (1994); *Song v. Kang*, No. 02-18-00375-CV, 2020 WL 1808487, at *7 (Tex. App.—Fort Worth Apr. 9, 2020, pet. denied) (mem. op.).

As before, Philip's arguments require us to interpret the record in a manner highly biased in his favor. But when the trial court rules against a party, we do just the opposite: we view the evidence in the light most favorable to the trial court's ruling and indulge every presumption in the ruling's favor. *Cypress Creek EMS*, 548 S.W.3d at 687; *Faram*, 895 S.W.2d at 844.

Philip's primary complaint lies with the trial court's awarding Lori the couple's house appraised at $560,000. Lori and the couple's eighteen-year-old daughter lived in the home and wanted to remain there. According to Lori, "That's my daughter and my house. That's our home. That's where we live."

To keep the house, Lori informed the trial court that she preferred that the trial court award Philip a greater portion of her 401(k). In contrast, when the trial court asked Philip whether he wanted the house sold and the proceeds split, an owelty lien, or a greater share of Lori's retirement, Philip responded with a fourth option—he wanted the house: "She can keep the IRA and the 401(k), and I'd rather have the house."

The trial court opted to follow Lori's suggestion and awarded Philip $283,296.50 of Lori's 401(k) plan. According to Philip's testimony, Lori had "around $347,000" in her plan. Using that number, the trial court awarded Philip about 82% of Lori's 401(k). The $283,296.50 represents slightly more than half of the $560,000 appraised value of the house. The trial court also awarded Philip 50% of Lori's pension plan. Ultimately though, as both parties acknowledge, the trial court awarded

about two-thirds—or as Philip asserts, perhaps as much as about three-quarters—of the community estate to Lori.

As noted in Philip's third point, when the trial court finds cruel treatment, as it did here, even an unequal distribution of two-thirds to three-quarters falls within the trial court's discretion, remains within the just and right requirements, and does not reflect punishment. *See Golias*, 861 S.W.2d at 403. The record, especially when viewed in light of the trial court's finding of Philip's cruelty, points not to punishment but to a just and fair division. *See Oliver*, 741 S.W.2d at 229 ("Although it is improper to make a division of community property to punish the errant spouse, it is proper to consider a spouse's fault in breaking up the marriage when determining an equitable division of community property." (citation omitted)).

We overrule Philip's fifth point.

III. CONCLUSION

Having overruled all five of Philip's points, we affirm the trial court's judgment.

/s/ Dana Womack

Dana Womack
Justice

Delivered: November 5, 2020