

**NO. 12-16-00335-CV**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

*IN THE MATTER OF THE* § *APPEAL FROM THE 369TH*  
*MARRIAGE OF KEITH D. JANUARY* § *JUDICIAL DISTRICT COURT*  
*AND EVELYN DIANE JANUARY* § *ANDERSON COUNTY, TEXAS*

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***MEMORANDUM OPINION***

Evelyn Diane January appeals the trial court’s divorce decree. In one issue, Evelyn contends the trial court abused its discretion in failing to award her a portion of Keith D. January’s retirement account. We affirm.

**BACKGROUND**

Evelyn and Keith were married on April 10, 2010. Keith filed for divorce on February 12, 2013. At the final hearing, the evidence showed that both Evelyn and Keith worked for the Texas Department of Criminal Justice—Institutional Division (TDCJ). Evelyn retired in January 2013 after twenty-two years of service and received a pension of approximately \$2,500 per month. Additionally, she received approximately \$400 per month from another pension and an unspecified amount in oil royalties. Evelyn had \$42,000 in a 401(k) account and separate property including a house and fifteen acres.

Keith testified that he worked for TDCJ during their marriage, and his net monthly pay was \$2,434.48. He had \$20,000 in a 401(k) account, and lived in state housing at the Pack Unit in Navasota. At the conclusion of the hearing, the trial court awarded each of the parties the community property in their possession or under their control, including cash and funds on deposit. Keith was awarded two vehicles and three firearms, and Evelyn was awarded two vehicles, and a television and rifle in Keith’s possession. Each of the parties assumed the debts in their name, and was awarded his or her retirement account and pension. Further, Keith was ordered to pay \$6,000 to Evelyn.

Following the decree of divorce, Evelyn made a timely request for findings of fact and conclusions of law. However, the trial court did not file any findings of fact and conclusions of law, and Evelyn failed to file a notice of past due findings. This appeal followed.

### **DIVISION OF COMMUNITY PROPERTY**

In her sole issue, Evelyn contends that the trial court abused its discretion by failing to award her a portion of Keith’s retirement account. She argues that the trial court’s decision to divest her of any and all interests she may have had in Keith’s retirement account was unsupported by the record and was arbitrary.

#### **Standard of Review**

We review a trial court’s division of property under an abuse of discretion standard. *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex 1981). It is this court’s duty to consider every reasonable presumption in favor of the proper exercise of discretion by the trial court in dividing the community estate. *Loaiza v. Loaiza*, 130 S.W.3d 894, 899 (Tex. App.—Fort Worth 2004, no pet.) (citing *Murff*, 615 S.W.2d at 698). To determine 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 the act was arbitrary or unreasonable. *Loaiza*, 130 S.W.3d at 899 (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985)).

Litigants must file a notice of past due findings when the court does not file findings within twenty days. TEX. R. CIV. P. 297; *Ad Villarai, LLC v. Chan Il Pak*, 519 S.W.3d 132, 137 (Tex. 2017). A party waives its right to challenge a failure to file findings if it does not file a notice of past due findings as rule 297 of the Texas Rules of Civil Procedure requires. *Id.* “Without [the] timely reminder [that Rule 297 requires], [the requesting party] waive[s] its complaint of the failure on appeal.” *Id.* (quoting *Las Vegas Pecan & Cattle Co., Inc. v. Zavala Cty.*, 682 S.W.2d 254, 255 (Tex. 1984)).

Where findings of fact and conclusions of law are not properly requested and none are filed, the judgment of the trial court must be affirmed if it can be upheld on any legal theory that finds support in the evidence. *In re W.E.R.*, 669 S.W.2d 716, 717 (Tex. 1984). In determining whether some evidence supports the judgment and the implied findings of fact, “it is proper to consider only that evidence most favorable to the issue and to disregard entirely that which is opposed to it or contradictory in its nature.” *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (quoting *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 513, 235 S.W.2d 609, 613 (1950)).

### Applicable Law

The trial court is charged with dividing the estate of the parties in a “just and right” manner, considering the rights of both parties. TEX. FAM. CODE ANN. § 7.001(West 2006); *Murff*, 615 S.W.2d at 698. The community property of the marital estate need not be equally divided. *Murff*, 615 S.W.2d at 699. The trial court may order an unequal division of the community property when a reasonable basis exists for granting that relief. *Hailey v. Hailey*, 176 S.W.3d 374, 380 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Relevant factors in the division of the marital estate include (1) the education of the parties, (2) their relative earning capacities, (3) the size of their separate estates, and (4) the nature of the community property. *Id.* (citing *Murff*, 615 S.W.2d at 699).

### Analysis

While the record reflects that Evelyn filed a request for findings of fact and conclusions of law, when the trial court failed to file its findings and conclusions, Evelyn did not file a notice of past due findings within thirty days of her original request. See TEX. R. CIV. P. 297. As a result of this failure, we imply all necessary findings to support the trial court’s order. See *Worford*, 801 S.W.2d at 109.

We must first determine whether there was sufficient evidence regarding the value of the property in the marital estate for the trial court to properly divide it. See *Sandone v. Miller-Sandone*, 116 S.W.3d 204, 207-08 (Tex. App.—El Paso 2003, no pet.). Evelyn contends that there was insufficient evidence regarding the value of specific items in the marital estate for a proper division of property. At trial, Keith testified regarding his earning capacity, the amount of his 401(k) and the loans against it, the amount of money in his savings and checking accounts, the accumulated amount in his retirement account, community credit card debt, the value of the vehicles in the parties’ possession, Evelyn’s separate property including a house, fifteen acres, a storage building, oil royalties, and the value of other property, including televisions and a travel trailer. Evelyn testified regarding the monthly income she received from her TDCJ pension, the monthly income from a second pension, the value of her 401(k) and any depletion, community credit card debt, her attempt to obtain disability, and the value of other property, including televisions. The trial court divided the property at issue, including vehicles, guns, and televisions, and ordered Keith to pay Evelyn the amount of \$6,000 because she assumed a greater proportion of the community debt. From the parties’ testimony, we conclude there was sufficient evidence for the trial court to make a “just and right” division of the community estate. See *Murff*, 615 S.W.2d at 698.

As for Evelyn's complaint regarding the property division, she argues that she did not receive her community share of the seventy-two months of Keith's retirement account that accrued during the marriage. However, during the hearing, Evelyn asked the court to award her only the community interest in Keith's retirement account after she retired in January 2013, i.e., forty months. Evelyn conceded, in her brief, that Keith would have been entitled to be awarded a portion of her retirement account for the time that she worked during the marriage, i.e., thirty-two months. But, she contends, the disparity between her two years of contributions during the marriage and Keith's six years of contributions supports a division of Keith's retirement account. In order to determine if the property division was inequitable as to Keith's retirement account, we review the relevant factors in a division of the marital estate. *See Hailey*, 176 S.W.3d at 380.

Regarding the first factor, the record did not indicate the educational level of either Evelyn or Keith, therefore, we do not consider this factor. *See id.* With reference to earning capacity, the record did not indicate Evelyn's total net income. However, before deductions, the record showed that Evelyn's monthly income was higher than Keith's net income. Because the record was not specific on this factor, we will not consider it. *See id.*

The next factor is the size of the separate estates. The record showed that Evelyn had a house and fifteen acres as part of her separate property, another pension that provided additional income, an unspecified amount of income from oil royalties, and her TDCJ pension. Evelyn's monthly pension was more than Keith's net monthly income. Additionally, her 401(k) was twice the size of Keith's 401(k). Because Evelyn's separate property is more valuable than Keith's separate property, this factor favors Keith receiving a greater share of the community property. *See id.*

In considering the nature of the community property, as noted above, Evelyn had a higher salary at the time of her retirement than Keith did at any time during their six years of marriage. Further, as noted above, she asked at trial for the court to award her only a portion of Keith's retirement account after she retired in January 2013, i.e., forty months. Evelyn also conceded in her brief that Keith would have been entitled to that portion of her retirement account during the time that she worked during the marriage, i.e., thirty-two months. When this evidence is taken as a whole, we do not believe this factor favors either Evelyn or Keith. *See id.*

Of these four factors, the only decisive factor is the size of Evelyn's separate property estate in comparison to Keith's separate property. This evidence alone supports the unequal division of the parties' community property. *See Worford*, 801 S.W.2d at 109. We conclude that the evidence showing that Evelyn's separate property estate was more valuable than Keith's separate property

estate supports the trial court's division of property. See *Hailey*, 176 S.W.3d at 381. Accordingly, the trial court did not abuse its discretion in ordering an unequal division of property. *Murff*, 615 S.W.2d at 698. Evelyn's sole issue is overruled.

**DISPOSITION**

Having overruled Evelyn's sole issue, the judgment of the trial court is *affirmed*.

**JAMES T. WORTHEN**

Chief Justice

Opinion delivered September 6, 2017.

*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

(PUBLISH)



## COURT OF APPEALS

### TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

#### JUDGMENT

SEPTEMBER 6, 2017

NO. 12-16-00335-CV

**IN THE MATTER OF THE MARRIAGE OF  
KEITH D. JANUARY AND EVELYN DIANE JANUARY**

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Appeal from the 369th District Court  
of Anderson County, Texas (Tr.Ct.No. 369-13-4887)

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THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the Appellant, **EVELYN DIANE JANUARY**, for which execution may issue, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.  
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*