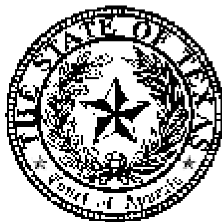
Affirmed and Opinion filed May 24, 2001.



In The

Fourteenth Court of Appeals

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NO. 14-99-00312-CV

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DANNY MACK CHRISTIAN, Appellant

V.

MARY JOSEPHINE CHRISTIAN, Appellee

On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Cause No. 3554OB98

O P I N I O N

Appellant, Danny Mack Christian, appeals from the judgment dividing the marital estate in his divorce from appellee, Mary Josephine Christian. Danny asserts that the trial court abused its discretion in excluding his testimony at trial and in awarding Mary a disproportionate share of the community estate. We affirm.

I. BACKGROUND

Danny and Mary were married for twenty-four years. Danny initiated the divorce when

he filed a petition for divorce on the ground of insupportability. Danny subsequently added claims of adultery, cruel treatment, fraud on the community, and breach of fiduciary duty. Mary filed a counterpetition for divorce on the grounds of insupportability and adultery. Danny and Mary each sought a disproportionate share of the community estate. On the day of trial, the trial court excluded Danny's testimony for failure to respond to Mary's discovery requests. Danny, however, was permitted to make a bill of exceptions. The trial court granted Mary's counterpetition for divorce on the ground that the marriage was insupportable due to discord and conflict of personalities and denied Danny's petition. Determining that Danny had a greater earning capacity than Mary, the trial court awarded Mary a disproportionate share of the community estate, including sixty percent of the retirement benefits accrued during the marriage.

II. EXCLUSION OF EVIDENCE

In his first, second, third, and seventh issues, Danny claims the trial court abused its discretion by excluding his testimony because he is a party witness.[1] The admission or exclusion of evidence rests within the sound discretion of the trial court. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). To obtain reversal of a judgment based upon error in the admission or exclusion of evidence, the appellant must show: (1) the trial court did in fact commit error, and (2) the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. TEX. R. APP. P. 44.1; *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989). An appellant seeking reversal of a judgment based on evidentiary error does not need to prove that but for the error a different judgment would necessarily have been rendered; rather, it is necessary to show only that the error probably resulted in an improper judgment. *McCraw v. Maris*, 828 S.W.2d 756, 758 (1992). The appellant must show the judgment turns on the particular excluded or admitted evidence.

[1] Danny also asserts the trial court abused its discretion in striking his pleadings. However, the record does not reflect that the trial court struck Danny's petition.

Alvarado, 897 S.W.2d at 753-54. In making this determination, we must review the entire record. *Gee*, 765 S.W.2d at 396.

Prior to trial, Danny filed an "Amended Motion for Protective Order, for Sanctions, and to Strike Discovery Responses." In this motion, Danny essentially argued that because Mary's responses to his discovery requests were "incomplete and evasive," he should not be required to respond to her discovery requests. Therefore, Danny sought protection from responding to Mary's discovery requests and the exclusion of Mary's responses at trial.[2] Neither party requested a hearing on the motion. Danny never responded to Mary's discovery requests. At trial, when Danny's counsel called Danny to testify, Mary objected on the basis that because Danny had not answered her interrogatories, his testimony should be excluded under Rule 215(5) of the Texas Rules of Civil Procedure.[3]

Former Rule 215(5) of the Texas Rules of Civil Procedure provides:

> A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and must be shown in the record.

TEX. R. CIV. P. 215(5), 733-34 S.W.2d (Tex. Cases) LXIV (1987, amended 1998). The Texas Supreme Court has explained with respect to Rule 215(5):

> The salutary purpose of Rule 215(5) is to require complete responses to discovery so as to promote responsible assessment of settlement and prevent

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[2] Danny had originally filed a "Motion for Protective Order and Alternatively, Motion for Sanctions." When Danny filed his original motion for a protective order, Mary had not responded to his discovery requests.

[3] Effective January 1, 1999, Rule 215(5) was repealed. However, this case was tried prior to that date and, therefore, Rule 215(5) was in effect at the time of trial.

> trial by ambush. The rule is mandatory, and its sole sanction—exclusion of evidence—is automatic, unless there is good cause to excuse its imposition. . . The trial court has discretion to determine whether the offering party has met his burden of showing good cause to admit the testimony; but the trial court has no discretion to admit testimony excluded by the rule without a showing of good cause.

Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 914 (Tex. 1992) (citations omitted). Because a trial court has discretion to determine whether the offering party has established good cause, we may overturn a trial court's decision to exclude such evidence only upon a finding of abuse of discretion. *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994).

A party must be named in response to an appropriate interrogatory unless there is a showing of good cause. *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162 (Tex. 1992). Good cause may exist to allow the testimony of a party witness when the witness' identity is certain and when his or her personal knowledge of relevant facts has been communicated to all other parties. *Smith v. Southwest Feed Yards*, 835 S.W.2d 89, 91 (Tex. 1992).

Two courts of appeals have addressed the exclusion of party testimony in divorce proceedings. First, in *Celso v. Celso*, the Tyler Court of Appeals found the trial court did not abuse its discretion when it allowed the wife to testify even though she had not responded to any of the question contained in her husband's interrogatories. *Celso v. Celso*, 864 S.W.2d 652, 654 (Tex. App.—Tyler 1993, no writ). The court observed that while the wife had failed to respond to any of the discovery requests, "we cannot escape the obvious conclusion that her identity as a person with knowledge of relevant facts in this suit for divorce was definite and irrefutable." *Id.* Likewise, in *Ramirez v. Ramirez*, the El Paso Court of Appeals found no abuse of discretion when the trial court allowed the wife to testify even though she had failed to identify herself in interrogatories as person with knowledge of relevant facts. *Ramirez v. Ramirez*, 873 S.W.2d 735, 740 (Tex. App.—El Paso 1994, no writ). Discussing the application of Rule 215(5) in the context of a divorce proceeding, the court explained:

> There is even less reason to enforce the rule rigidly where the unidentified witness is one of the parties to a divorce suit. Aside from the wife's pleadings, responses to discovery and her deposition, there is, or should be, a presumption that both husband and wife have knowledge of relevant facts pertaining to the marriage, to their children, and to their property, as well as to the causes or reasons for the dissolution of the marriage. Allowing a party to a divorce to testify despite his or her failure to identify him- or herself as a fact witness would not likely serve as a surprise to the other party and cannot be considered as return to trial by ambush.

Id. at 739-40.

As a spouse in a divorce proceeding, Danny would certainly have knowledge of facts concerning his and Mary's marriage and the property comprising their community estate. Therefore, following the reasoning in *Celso* and *Ramirez*, we conclude the trial court abused its discretion by not permitting Danny to testify.

Danny also asserts Mary waived her claim to request the exclusion of his testimony because she did not file a motion to compel or otherwise get a trial ruling on this discovery dispute until the day of trial. The failure to obtain a pretrial ruling on discovery disputes, which exist prior to the commencement of trial, constitutes waiver of any claim for sanctions based on that conduct. *Smith v. O'Neal*, 850 S.W.2d 797, 799 (Tex. App.—Houston [14th Dist.] 1993, no writ) (citing *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 170 (Tex. 1993)). Because Mary did not file a motion to compel or motion for sanctions prior to trial, she waived the right to request the exclusion of Danny's testimony, and the trial court erred in excluding that testimony.

Our inquiry, however, does not end here. We must determine whether the trial court's error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. TEX. R. APP. P. 44.1; *Lewis v. Western Waste Indus.*, 950 S.W.2d 407, 410 (Tex. App.—Houston [1st Dist.] 1997, no writ) (determining whether trial court's erroneous exclusion of testimony after, appellee had waived claim for exclusion of such testimony, was

reasonably calculated to cause and probably did cause rendition of an improper judgment); *Morris v. Short*, 902 S.W.2d 566, 570 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (stating that to obtain reversal when the trial court erroneously excludes the testimony of an unidentified witness, the appellant must show harm).

Danny complains the trial court erred in awarding Mary a disproportionate share of the community estate, including sixty percent of all retirement benefits which had accrued during the marriage, and that such award was the result of the exclusion of his testimony at trial. When challenging the trial court's division of the property, the appellant must be able to demonstrate from the record that the division is so unjust and unfair as to constitute an abuse of discretion. *Zieba v. Martin*, 928 S.W.2d 782, 790 (Tex. App.—Houston [14th Dist.] 1996, no writ); *Welch v. Welch*, 694 S.W.2d 374, 376 (Tex. App.—Houston [14th Dist.] 1985, no writ). While it is not required that the property by divided equally, the trial court must divide the estate in an equitable manner. *Zieba*, 928 S.W.2d at 790; *Welch*, 694 S.W.2d at 376. The consideration of the disparity of incomes or of earning capacities between the parties is proper and "need not be limited by 'necessitous' circumstances." *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981); *Vandiver v. Vandiver*, 4 S.W.3d 300, 302 (Tex. App.—Corpus Christi 1999, pet. denied).[4]

The primary basis for the trial court's awarding Mary a disproportionate share of the community estate, including sixty percent of all retirement benefits, is its finding that there is a disparity in the earning capacity of Danny and Mary. Mary testified that Danny had always earned more than she during the course of the marriage. Danny complains that only Mary was

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[4] Other factors include: fault in the breakup of the marriage; benefits the innocent spouse would have received from the continuation of the marriage; business opportunities, education, and training; relative physical conditions and disparity of ages; relative financial conditions and obligations; size of the respective estates and the nature of the property; custody of the children; excessive community property gifts to others or waste of community assets; and tax consequences. *Zieba*, 928 S.W.2d 790-91; *Baccus v. Baccus*, 808 S.W.2d 694, 700 (Tex. App.—Beaumont 1991, no writ).

allowed to put on evidence of earning capacity. The record, however, shows that while Danny put forth testimony in his bill of exceptions relevant to fault in the breakup of the marriage,[5] he did not attempt to introduce any testimony regarding his or Mary's respective earning capacities. Danny's inventory and appraisement were entered into evidence without objection, as was Mary's deemed admission that she had "turned down opportunities for promotions and salary upgrades."[6]

A trial court does not abuse its discretion when it bases its decision on conflicting evidence or where there is some evidence of a substantive and probative character to support the division of the property. *Zieba*, 928 S.W.2d at 787 (citing *Wood v. O'Donnell*, 894 S.W.2d 555, 557 (Tex. App.—Fort Worth 1995, no writ)). There was some evidence of probative value to support the trial court's division of property on the basis of earning disparity. Moreover, even if Danny had been permitted to testify at trial, he did not demonstrate that he would have presented any testimony relevant to his and Mary's respective earning capacities. Therefore, even though the trial court abused its discretion in not permitting Danny to testify at trial, absent a showing of harm, Danny has not shown that the trial court's error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. TEX. R. APP. P. 44.1. Danny's first, second, third, and seventh issues are overruled.

III. DIVISION OF THE COMMUNITY ESTATE

In his fourth, fifth, sixth, eighth, ninth, and tenth issues, Danny claims of the trial court

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[5] Most of Danny's testimony in the bill of exceptions concerned his allegation that Mary had been "financially irresponsible" for the duration of their marriage, which, in turn, resulted in the breakup of the marriage. The trial court was not concerned with evidence concerning fault in the breakup of the marriage as it informed the parties: "As I told you, I feel both of them are equally irresponsible and both of them are at fault in this matter from what I have heard in this bill of review [sic] on both sides."

[6] Because Mary did not respond to Danny's requests for admissions, the matters in these requests were deemed admitted.

erred in awarding Mary a disproportionate share of the community estate. Danny reiterates his contention that the trial court's error was the result of his testimony being excluded from trial. The trial court has broad discretion in dividing the estate of the parties; that division should be corrected on appeal only when an abuse of discretion has been shown. *Murff*, 615 S.W.2d at 698. The trial court's discretion is not unlimited, but, instead, there must be some reasonable basis for an unequal division of the property. *Zieba*, 928 S.W.2d at 790; *Welch*, 694 S.W.2d at 376. Every reasonable presumption should be resolved in favor of the proper exercise of discretion by the trial court in dividing the property of the parties. *Zieba*, 928 S.W.2d 791; *Welch*, 694 S.W.2d at 376. A trial court does not abuse its discretion when it bases its decision on conflicting evidence or where there is some evidence of a substantive and probative character to support the division of the property. *Zieba*, 928 S.W.2d at 787 (citing *Wood*, 894 S.W.2d at 557).

As discussed above, the trial court found there was a disparity in the earning capacities of Danny and Mary. Mary testified that Danny had earned more than she during the marriage. Danny had the opportunity to present testimony in his bill of exceptions regarding the earning capacities of the parties, but apparently chose not to do so. Danny's inventory and appraisement was introduced into evidence, as well as Mary's deemed admission that she had turned down promotions and salary increases. Because there was some evidence of earning disparity to support an award of a disproportionate share of the community estate to Mary, including sixty percent of the retirement benefits, there was no abuse of discretion by the trial court. Danny's fourth, fifth, sixth, eighth, ninth, and tenth issues are overruled.

Accordingly, we affirm the judgment of the trial court.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed May 24, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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