

**Affirmed in Part, Reversed and Remanded in Part Subject to Suggestion of Remittitur,
and Opinion filed January 20, 2000.**



In The

Fourteenth Court of Appeals

NO. 14-98-00042-CV

JUDITH ANN DURHAM, Appellant

V.

**DOUGLAS BOYD DURHAM and
WALTER B. WILLIAMS, Appellees**

=====
**On Appeal from the 257th District Court
Harris County, Texas
Trial Court Cause No. 94-15757**
=====

OPINION

In this marital property division case, Judith Ann Durham (“Judy”) appeals her decree of divorce from Douglas Boyd Durham (“Doug”) on the grounds that the trial court erred in awarding: (1) Judy a disproportionately lower share of the community estate; and (2) intervenor Walter B. Williams, Judy’s

previous attorney, (a) damages in excess of what he testified he was owed; and (b) attorney's fees. We affirm in part and reverse and remand in part subject to remittitur.¹

Division of Marital Estate

The first of Judy's three points of error argues that the trial court abused its discretion in awarding her a lesser share of the marital estate because Doug failed to establish any basis for an unequal division.

In a divorce decree, the trial court is to order a division of the parties' estate in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage. *See* TEX. FAM. CODE ANN. § 7.001 (Vernon 1998). Trial courts have wide discretion and are allowed to take many factors into consideration in making a just and right division. *See Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998). These factors include, among other things, wasting of community assets,² relative earning capacities of the parties,³ fault for breakup of the marriage,⁴ lost financial benefit from the marriage ending,⁵ business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property. *See Murff v. Murff*, 615 S.W.2d 696, 698-99 (Tex. 1981). An abuse of discretion does not occur where the trial court bases its decision on conflicting evidence or where some evidence of a substantial and probative character exists to support the division. *See Zieba v. Martin*, 928 S.W.2d 782, 787 (Tex. App.–Houston [14th Dist.] 1996, no writ).⁶

¹ As a preliminary issue, Doug contends that Judy did not timely file her appellate brief. On August 31, 1998, Judy filed a motion to extend time to file her brief. On September 24, 1998, this court granted that motion. Therefore, Judy's brief, also filed that date, was timely.

² *See Schlueter*, 975 S.W.2d at 589.

³ *See Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996).

⁴ *See id.*

⁵ *See id.*

⁶ If the appellate court finds an abuse of discretion in a property division, it must reverse and remand rather than render judgment for a different division. *See Jacobs v. Jacobs*, 687 S.W.2d 731, 732 (Tex. 1985).

In this case, Judy and Doug stipulated to the value of most of the assets in the marital estate. Based on the values it assigned to the property, the trial court divided it as follows:

TO DOUG:

TO JUDY:

<u>Assets</u>	<u>Value</u>	<u>Assets</u>	<u>Value</u>
1987 BMW	\$ 5,000	Townhouse	\$105,500
1990 30' Boat	30,000	1985 BMW	4,000
Wells Fargo Account	2,200	Norwalk Savings	200
Wells Fargo Account	2,500	Bank One Account	200
40 shares of Xerox	2,385	Bank One Account	250
Evergreen Total Return	20,000	Attorney Escrow Account	5,832
Cash from Retirement	72,680	Taz Thomas Trust	3,739
ESOP Account	11,343	Norwalk Savings IRA	26,378
Retirement Account	<u>68,714</u>	Prudential Account	18,163
		Teacher Retirement	17,000
		Retirement Account	<u>25,000</u>
Total Assets	\$214,822 (51%)		\$206,262 (49%)
<u>Debts</u>		<u>Debts</u>	
1990 Boat Lien	\$ 27,718	1 st Lien on Townhouse	\$ 13,000
Attorney's Fees	<u>22,775</u>	2 nd Lien on Townhouse	80,000
		Credit Card Account	5,700
		Steffler Judgment	5,663
		Williams Judgment	<u>11,387</u>
Total Debts	\$ 50,493		\$115,750
NET TO DOUG	\$ 164,329	NET TO JUDY	\$ 90,512

It appears from the foregoing that the assets in the marital estate were fairly evenly divided, and that the disparity in the allocation of debts, and thus the net estate, is largely attributable to the fact that Judy incurred individual debts on a credit card account and for attorney's fees, including the second mortgage on the townhouse. In addition, whereas the debt Judy will carry for her residence is reflected in the division, the debt that Doug will have to incur to lease or own a residence is not reflected therein. Under these circumstances, we believe that any inequality in the division was within the discretion of the trial court. Accordingly, appellant's first point of error is overruled.

Award to Williams

Judy's second and third points of error argue that the trial court abused its discretion in awarding Williams: (1) damages in excess of that which he testified he was owed for working on the divorce; and (2) his *pro se* attorney's fees incurred in intervening to enforce that excessive claim.⁷

Attorney's Fees

Judy argues that Williams's demand for excessive fees for the work on her case should preclude any award of attorney's fees for his *pro se* services but cites only *Findlay* in support of that proposition. *See Findlay v. Cave*, 611 S.W.2d 57, 58 (Tex. 1981). *Findlay* recognizes the rule that a creditor who makes an excessive demand upon a debtor is not entitled to attorney's fees for subsequent litigation required to recover the debt. *See id.* Importantly, however, *Findlay* notes that this rule applies only where: (1) the claim is for a liquidated debt; and (2) the creditor either refused a tender by the debtor of the liquidated amount actually due or indicated that such a tender would be refused. *See id.*

In this case, Judy does not claim that she tendered to Williams the amount actually due or that he indicated he would refuse that amount. Therefore, Judy has provided us no legal basis to preclude an award of attorney's fees to Williams if the amount of his claim was excessive, which we discuss below.

Damages

For his representation of Judy in the divorce, Williams billed Judy fees of \$10,830 and costs of \$388. According to Williams, Judy paid \$6,750, leaving a balance of \$4,468 plus interest thereon of \$334. However, Williams admitted on cross-examination that the foregoing balance included a \$1,275 fee that was incorrectly charged twice. Judy did not present any other evidence controverting the amounts Williams claimed he was owed.

Williams testified that the amounts he incurred in bringing the intervention to collect this debt from Judy included \$4,035 for preparing the case, \$218 in out-of-pocket costs, \$1,125 for his time in court, \$875 for his time to "wrap-up" the suit, and \$76 in additional expenses. Although the total of Williams's

⁷ A separate appeal addressed a turnover order Williams obtained to collect his judgment against Judy but not the judgment itself. *See Durham v. Williams*, No. 14-97-00778-CV (Tex. App.— Houston [14th Dist.] April 1, 1999, no pet.)

damages, attorney's fees, and costs, including the fee charged twice, totaled \$11,131, the trial court awarded him \$11,387.

If part of a damage verdict lacks sufficient evidentiary support, the proper course is to suggest a remittitur of that part of the verdict. *See Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 641 (Tex. 1987). The party prevailing in the trial court is thereby given the option to either accept the remittitur or have the case remanded. *See id.*; TEX. R. APP. P. 46.5.

In this case the amount awarded to Williams lacks evidentiary support with regard to \$1626 consisting of: (1) \$1275, the fee Williams admitted he charged Judy twice; (2) \$95, the portion of the \$334 of claimed interest attributable to the ratio of the \$1275 fee to the \$4468 unpaid balance; and (3) \$256, the amount by which the \$11,387 awarded to Williams exceeds the \$11,131 total he testified he was due. Accordingly, the judgment of the trial court is affirmed except as to the amounts awarded to Williams, which are reversed and remanded. However, if within 15 days from the date of issuance of this opinion Williams files a remittitur of the judgment for \$1626, this court will reform the judgment accordingly and affirm it as modified. *See* TEX. R. APP. P. 46.5.

Richard H. Edelman
Justice

Judgment rendered and Opinion filed January 20, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do not Publish — TEX. R. APP. P. 47.3(b).

