



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

No. 02-21-00291-CV

WILLIAM OWEN BARBER, Appellant

v.

IRENA MARY BARBER, Appellee

On Appeal from the 367th District Court
Denton County, Texas
Trial Court No. 20-10075-367

Before Sudderth, C.J.; Kerr and Birdwell, JJ.
Memorandum Opinion by Justice Kerr

MEMORANDUM OPINION

This appeal arises from a division of property incident to a divorce. In two issues, Husband William Barber argues that the trial court erred (1) by implicitly finding that the nearly \$70,000 that Husband had paid for the construction of a pool at the couple's home was community property and (2) by failing to order Wife Irena Barber to reimburse Husband for credit-card debt he incurred to pay for repairs to a home separately owned by Wife. We will affirm.

I. Background

Husband and Wife married in 2010. Because they married later in life, each spouse brought a substantial amount of separate property into the marriage. At the time of the marriage, Husband owned a home in Plano, and Wife owned two homes: one in Granbury and another located on Poplar Court in Plano.

In 2014, Husband and Wife purchased a new house in Frisco for \$613,000, after which Husband sold his Plano home, and Wife sold her Granbury home. Husband used \$141,000 from the sale of his Plano home to pay down the mortgage on the new Frisco house, and Wife likewise applied \$150,000 from the sale of her Granbury home toward the Frisco house's mortgage.

Shortly after the couple moved into the Frisco house, Husband paid nearly \$70,000 for the construction of an elaborate pool at the new home. While Husband

maintains that he used his separate property to pay for the pool, Wife testified at trial that she believed that Husband had paid for it with community funds.¹

After marrying Husband, Wife kept her separately owned home on Poplar as an investment and estate-planning vehicle. Wife allowed Husband's daughter and two grandsons, to whom Husband had previously been providing rent assistance, to live in the home rent free for over ten years.

In late 2020, mold and water damage made the Poplar house uninhabitable.² Husband and Wife hired a contractor to remediate the house. Husband used a credit

¹Wife's testimony on this point was seemingly inconsistent. At one point during questioning from Husband's attorney, Wife testified as follows:

Q. Do you know how much [Husband] received from the sale of his home?

A. I heard a number earlier, but I don't recall. 200 something. I don't --

Q. Okay. Would you dispute that he received \$253,000.00?

A. I -- I can't dispute it. I don't know it.

....

Q. All right. And do you dispute that [Husband] used some of that money to put the pool in that house, in the Frisco house?

A. Do I dispute it? No.

This testimony would appear to indicate that Wife acknowledged that the funds used to purchase the pool constituted proceeds from the sale of Husband's separate property, namely his home in Plano. But when questioned later about the funds used to pay for the pool, Wife testified that she disputed that Husband had paid for the pool with separate funds and instead believed that the money had been community property.

card to pay \$5,430 toward the remediation. Ultimately, homeowner's insurance paid Wife over \$20,000 to cover the water-damage repair costs, but Wife did not share the insurance proceeds with Husband. Before repairs were completed, wife sold the Poplar house to "one of those people who buy ugly houses" for around \$130,000.

In December 2020, Husband sued for divorce, and Wife countersued. In June 2021, following a bench trial, the trial court signed a final divorce decree. The decree awarded Husband a 23% separate interest in the Frisco house and Wife a 24.47% separate interest.³ The decree also required each spouse to pay all credit-card debts for which he or she was the primary account holder. The decree did not address what Husband had spent for the pool's construction, nor did it require Wife to reimburse Husband for the credit-card debt he had incurred for the Poplar house remediation. This appeal followed.

²In his brief, Husband attributes the water damage and mold to a "plumbing failure." But Wife testified that the water damage was caused by Husband's grandsons putting things in the toilet, which caused it to overflow.

³These percentages of separate property ownership appear to correspond to the amounts of separate funds that Husband and Wife contributed toward the mortgage on the Frisco house. The original purchase price of the Frisco house was \$612,993. Twenty-three percent of this amount is \$140,988.39, which is approximately equal to the \$141,000 that Husband paid from the proceeds of the sale of his Plano house toward the Frisco house mortgage. Similarly, 24.7% of the purchase price equals \$149,999.39, which is roughly equal to the \$150,000 that Wife contributed from the proceeds of the sale of her house in Granbury.

II. Discussion

On appeal, Husband raises two issues. First, he argues that the trial court erred in dividing the marital estate by implicitly treating the \$70,000 that Husband had paid for the Frisco house's pool as community property. Second, he asserts that the trial court erred by failing to order Wife to reimburse him for the \$5,430 remediation-related debt that he incurred. For the reasons set forth below, we affirm.

A. Standard of Review

“A trial court has broad discretion in dividing the marital estate, and we presume the trial court exercised its discretion properly.” *Loiζa v. Loiζa*, 130 S.W.3d 894, 899 (Tex. App.—Fort Worth 2004, no pet.) (citing *Murff v. Murff*, 615 S.W.2d 696, 698–99 (Tex. 1981)). In order to successfully challenge a trial court's division of property, a party must demonstrate from evidence in the record that the division was so unjust that the trial court abused its discretion. *Id.*; *Zeptner v. Zeptner*, 111 S.W.3d 727, 734 (Tex. App.—Fort Worth 2003, no pet.) (op. on reh'g); *Pletcher v. Goetz*, 9 S.W.3d 442, 446 (Tex. App.—Fort Worth 1999, pet. denied) (op. on reh'g). A trial court abuses its discretion when it acts without reference to any guiding rules or principles or its actions are arbitrary or unreasonable under the circumstances. *See Loiζa*, 130 S.W.3d at 899.

A trial court's discretion in evaluating a claim for reimbursement is equally as broad as its discretion in making a “just and right” division of the marital estate. *Penick v. Penick*, 783 S.W.2d 194, 198 (Tex. 1988). We must give great latitude to the trial

court's application of equitable principles to value a claim for reimbursement. *Id.* If there is some evidence of substantive and probative character to support the trial court's decision, there is no abuse of discretion. *In re Estate of Baker*, 627 S.W.3d 523, 526 (Tex. App.—Waco 2021, no pet.); *Ayala v. Ayala*, 387 S.W.3d 721, 726 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

B. Issue One: The \$70,000 for the pool

Husband's first issue concerns the \$70,000 that he paid to have the pool installed at the Frisco house. Husband testified that these funds were proceeds from the sale of his separately owned home in Plano. Husband thus argues that he should have been awarded a larger percentage of separate ownership in the Frisco house than what the divorce decree provided, asserting that, in dividing the Frisco house's ownership among the various marital estates as set forth in the decree, the trial court implicitly (but wrongly) found that Husband's \$70,000 was community property.⁴ According to Husband, this must be the case: if the trial court treated the \$70,000 in the same manner as the separate funds that each spouse contributed to pay down the

⁴Although Husband filed a request for findings of fact and conclusions of law, he did not file it timely. Accordingly, the trial court did not issue findings of fact or conclusions of law in support of the divorce decree. Thus, all findings necessary to support the divorce decree are implied. *See, e.g., Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 480 (Tex. 2017).

Frisco house's mortgage, then his separate-ownership percentage should have been as high as 34.42%.⁵ We are not convinced.

In essence, what Husband seeks in his first issue is credit for making a capital improvement—adding the pool—to the community-owned Frisco house. The Texas Family Code provides that a claim for “capital improvements to property other than by incurring debt” is one for reimbursement. Tex. Fam. Code Ann. § 3.402(a)(8); *see also Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex. 1982) (“A right of reimbursement arises when the funds or assets of one estate are used to benefit and enhance another estate without itself receiving some benefit.”). Thus, in order to prevail on his first issue, Husband must show that the trial court abused its discretion by denying a reimbursement claim. *See Penick*, 783 S.W.2d at 198; *Mason v. Mason*, No. 03-17-00546-CV, 2019 WL 1967166, at *1 (Tex. App.—Austin May 3, 2019, no pet.) (mem. op.).

Section 3.402 of the Texas Family Code governs reimbursement claims. A claim for reimbursement must be pleaded. *See Vallone*, 644 S.W.2d at 459; *Finch v. Stegman*, No. 01-19-00109-CV, 2020 WL 4516866, at *8 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (mem. op.). Courts are to apply equitable principles in resolving reimbursement claims, and such claims are to be measured “by the enhancement in

⁵Husband appears to have derived this percentage simply by adding the \$70,000 that he paid for the pool to the \$141,000 in separate funds used to pay down the mortgage on the Frisco house and then dividing this sum (\$211,000) by the \$612,993 purchase price. Alternatively, Husband suggests that if one assumes that the pool increased the value of the house by \$70,000, then Husband's share of separate ownership should be 30.89%, and Wife's should be decreased to 21.96%.

value to the benefited marital estate.” Tex. Fam. Code Ann. § 3.402(b), (d); *see also Anderson v. Gilliland*, 684 S.W.2d 673, 675 (Tex. 1985) (“[A] claim for reimbursement for funds expended by an estate for improvements to another estate is to be measured by the enhancement in value to the benefited estate.”).

Husband has not met his burden to show that the trial court abused its discretion by denying his reimbursement claim. Because the trial court did not issue findings of fact and conclusions of law, we must presume that the trial court made all findings in support of its judgment and must affirm the judgment if it can be upheld on any legal theory that finds support in the evidence. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). A review of the record reveals ample evidence to support the trial court’s judgment. First, Husband failed to plead a claim for reimbursement based on the money that he had spent on the pool.⁶ *See Vallone*, 644 S.W.2d at 459 (“The party claiming the right of reimbursement has the burden of pleading and proving that the expenditures and improvements were made and that they are reimbursable.”). Moreover, even setting aside this pleading defect, Husband presented little to no

⁶We note that the failure to plead a claim for reimbursement would not necessarily require the denial of such a claim. *See Talliti v. Sarris*, No. 05-10-00096-CV, 2011 WL 2859996, at *7 (Tex. App.—Dallas July 20, 2011, no pet.) (mem. op.) (holding that a failure to plead a claim for reimbursement is not per se fatal because “courts generally construe pleadings in a divorce case more liberally than in other civil cases”). Nonetheless, such a failure, particularly when taken together with other record evidence, provides support for the trial court’s exercise of discretion to deny Husband’s reimbursement claim.

evidence concerning the extent to which the pool increased the Frisco home's value.⁷ Because a reimbursement claim is measured in terms of the increase in value to the benefited estate, the lack of evidence presented on this issue provides an independent basis for denying Husband's claim. See *Anderson*, 684 S.W.2d at 675; *Zeptner*, 111 S.W.3d at 735 ("The party claiming reimbursement bears the burden of establishing the net benefit to the payee estate."). Furthermore, because Wife controverted Husband's testimony that he had used his separate property for the pool, the trial court could have found that Husband had failed to carry the difficult burden to show that these were separate funds, which would be fatal to his claim for reimbursement.⁸ See *Hinton v. Burns*, 433 S.W.3d 189, 196 (Tex. App.—Dallas 2014, no

⁷The extent of Husband's evidence regarding some increased value was limited to one conclusory statement during his direct testimony that the pool "contributed to the sales price" of the house. Husband did not state a specific dollar amount by which he believed that the pool had increased the sales price, nor did he call any expert witness, such as an appraiser or a real-estate agent, to testify about the supposed increase in value.

⁸Husband bore the burden of proving that these funds were separate property by clear and convincing evidence. *Sink v. Sink*, 364 S.W.3d 340, 344 (Tex. App.—Dallas 2012, no pet.). As noted above, though Wife's testimony on this issue was seemingly inconsistent, she clearly stated twice on the record that she disputed the separate character of the funds used to pay for the pool, thus holding Husband to his burden of proof. While Husband did testify that the funds were his separate property and offered bank statements and copies of checks in support of his testimony, he presented no corroborating or expert testimony on this issue. Thus, the trial court could have found that Husband had failed to carry his high burden of proof to show that these funds were his separate property. See *Leggio v. Florian*, No. 14-21-00168-CV, 2022 WL 3093538, at *3 (Tex. App.—Houston [14th Dist.] Aug. 4, 2022, no pet. h.) (mem. op.) (pointing out that, while not required, expert testimony is helpful in tracing funds and noting that "[a]s a general rule, mere testimony that funds came

pet.) (“[A] spouse making a claim for reimbursement on behalf of a separate estate must prove by clear and convincing evidence that the funds expended on behalf of the community estate were separate funds.”); *see also Boyd v. Boyd*, 131 S.W.3d 605, 612 (Tex. App.—Fort Worth 2004, no pet.) (noting that the burden of tracing funds to prove their separate character “is a difficult . . . burden to sustain”).

In sum, because the evidence in the record goes to a number of legal theories that would support the trial court’s denial of Husband’s pool-related reimbursement claim, we cannot hold that the trial court abused its discretion by denying this claim. *See Worford*, 801 S.W.2d at 109. We overrule Husband’s first issue.

C. Issue Two: The credit-card debt for remediation

In his second issue, Husband contends that the trial court erred by failing to order Wife to reimburse Husband for the \$5,430 in credit-card debt that he had incurred to pay for remediation of the Poplar house. But Husband has not satisfied his burden on this issue.

As noted, we must presume that the trial court made all findings in support of its judgment and must affirm the judgment if it can be upheld on any legal theory that

from a separate source, without any tracing of the funds, will not constitute the clear and convincing evidence necessary to rebut the community presumption” (quoting *Welch v. Estate of Welch*, No. 14-20-00113-CV, 2021 WL 6141184, at *5 (Tex. App.—Houston [14th Dist.] Dec. 30, 2021, no pet.) (mem. op.)); *Sink*, 364 S.W.3d at 346 (holding that trial court did not abuse its discretion in characterizing certain assets as community property where husband did not present specific tracing testimony or corroborating testimony or evidence to prove the assets’ separate character).

finds support in the evidence. *Worford*, 801 S.W.2d at 109. The record supports the trial court’s denial of Husband’s claim for reimbursement of the credit-card debt. First, Husband did not properly plead his claim. *See Vallone*, 644 S.W.2d at 459. Although his first amended petition for divorce requests that the *community* estate be reimbursed for funds expended to make repairs to the Poplar house, it does not request the relief that Husband now seeks—an order directing Wife to reimburse Husband’s *separate* estate for these expenditures.⁹ Moreover, in 2018 Husband and Wife signed an agreement¹⁰ specifically providing that any “appreciation or increases in value” of the Poplar house “due to financial contributions of either Husband’s separate property or of community property . . . remain the separate property of Wife because those contributions are deemed to be a gift . . . by Husband to Wife.” Indeed, at trial Husband conceded that by signing this agreement, he had waived any claim for reimbursement regarding the Poplar house. Furthermore, even if Husband had not waived his reimbursement claim, because Wife had allowed Husband’s daughter and grandsons—to whom Husband had previously provided money for rent—to live in the Poplar house rent free for over ten years and because the evidence suggests that Husband’s daughter and grandsons contributed to the water damage, the trial court

⁹This pleading defect would not, of course, in and of itself require the denial Husband’s reimbursement claim. *See Talliti*, 2011 WL 2859996, at *7.

¹⁰This agreement is formally titled “Confirmation of Wife’s Separate Property Agreement.”

could reasonably have denied Husband’s claim for reimbursement on equitable principles. *See* Tex. Fam. Code Ann. § 3.402(b); *Anderson*, 684 S.W.2d at 675 (“The right of an estate to reimbursement from another estate . . . should be determined by equitable principles.”).

As the record contains sufficient evidence to support a number of legal theories that would justify the denial of Husband’s claim for reimbursement of the remediation-related debt, we cannot hold that the trial court abused its discretion by denying Husband’s reimbursement claim. *See Worford*, 801 S.W.2d at 109. We overrule Husband’s second issue.

III. Conclusion

Having overruled both of Husband’s issues, we affirm the trial court’s judgment.

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

Delivered: September 8, 2022