Opinion issued October 27, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00010-CV

SAUNDRA L. SANDERS, Appellant

V.

MARK E. SANDERS, Appellee

On Appeal from the 247th District
Harris County, Texas
Trial Court Case No. 2010-01316

MEMORANDUM OPINION

In this restricted appeal of a default judgment granting a final divorce decree, Saundra Sanders raises three issues contending that she was not properly

served with the citation or petition for divorce and that the evidence is legally and factually insufficient to support the trial court's property division.

We affirm.

Background

Mark Sanders filed for divorce after 10 years of marriage to Saundra. The clerk issued citation, and Mark attempted to serve Saundra. After three failed attempts at service by certified mail and four failed attempts at service by personal delivery, however, Mark moved for substituted service. The trial court authorized substituted service by leaving a copy of the citation and divorce petition taped to the front entrance of the home Mark and Saundra still shared at the time Mark filed for divorce. Although a process server's affidavit states that the citation and petition were taped to the front entrance of her home, Saundra complains that she never received a copy of either document.

Mark's petition alleged the marriage had become "insupportable because of discord or conflict of personalities." The couple did not have children. Mark identified the home the couple shared and requested that he be permitted to keep a car; certain furniture, electronic equipment, and personal items; and the funds in three checking accounts. Saundra did not file an answer or otherwise appear.

On July 30, 2010, the trial court conducted a hearing and signed a default judgment granting Mark a final decree of divorce. The divorce decree noted that

"although duly and properly cited," Saundra "did not appear and wholly made default." With respect to the division of property, the trial court ordered only that "the personal effects of the parties are awarded to the party having possession." There was no further division of the marital estate.

According to Saundra, she and Mark were still living together in the same house when she received notice of the default judgment on September 7, 2010. She filed her notice of restricted appeal on December 30, 2010.

Restricted Appeal

A restricted appeal confers our court with jurisdiction to review service issues and to determine whether the evidence is legally and factually sufficient to support the judgment. *See Wilson v. Wilson*, 132 S.W.3d 533, 536 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (citing *Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997)). To prevail in her restricted appeal, Saundra must show: (1) she appealed the default judgment within six months, (2) she was a party to the divorce proceeding, (3) she did not participate in the hearing and did not timely file a post-judgment motion, and (4) the error complained of is apparent on the face of the record. *See* TEX. R. APP. P. 30; *see also Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004); *Barry v. Barry*, 193 S.W.3d 72, 74 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The "face of the record" consists of all the papers that were before the trial court when it rendered

judgment, including the statement of facts. *See Wilson*, 132 S.W.3d at 536. Because it is dispositive of the appeal, we consider only the appearance of error on the face of the record.

Service of Process

In her first issue, Saundra argues that the default judgment should be reversed because she was not served with citation or a copy of the divorce petition and she did not receive notice of the default hearing. Saundra's primary complaint is not that Mark failed to comply with the procedural rules for service of process, but that he interfered with service by intercepting her mail and by removing the citation and petition from the front door of their shared home.

To support her assertion that she did not actually receive a copy of the citation or petition, Saundra included in her appendix copies of her employment time sheets recording the days and hours she worked. Because those time sheets are not in the appellate record, we cannot consider them as evidence in this restricted appeal. *See Alexander*, 134 S.W.3d at 848−49 (instructing against consideration of extrinsic evidence in restricted appeals); *Nguyen v. Intertex, Inc.*, 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (noting that attachment of documents as exhibits or appendices to briefs is not formal inclusion in record on appeal).

We look only to the face of the record for strict compliance with the rules governing citation and return of service. *See Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990) ("For well over a century the rule has been firmly established in this state that a default judgment cannot withstand direct attack by a defendant who complains that he was not served in strict compliance with applicable requirements."); *see also Ins. Co. of State of Pa. v. Lejeune*, 297 S.W.3d 254, 255 (Tex. 2009) (noting that failure to strictly comply with rules for service of process constitutes error on face of record). The party requesting service, in this case Mark, must ensure not only that proper service is accomplished, but that the record reflects as much. *Furst v. Smith*, 176 S.W.3d 864, 869 (Tex. App.—Houston [1st Dist.] 2005, no pet.). No presumptions in favor of valid service are made in a restricted appeal from a default judgment. *Hubicki v. Festina*, 226 S.W.3d 405, 407 (Tex. 2007).

In a divorce proceeding, citation "shall be issued and served as in other civil cases." TEX. FAM. CODE ANN. § 6.408 (West Supp. 2011). Rule 106(a) authorizes service by delivering the citation, with a copy of the petition, to the respondent in person or by registered or certified mail, return receipt requested. TEX. R. CIV. P. 106(a). When service under one of these two methods fails, the trial court, "[u]pon motion supported by affidavit," may authorize service "in any other manner that the affidavit or other evidence before the court shows will be reasonably effective

to give the [respondent] notice of the suit." TEX. R. CIV. P. 106(b)(2). The supporting affidavit must state (1) "the location of the [respondent's] usual place of business or usual place of abode or other place where [she] can probably be found" and (2) the specific facts showing that traditional service has been attempted "at the location named in such affidavit but has not been successful." TEX. R. CIV. P. 106(b). An affidavit that is conclusory or otherwise insufficient does not support the authorization of substituted service. *See Wilson*, 800 S.W.2d at 836.

Mark's motion for substituted service asserted that reasonably effective notice of the divorce proceeding could be given to Saundra by having an authorized person attach "a copy of the citation with a copy of the petition to the front entrance of [her] place of abode located at 22319 SPRING CROSSING DR, SPRING, TX 77373." To support his motion, Mark attached an affidavit setting forth the following dates, times, and locations at which the process server was unable to personally serve Saundra.

Personal service was sought on the defendant, SAUNDRA L. SANDERS. In the above name and numbered cause, by delivering to the defendant, in person, a true copy of the Citation with a copy of the ORIGINAL PETITION FOR DIVORCE. It is impractical to secure personal service on SAUNDRA L. SANDERS. According to the Texas Rules of Civil Procedure, because the defendant is continually absent or refuses to accept delivery of the court papers, thus evading said service. I have attempted to serve SAUNDRA L. SANDERS. On the dates and times listed below:

DATE	TIME		RESULTS
06/12/10	10.00 A.M.	22319 SPRING CROSSING DR SPRING, TX 77373	SCHEDULED MEETING WHEN APPROACHING THE PROPERTY I WAS TOLD BY A GENTLEMAN THAT SHE HAD GONE SHOPPING
06/17/10	8:20 A.M.		WENT TO POE WAS TOLD THAT THEY WOULD NOT BE ABLE TO PULL HER FROM THE EMERGENCY AREA AND THAT THEY CAN NOT MAKE HER ACCEPT SERVICE FROM ME.
06/19/10	9:10 A.M.		ANOTHER SCHEDULED APPOINTMENT FOR SERVICE. KNOCKED ON THE DOOR SPOKE WITH A WOMAN SHE STATED THAT SAUNDRA SANDERS WAS NOT AT HOME. LEFT CALL SLIP NO RETURN CALL
06/22/10	9:44 P.M.		NO ANSWER TO THE DOOR.

I, respectfully request the Judge of the Honorable Court to authorize service of the Citation on SAUNDRA L. SANDERS by taping it to the front entrance to the defendant's place of abode located at 22319 SPRING CROSSING DR, SPRING TEXAS 77373

Saundra does not dispute that the house at 22319 Spring Crossing Drive was her usual place of abode.

The process server's affidavit was sufficient to justify substituted service under rule 106(b) because it (1) stated Saundra's place of abode and (2) indicated that at least one attempt to personally serve her at that address was unsuccessful. *See* TEX. R. CIV. P. 106(b); *see also Pickersgill v. Williams*, No. A14-93-00424-CV, 1994 WL 2011, at *3–4 (Tex. App.—Houston [14th Dist.] Jan. 6, 1994, writ denied) (mem. op.) (affidavit referencing "the address I believe to be his place of residence" was sufficient). The particular method of service ordered in this case, i.e., taping the citation and petition to the front entrance of the address identified as the defendant's place of abode, generally is reasonably effective to give notice to the defendant of the lawsuit. *Cf. Rowsey v. Matetich*, No. 03-08-00727-CV, 2010 WL 3191775, at *4 (Tex. App.—Austin Aug. 12, 2010, no pet.); *Ratcliff v.*

Ratcliff, No. 09-09-00138-CV, 2010 WL 1087517, at *1 (Tex. App.—Beaumont Mar. 25, 2010, no pet.); *Williams v. Grafflin*, No. 11-05-00138-CV, 2006 WL 3238426, at *2 (Tex. App.—Eastland Nov. 9, 2006, no pet.); *Pettigrew v. Recoveredge, L.P.*, No. 05-97-00239-CV, 1997 WL 466518, at *2 (Tex. App.—Dallas Aug. 15, 1997, no writ).

Saundra does not contend otherwise. Rather, as her first issue on appeal has been narrowly crafted, she contends only that this manner of substituted service was inappropriate here because she lived with Mark at the time he sought the divorce and he therefore had the opportunity to, and did, remove the citation and petition. There is no evidence on the face of this record to support Saundra's assertion that Mark actually interfered with the substituted service ordered by the trial court. In the absence of such evidence, we decline to announce a rule declaring the trial court's order to be in error. We also note Mark's testimony at the default hearing that he and Saundra were no longer living together. We therefore conclude that Saundra has failed to show error on the face of the record regarding her claim that she was not served with citation.

We further hold that the face of the record does not establish error with respect to Saundra's claim that she did not receive notice of the default hearing. Mark had no duty to notify Saundra before taking a default judgment when the substituted service authorized by the trial court was reasonably calculated to

apprise Saundra of the pendency of the divorce proceeding, and she nonetheless failed to answer or appear. *See Brooks v. Assocs. Fin. Servs. Corp.*, 892 S.W.2d 91, 94 (Tex. App.—Houston [14th Dist.] 1994, no pet.).

We overrule Saundra's first issue.

Division of Marital Property

In her second and third issues, Saundra argues that the default judgment should be reversed because the evidence is legally and factually insufficient to support the trial court's division of the marital estate. She asserts that the absence of any evidence of the character and value of the parties' assets precluded the trial court from awarding Mark any community property. Although Saundra does not specifically identify any community asset that she contends was improperly awarded to Mark, she asserts generally that the parties' marital estate included a home, two cars, and various pieces of furniture.

While we agree that the trial court's property division must be supported by sufficient evidence, *see Wilson*, 132 S.W.3d at 536, we disagree that there is any abuse of discretion in this case. Under the heading "Division of Marital Estate," the divorce decree orders only that "personal effects of the parties are awarded to the party having possession." "Personal effects" are defined generally to mean articles of personal property "bearing intimate relation or association to [the] person." *First Methodist Episcopal Church S. v. Anderson*, 110 S.W.2d 1177,

1183 (Tex. Civ. App.—Dallas 1937, writ dismissed); *see Teaff v. Ritchey*, 622 S.W.2d 589, 591−92 (Tex. App.—Amarillo 1981, no writ) (defining "personal effects" to include items such as "clothes, toilet articles, eye glasses and dentures"). The decree does not expressly award either party the community assets identified by Saundra, i.e., the parties' home, cars, and furniture. Moreover, as these items are not personal articles having an intimate association with Mark or Saundra individually, neither are they included in foregoing definition of "personal effects" or awarded under the divorce decree to the party having possession of them. *See Teaff*, 622 S.W.2d at 592 (insurance policies are significant items of intangible personal property, not personal effects). We therefore hold that there is no error on the face of the record with respect to the trial court's division of property.

As Mark points out, Saundra may seek a post-divorce division of community property that was not divided in the divorce decree. *See* TEX. FAM. CODE ANN. §§ 9.201 ("Either former spouse may file a suit as provided by this subchapter to divide property not divided or awarded to a spouse in a final decree of divorce or annulment."), 9.203 (West 2006) ("If a court of this state failed to dispose of property subject to division in a final decree of divorce or annulment even though the court had jurisdiction over the spouses or over the property, the court shall divide the property in a manner that the court deems just and right . . . ."); *see also*

Kadlecek v. Kadlecek, 93 S.W.3d 903, 909 (Tex. App.—Austin 2002, no pet.) (acknowledging that sections 9.201 and 9.203 allow for post-divorce division of community property not divided in original decree).

We overrule Saundra's second and third issues regarding the trial court's property division.

Agreement of the Parties

Buried within Saundra's second issue is a challenge to that part of the divorce decree finding that "the parties have entered into a written agreement as contained in this decree by virtue of having approved this decree as to both form and substance. To the extent permitted by law, the parties stipulate the agreement is enforceable as a contract." She contends that this provision will obligate her to comply with an agreement she did not make. This Court may only reverse a judgment on appeal if the error complained of "probably caused the rendition of an improper judgment." TEX. R. APP. P. 44.1(a)(1). Even if the trial court erred in finding an agreement between the parties as to the terms of the divorce decree and its enforceability, the divorce decree is the trial court's final judgment and is enforceable as such. *Cf Hagen v. Hagen*, 282 S.W.2d 899, 902 (Tex. 2009). Thus, any error in finding the existence of an enforceable agreement is not reversible error, and we overrule that part of Saundra's second issue contending otherwise.

Conclusion

Having concluded that no error appears on the face of this record, we affirm the trial court's default judgment granting a final decree of divorce.

Harvey Brown
Justice

Panel consists of Justices Jennings, Sharp, and Brown.