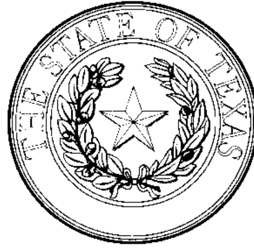
Opinion issued June 23, 2022



In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00571-CV

CHRISTINA MARIE CARLSON GILES, Appellant

V.

JASON MICHAEL GILES, Appellee

On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Case No. 105116-F

MEMORANDUM OPINION

In this restricted appeal, appellant, Christina Marie Carlson Giles ("Christina"), appeals from a default divorce decree dissolving her marriage to appellee, Jason Michael Giles ("Jason"). In six issues, Christina contends that the trial court lacked personal jurisdiction over her because service of process was

invalid and that the evidence is legally insufficient to support the trial court's order of conservatorship rights and division of property in the decree.

We affirm in part and reverse and remand in part.

Background

Jason and Christina were married in 2004 and subsequently had two children. On October 9, 2019, Jason filed a petition for divorce. In the petition, Jason stated that he and Christina would enter into a written agreement regarding the conservatorship of the children, but he asked that he be granted the exclusive right to designate their primary residence, which he asserted "should be restricted to a geographic area within [100] miles of the main Brazoria County Courthouse in Angleton, Texas." Christina did not file an answer.

At trial on February 26, 2020, Jason appeared with counsel, and Christina did not appear. Jason testified that he had served Christina with process and had encouraged her to retain counsel. The trial court took judicial notice on the record of the return of service in the file and stated that Christina was served with citation and the petition for divorce on December 7, 2019 and that she had not answered or appeared. Jason testified that the marriage had become insupportable. He alleged that Christina had become involved over the internet with a man who claimed to be in the military in Hawaii, but who was actually from Nigeria, and that she had been

obtaining loans and sending money to him. Jason testified that he and Christina were the parents of two minor children, ages seven and twelve.

With respect to the conservatorship of the children and a division of property, Jason testified, as follows:

> Q. Have you reviewed something that we filed called Petitioner's proposed child conservatorship and child support orders and proposed division of property and debt?
>
> A. Yes, I have.
>
> Q. *If you were to testify* in detail about each one of these, would it [be] your testimony [that] you are asking the Court to render orders consistent with this?
>
> A. Yes, it would.

(Emphasis added.) The trial court then admitted into evidence Jason's "Proposed Child Conservatorship and Child Support Orders and Proposed Division of Property and Debt," discussed below. And, Jason essentially read it into the record.

At the end of the hearing, the trial court stated:

> Based on the testimony, I will grant the divorce on the grounds of insupportability. I will make orders with regard to the children as set forth in the [proposed decree] also and find those orders will be in the best interest of the children.
>
> Additionally, [the] Court will divide the property and debts as set forth in [the proposed decree] and finding that to be a just and right division of the marital estate.

On March 16, 2020, the trial court signed a final decree. In the decree, it found that Jason and his counsel were present at trial, but that Christina, although served, had failed to appear and was in default. The trial court granted a divorce on

the ground of insupportability. In the decree, the trial court found that its orders "concerning the rights and duties of the Husband and Wife in relation to their children, including orders for conservatorship (custody), possession and access (visitation), child support and medical support, are in the children's best interest." The trial court appointed Jason and Christina as joint managing conservators of their two minor children and granted Jason the "exclusive right to designate the primary residence of the children . . . without regard to geographic location" and the "exclusive right to apply for and renew passports for the children." The trial court also, as discussed below, granted Jason a series of exclusive rights to make decisions about the children's welfare and rearing. The trial court ordered that Christina pay child support in the amount of $875.00 per month, for which it issued an order of withholding to her employer.

Also, in the decree, the trial court divided the community estate. It awarded Jason, as discussed below, all property in his care, custody, control, or in his name; the marital residence; a truck; a business; all appliances at the marital residence and all furnishings, televisions, equipment, and supplies in Jason's home office, belonging to the children, or remaining at the home after April 15, 2020; all retirement accounts in Jason's name or created as a result of his employment or contributions; and all cash and money in any bank, credit union, or other financial institution listed in his name alone.

The trial court awarded Christina all property in her care, custody, control, or in her name; all furniture and televisions located at the marital residence not awarded to Jason; all retirement accounts in her name or created as a result of her employment or contributions; all cash and money in any bank or other financial institution listed in her name alone; and a 2017 Dodge Journey, which it ordered her to sell or refinance by May 1, 2020. The trial court also divided the parties' debts.

Christina did not timely file any post-judgment motions, a request for findings of fact and conclusions of law, or a notice of appeal. On August 11, 2020, Christina filed a notice of restricted appeal.

Restricted Appeal

A restricted appeal is a procedural device available to a party who did not participate, either in person or through counsel, in a proceeding that resulted in a judgment against the party. TEX. R. APP. P. 30. A party filing a restricted appeal must demonstrate that: (1) her notice of restricted appeal was filed within six months after the judgment was signed; (2) she was a party to the underlying suit; (3) she did not participate at the hearing that resulted in the judgment complained of and did not timely file any post-judgment motions or requests for findings; and (4) error is apparent on the face of the record. *Pike-Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014). The "face of the record" includes all papers on file in the appeal, including

the clerk's record and any reporter's record. *Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997).

Here, the record establishes that Christina filed her notice of restricted appeal within six months of the default decree, that she did not appear at trial, and that she did not file any post-judgment motions or request findings of fact and conclusions of law. *See Grant*, 447 S.W.3d at 886. Thus, the only issue presented is whether error appears on the face of the record. *See id*.

Service of Process

In her first, second, third, and fourth issues, Christina argues that the face of the record shows that service of process was invalid because it failed to comply with the rules, and thus the trial court lacked personal jurisdiction over her. Namely, she asserts that (1) there are material differences in the respondent named in the petition, citation, and return, and (2) the return is not file-stamped and thus fails to show that it was on file for the requisite period prior to the entry of the decree.

Standard of Review and Guiding Principles of Law

A claim of a defect in service of process challenges a trial court's personal jurisdiction over a defendant. *Livanos v. Livanos*, 333 S.W.3d 868, 874 (Tex. App.—Houston [1st Dist.] 2010, no pet.). Whether the trial court had personal jurisdiction over the defendant is a question of law, which we review de novo. *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009).

When reviewing a default judgment in a restricted appeal, we do not indulge any presumption in favor of valid issuance, service, and return of citation. *See Wachovia Bank of Del., N.A. v. Gilliam*, 215 S.W.3d 848, 848 (Tex. 2007). If the record fails to show strict compliance with the rules, error is apparent on the face of the record, and the attempted service of process is invalid. *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 153 (Tex. 1994); *Cohen v. Bar*, 569 S.W.3d 764, 772 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). When the attempted service of process is invalid, the trial court does not acquire personal jurisdiction over the defendant, and the default judgment is void. *Livanos*, 333 S.W.3d at 874. Actual notice, without proper service, is not sufficient. *Wilson v. Dunn*, 800 S.W.2d 833, 837 (Tex. 1990); *see* TEX. R. CIV. P. 124.

Texas Rule of Civil Procedure 99 provides that a citation must:

> (1) be styled "The State of Texas,"
> (2) be signed by the clerk under seal of court,
> (3) contain name and location of the court,
> (4) show date of filing of the petition,
> (5) show date of issuance of citation,
> (6) show file number,
> (7) show names of parties,
> (8) *be directed to the defendant*,
> (9) show the name and address of attorney for plaintiff . . . ,
> (10) contain the time within which these rules require the defendant to file a written answer with the clerk who issued citation,
> (11) contain address of the clerk, [and]

(12) notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered . . . ,

. . . .

TEX. R. CIV. P. 99(b) (emphasis added).

Rule 107, governing the return of service, provides that:

(a) The officer or authorized person executing the citation must complete a return of service. *The return may, but need not, be* endorsed on or *attached to the citation*.

(b) *The return*, *together with any document to which it is attached*, *must include* the following information:

. . .

(5) *the person or entity served*;

. . . .

(g) *The return and any document to which it is attached must be filed with the court* and may be filed electronically . . . .

(h) *No default judgment shall be granted in any cause until proof of service* as provided by this rule or by Rules 108 or 108a, or as ordered by the court in the event citation is executed by an alternative method under Rule 106, *shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment*.

TEX. R. CIV. P. 107 (emphasis added).

(1) ***Named Respondent***

Christina complains that the body of the petition correctly names her as "Christina Marie Carlson Giles," but the citation reflects that it was directed to "Christina Marie Giles," and the return reflects that citation was served upon "Christin**e** Marie Giles."

Texas courts recognize a distinction between misidentification and misnomer. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 4 (Tex. 1990). Misidentification "arises when two separate legal entities actually exist and a plaintiff mistakenly sues the entity with a name similar to that of the correct entity." *Reddy P'ship v. Harris Cty. Appraisal Dist.*, 370 S.W.3d 373, 376 (Tex. 2012) (internal quotations omitted); *Parker*, 794 S.W.2d at 5; *Sembritzky v. Shanks*, No. 01-07-00251-CV, 2009 WL 48234, at *4 (Tex. App.—Houston [1st Dist.] Jan. 8, 2009, no pet.) (mem. op.). Misidentification renders service invalid as a matter of law. *Patrick O'Connor & Assocs., L.P. v. Hall*, No. 01-15-00661-CV, 2016 WL 4440665, at *2 (Tex. App.—Houston [1st Dist.] Aug. 23, 2016, pet. denied) (mem. op.).

The cases Christina cites in support of her argument present examples of misidentification. In *Rone Engineering Service, Ltd. v. Culbertson*, the return of service stated that the citation and petition were served on "Rone Engineers, Ltd." but the default judgment was rendered against "Rone Engineering Service, Ltd." 317 S.W.3d 506, 508 (Tex. App.—Dallas 2010, no pet.). The court of appeals, noting that it is common knowledge that related corporate entities often share a portion of the same name, but are, nonetheless, separate and distinct corporate entities, held that there was nothing in the record to demonstrate whether "Rone Engineers, Ltd." or "Rone Engineering Service, Ltd." was the intended defendant. *Id.* at 509–10. Accordingly, the record did not support the default judgment. *Id.* at

510. Similarly, in *North Carolina Mutual Life Insurance Company v. Whitworth*, the court of appeals held that the default judgment there could not stand because the address at which citation was served and the party on whom it was served differed from the address and party listed in the petition. 124 S.W.3d 714, 716 (Tex. App.—Austin 2003, pet. denied).

By contrast, "[w]hen a correct defendant is served under a wrong or misspelled name, the case is not one of misidentification, but rather misnomer." *See Huynh v. Vo*, No. 01-02-00295-CV, 2003 WL 1848607, at *2 (Tex. App.—Houston [1st Dist.] Apr. 10, 2003, no pet.) (mem. op.); *see also Barth v. Bank of Am., N.A.*, 351 S.W.3d 875, 876–77 (Tex. 2011) (holding suit against "Bank of America, N.A.," incorrectly named as "Bank of America Corporation," constituted misnomer); *In re Greater Hous. Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 325 (Tex. 2009) ("A misnomer occurs when a party misnames itself or another party, but the correct parties are involved."); *Sembritzky*, 2009 WL 48234, at *3–4 (holding that citation issued to defendant under moniker of "Rocky Sembritzky," rather than his legal name, "Verley Lee Sembritzky, Jr.," constituted misnomer); *Baker v. Charles*, 746 S.W.2d 854, 855 (Tex. App.—Corpus Christi 1988, no pet.) (holding that incorrectly naming defendant in citation, pleading, and judgment as "Holly Baker," rather than his actual name, "Holley Farlane Baker II," constituted misnomer).

“When the correct party . . . is sued under [an] incorrect name, the court acquires jurisdiction after service with the misnomer if it is clear that no one was misled or placed at a disadvantage by the error.” *Reddy P’ship*, 370 S.W.3d at 376 (internal quotations omitted); *see Brown v. Lanier Worldwide, Inc.*, 124 S.W.3d 883, 894 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

Here, the record shows that Christina is named in the style of the petition as “Christina Marie Giles.” She is also identified in the style and body of the decree as “Christina Marie Giles,” with a home address of the marital residence. The citation also shows that it was directed to “Christina Marie Giles” at the address of the marital residence. The return affidavit shows that the petition was served on “Christin**e** Marie Giles” at the address of the marital residence. The citation and return contain no other apparent errors. *See* TEX. R. CIV. P. 99(b), 107.

It is undisputed that Christina was personally served at the address of the marital residence. *See Huynh*, 2003 WL 1848607, at *2. Christina does not dispute that she is the proper party to the suit for divorce. *See Sembritzky*, 2009 WL 48234, at *4 (noting that defendant did not assert that he was not party against whom plaintiff sought judgment or not proper party to divorce). Rather, she complains that she was incorrectly named. *See id.* Thus, this case presents a complaint of misnomer, not misidentification. *See id.*

"[U]nless the pleadings and citation actually mislead the misnamed defendant, a default judgment will not be rendered void." *Dezso v. Harwood*, 926 S.W.2d 371, 374 (Tex. App.—Austin 1996, writ denied); *see also Reddy P'ship*, 370 S.W.3d at 376. Christina does not argue that she was confused or misled by the misspelling or that there exists a different person who is the proper defendant. *See Barth*, 351 S.W.3d at 877 ("Bank of America, N.A. agrees that it has not been misled."); *Sembritzky*, 2009 WL 48234, at *4; *Huynh*, 2003 WL 1848607, at *2.

Accordingly, we hold that Christina was properly served with process and that there is not a lack of personal jurisdiction apparent on the face of the record.

(2) ***Filing of Return***

Christina next complains that the return of service is not file-stamped and thus the record does not show that it was on file for the requisite period prior to entry of the default decree.

As discussed above, Rule 107 states that the return "may" be attached to the citation; the "return and any document to which it is attached must be filed with the court"; and "[n]o default judgment shall be granted in any cause until proof of service . . . shall have been on file with the clerk of the court ten days." TEX. R. CIV. P. 107(a), (g), and (h). The return or proof of service must affirmatively reveal that it has been on file for the required ten days, and, if not, the default judgment rendered is void. *Livanos*, 333 S.W.3d at 875.

In *Guardiola v. Moosa*, the appellant argued that the record did not reveal when the return was filed, which was insufficient to comply with Rule 107 and rendered the default judgment against her void. No. 05-20-00503-CV, 2021 WL 1220694, at *2 (Tex. App.—Dallas Apr. 1, 2021, no pet.) (mem. op.). The "Affidavit of Service" in the record was a two-page document—the first of which was the citation and the second was the return. *Id.* (citing TEX. R. CIV. P. 107(a)). The first page was stamped with the filing date. *Id.* Thus, the court concluded, the record established the filing date of the return. *Id.* (citing TEX. R. CIV. P. 107(g)).

Here, similarly, the affidavit of service in the record is a three-page document. *See id.* The first page is the citation, the second page is a form "Return of Service," which is marked "See Affidavit," and the third page is the executed affidavit of return of service. *See* TEX. R. CIV. P. 107(a) (providing that return may be attached to citation). The first page is stamped with a filing date of December 9, 2019. Thus, the record shows that the return was filed. *See* TEX. R. CIV. P. 107(g) ("The return and any document to which it is attached must be filed with the court . . . ."); *Guardiola*, 2021 WL 1220694, at *2. Further, the record affirmatively shows that the return had been on file for well over the requisite ten-day period when the trial court signed the March 16, 2020 default decree. *See* TEX. R. CIV. P. 107(h); *Livanos*, 333 S.W.3d at 875.

We overrule Christina's first, second, third, and fourth issues.

Legal Sufficiency of the Evidence

In her fifth and sixth issues, Christina argues that the evidence is legally insufficient to support the trial court's (1) order of conservatorship rights because there was no evidence presented that the "exclusive rights" granted to Jason are in the best interest of the children and (2) division of property because there was no evidence presented to support a just and right division of the community estate.

Standard of Review and Guiding Principles of Law

In a suit for divorce, the petition is not taken as confessed if the respondent does not file an answer. TEX. FAM. CODE § 6.701. If the respondent fails to answer or appear, the petitioner must still present evidence to support the material allegations in the petition. *Vazquez v. Vazquez*, 292 S.W.3d 80, 83–84 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Further, in a suit for divorce in which the parties are the parents of a child, a suit affecting the parent-child relationship must be included. TEX. FAM. CODE § 6.406 (governing mandatory joinder). Thus, a failure to answer or appear does not relieve the petitioner of his burden to present evidence to support the allegations with respect to conservatorship. *See Arevalo v. Fink*, No. 01-19-00822-CV, 2020 WL 5778813, at *3 (Tex. App.—Houston [1st Dist.] Sep. 29, 2020, no pet.) (mem. op.); *see also Rhamey v. Fielder*, 203 S.W.3d 24, 29 (Tex. App.—San Antonio 2006, no pet.) ("The best interest of the child requires that the issues be as fully developed as possible.").

A trial court's decisions regarding conservatorship and property division are evaluated under an abuse-of-discretion standard. *See In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007); *Ayala v. Ayala*, 387 S.W.3d 721, 726 (Tex. App.—Houston [1st Dist.] 2011, no pet.). A trial court abuses its discretion if it acts arbitrarily or unreasonably, without reference to guiding rules or principles. *Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011). Under an abuse-of-discretion standard, legal insufficiency of the evidence is not an independent ground of error, but is a relevant factor in assessing whether the trial court abused its discretion. *In re J.J.G.*, 540 S.W.3d 44, 55 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *see also Norman Commc'ns*, 955 S.W.2d at 270 (holding legal sufficiency reviewable on restricted appeal). We consider (1) whether the trial court had sufficient information upon which to exercise its discretion and (2) whether it erred in applying its discretion. *J.J.G.*, 540 S.W.3d at 55.

A party challenging the legal sufficiency of the evidence supporting a finding on which she did not have the burden of proof must show that no evidence supports the adverse finding. *Guimaraes v. Brann*, 562 S.W.3d 521, 549 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). A "no evidence" challenge may be sustained if: (1) the record shows a complete absence of evidence of a vital fact; (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a

scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005).

Conservatorship Rights

In her fifth issue, Christina asserts that there was no evidence presented that the "exclusive rights" granted to Jason are in the best interest of the children. She asserts that, although she and Jason were appointed as joint managing conservators, Jason was awarded exclusive rights "that mirror[] sole managing conservatorship" and that there was no evidence presented to "warrant [Jason] having the exclusive rights outlined."

"The best interest of the child shall always be the primary consideration of the court in determining issues of conservatorship and possession of and access to the child." TEX. FAM. CODE § 153.002. The Texas Family Code provides that it is public policy to (1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child; (2) provide a safe, stable, and nonviolent environment for the child; and (3) *encourage parents to share in the rights and duties* of raising their child after the parents have separated or dissolved their marriage. *Id.* § 153.001(a). There is a rebuttable presumption that the best interest of a child is served by the appointment of the parents as joint managing conservators. *Id.* § 153.131(b).

In determining the best interest of a child, the Family Code directs courts to consider several factors, including:

> (1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators;
>
> (2) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;
>
> (3) whether each parent can encourage and accept a positive relationship between the child and the other parent;
>
> (4) whether both parents participated in the rearing of the child before the filing of the suit;
>
> (5) the geographical proximity of the parents' residences;
>
> (6) if the child is 12 years of age or older, the child's preference, if any, regarding the person to have the exclusive right to designate the primary residence of the child; and
>
> (7) any other relevant factor.

Id. § 153.134(a); *see also Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (setting out factors to be considered in determining best interest of child).

The record shows that, in his petition, Jason asked that he be granted the exclusive right to designate the primary residence of the children, which he asserted "should be restricted to a geographic area within [100] miles of the main Brazoria County Courthouse in Angleton, Texas." In his Proposed Child Conservatorship, Jason requested that he and Christina be appointed as joint managing conservators; that he be granted the exclusive right to designate the children's primary residence; and that the trial court otherwise enter a standard possession order. *See* TEX. FAM. CODE §§ 153.3101–.3171.

At trial, Jason testified only that he and Christina are the parents of two children, and he stated their names, birthdates, and birthplaces.

In its final decree, the trial court appointed Jason and Christina as joint managing conservators of the children and granted Jason the "exclusive right to designate the primary residence of the children," but "without regard to geographic location" and with the "exclusive right to apply for and renew passports for the children." The trial court also ordered that Jason "exclusively has":

1. the right to consent to invasive medical, dental, and surgical treatment for the children
2. the right to consent to psychiatric or psychological treatment for the children
3. the right to receive child support and save or spend these funds for the children's benefit
4. the right to represent the children in a legal action and make important legal decisions that affect the children
5. the right to consent to a child's marriage, or to a child enlisting in the U.S. Armed Forces
6. the right to make decisions concerning the children's education
7. the right to the services and earnings of the children
8. the right to make decisions for the children about their estates if required by law (unless the children have a guardian or attorney ad litem or guardian of the estate)
9. the duty to manage the children's estates to the extent the estates have been created by the parents' community or joint property.

The trial court states in the decree that it found that its orders "concerning the rights and duties of the Husband and Wife in relation to their children, including orders for

conservatorship (custody), possession and access (visitation), child support and medical support, are in the children's best interest."

Christina does not complain on appeal that she and Jason were appointed as joint managing conservators of the children. Rather, she complains that there was no evidence presented to support the trial court's granting of exclusive rights to Jason.

The record of the trial does not reflect that any evidence was presented from which the trial court could have determined the best interest of the children. *See id.* § 153.134(a); *see also Holley*, 544 S.W.2d at 371–72. Jason did not testify regarding any of the circumstances of the children or of either parent. There was no evidence presented of his or Christina's relationship with the children. Further, apart from requesting the exclusive right to designate the children's primary residence, the record does not show that Jason requested the exclusive right to designate the primary residence "without regard to geographic location," the "exclusive right to apply for and renew passports for the children," or the other exclusive rights that he was granted. These other exclusive rights are substantively identical to Family Code section 153.132, governing the "Rights and Duties of Parent Appointed *Sole* Managing Conservator." *See* TEX. FAM. CODE § 153.132 (emphasis added). Thus, in essence, the trial court made Jason the sole managing conservator of the children, even though he did not plead for such relief. *See id.*; *Binder v. Joe*, 193 S.W.3d 29,

33 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (holding, in restricted appeal from default judgment, that trial court erred in appointing father sole managing conservator even though he did not plead for such relief).

Christina's failure to answer or appear at trial did not relieve Jason of his burden to present evidence regarding the best interest of the children. *See Arevalo*, 2020 WL 5778813, at *3; *see also Rhamey*, 203 S.W.3d at 29 ("The best interest of the child requires that the issues be as fully developed as possible."). Because the record does not show that Jason presented any evidence of any of the facts or circumstances of the children, or of either parent, from which a best-interest determination could have been made, we conclude that the trial court lacked sufficient information upon which to exercise its discretion. *See B.K. v. T.K.*, No. 02-19-00472-CV, 2021 WL 2149621, at *3 (Tex. App.—Fort Worth May 27, 2021, no pet.) (mem. op.) (holding that trial court "could not have properly exercised its discretion in making the child-related rulings in the decree" because it heard "no evidence from which it could determine the child's best interest"); *Arevalo*, 2020 WL 5778813, at *4; *J.J.G.*, 540 S.W.3d at 55.

Because the evidence is legally insufficient to support the trial court's best-interest finding as to the complained-of exclusive rights granted to Jason, and because the trial court granted Jason relief not requested in his petition, we hold that the trial court abused its discretion in rendering its order of conservatorship rights in

the decree. *See B.K.*, 2021 WL 2149621, at *3; *Binder*, 193 S.W.3d at 32–33. Further, these errors are apparent on the face of the record. *See B.K.*, 2021 WL 2149621, at *3; *Giron v. Gonzalez*, 247 S.W.3d 302, 309 (Tex. App.—El Paso 2007, no pet.); *Binder*, 193 S.W.3d at 32–33.

We sustain Christina's fifth issue.

Division of Property

In her sixth issue, Christina argues that the evidence is legally insufficient to support the trial court's division of property because Jason presented no evidence identifying the community assets or the value of the community estate.

In a divorce decree, a trial court "shall order a division of the estate of the parties 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." TEX. FAM. CODE § 7.001. The trial court has broad discretion in making a "just and right" division of the community estate, and its discretion will not be disturbed on appeal unless a clear abuse of discretion is shown. *Ayala*, 387 S.W.3d at 731; *see also Chafino v. Chafino*, 228 S.W.3d 467, 472 (Tex. App.—El Paso 2007, no pet.) ("It is the reviewing court's duty to presume that the trial court properly exercised its discretion in dividing the estate.").

Although the trial court is not required to divide the community estate equally, its division must be equitable. *Sandone v. Miller-Sandone*, 116 S.W.3d 204, 207

(Tex. App.—El Paso 2003, no pet.) ("[T]here must be some reasonable basis for an unequal division."); *see Ayala*, 387 S.W.3d at 731. In making its division, the trial court should consider factors including the nature of the marital property; the relative earning capacity and business experience of the spouses; their relative financial condition and obligations; their education; the size of separate estates; the age, health, and physical conditions of the parties; fault in breaking up the marriage; the benefit the innocent spouse would have received had the marriage continued; and the probable need for future support. *Ayala*, 387 S.W.3d at 731–32; *see also Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981).

When a respondent to a divorce petition defaults, the petitioner must still present evidence to support the material allegations in the petition, including evidence to support a "just and right" division of the community estate. TEX. FAM. CODE §§ 6.701, 7.001; *Sandone*, 116 S.W.3d at 207; *see also Wilson v. Wilson*, 132 S.W.3d 533, 536 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (holding, in default divorce case, that restricted appeal "confers jurisdiction upon the appellate court to review whether the evidence is legally . . . sufficient to support the judgment"). Thus, here, despite Christina's failure to answer or appear, Jason still had the burden to prove the material allegations in his petition regarding the division of the community estate.

The record shows that Jason did not testify regarding the value of any of the property in the community estate, except that he thought the net equity in the house was "about 15,000." He testified, rather, that *if he were to testify* about a division of property, it would be in accordance with that stated in the proposed division, as follows:

> Q. Have you reviewed something that we filed called Petitioner's . . . proposed division of property and debt?
>
> A. Yes, I have.
>
> Q. If you were to testify in detail about each one of these, would it [be] your testimony [that] you are asking the Court to render orders consistent with this?
>
> A. Yes, it would.

In his Proposed Division of Property, Jason asked the trial court to award him (1) the marital residence, which he asserted had a value of $290,278 and an outstanding principal balance of $233,633; (2) a Chevrolet Colorado Pick-up Truck, which he asserted had a value of $20,344 and an outstanding loan balance of $33,791; (3) "[t]he checking and savings accounts held in [his] name at [TDECU]," which he asserted had total balances of under $500; (4) a "Limited Liability Corporation entitled JCG Stores," which he asserted was "formed but not used" and had total commercial checking and savings account balances of $40; (5) all appliances at the marital residence and all furnishings, televisions, and equipment located at his home office, children's belongings, and all furniture and televisions "left at [the marital residence] after April 15, 2020," of which he did not state a

value; and (6) "[a]ny and all retirement funds and retirement accounts of any kind created as a result of [Jason's] employment and/or contributions," of which he did not state a value.

Jason asked the trial court to award Christina a 2017 Dodge Journey, which he asserted had a value of $13,352 and an outstanding loan balance of $14,692, and he asked that she be ordered to either refinance it in her name or sell it by May 1, 2020. Jason asked that she also be awarded checking and savings accounts held in her name; all furniture and televisions not awarded to Jason and removed from the residence by April 15, 2020; and all retirement funds and accounts "created as a result of [her] employment and[/]or contributions."

Jason also asked the trial court to divide the parties' debts. His request included that each party be ordered to pay "any and all unsecured debt created solely by [the party], including but not limited to" the listed debts.

In its final decree, the trial court awarded Jason (1) "[a]ll property in [his] care, custody or control, or in [his] name"; (2) the marital residence; (3) a 2018 Chevrolet Colorado truck; (4) "[a]ny and all checking and savings accounts held in [his] name at [TDECU]"; (5) the business known as JCG Stores, LLC and all accounts held by it; (6) all appliances at the marital residence and all furnishings, televisions, equipment, and supplies in Jason's home office, belonging to the children, or remaining at the home after April 15, 2020; (7) all retirement accounts

"of any kind in [Jason's] name or created as a result of [Jason's] employment and[/]or contributions"; and (8) "[a]ll cash and money in any bank, credit union, or other financial institution listed in [his] name alone."

The trial court awarded Christina (1) all property in her care, custody, or control, or in her name; (2) all furniture and televisions located at the marital residence not awarded to Jason; (3) all retirement accounts "of any kind existing in [her] name or created as a result of [her] employment and[/]or contributions"; (4) "[a]ll cash and money in any bank or other financial institution listed in [her] name alone"; and (5) a 2017 Dodge Journey, which it ordered her to sell or refinance by May 1, 2020. The trial court also generally divided the parties' debts.

There was no evidence presented, however, of the value of the retirement accounts; the value of the business or business assets, if any; the value of the "cash and money in any bank, credit union, or other financial institution" held by each party; the value of the home appliances or the furnishings, televisions, equipment, and supplies in Jason's office; or of the value of any property otherwise in each party's "care, custody or control." Jason presented no evidence of the extent or value of the community estate. *See Watson v. Watson*, 286 S.W.3d 519, 523–24 (Tex. App.—Fort Worth 2009, no pet.); *Sandone*, 116 S.W.3d at 207–08 (holding that just and right division requires probative evidence about "the size of the community pie"). Likewise, Jason did not present probative evidence of the parties' debts

because his Proposed Division of Debt expressly does not include all of his or Christina's debts.

We conclude that the trial court lacked sufficient evidence of the value of the community estate to make a just and right division. *See J.J.G.*, 540 S.W.3d at 55 (noting that we consider whether trial court had sufficient information upon which to exercise its discretion); *see also Watson*, 286 S.W.3d at 525; *Sandone*, 116 S.W.3d at 207–08; *see, e.g.*, *Houston v. Thorpe*, No. 04-19-00469-CV, 2020 WL 3547988, at *5–6 (Tex. App.—San Antonio July 1, 2020, no pet.) (mem. op.) (holding that trial court lacked evidence regarding value of community estate and reversing default decree); *Chapa v. Chapa*, No. 04-17-00345-CV, 2018 WL 1934240, at *2 (Tex. App.—San Antonio Apr. 28, 2018, no pet.) (mem. op.) (holding, in restricted appeal of default divorce decree, that because no evidence was presented of value of estate or of any component parts, there was "no evidence upon which the trial court could have concluded the division of the estate in the decree [was] just and right").

Because there is no evidence of the value of the community estate, there is no evidence to support the judgment. *See Watson*, 286 S.W.3d at 525; *Sandone*, 116 S.W.3d at 208; *see also Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex. 1985) ("Once reversible error affecting the 'just and right' division of the community estate is found, the court of appeals must remand the entire community estate for a new division."). We hold that the trial court abused its discretion in dividing the estate

in the absence of evidence of value. *See Matter of Marriage of Lucio*, No. 14-15-00951-CV, 2017 WL 1540799, at *2 (Tex. App.—Houston [14th Dist.] Apr. 27, 2017, no pet.) (mem. op.); *see also J.J.G.*, 540 S.W.3d at 55; *Wilson*, 132 S.W.3d at 537–38; *Sandone*, 116 S.W.3d at 208. Further, the error is apparent on the face of the record. *See* TEX. R. APP. P. 30; *Chapa*, 2018 WL 1934240, at *2.

We sustain Christina's sixth issue.

Conclusion

We affirm the portion of the trial court's decree granting a divorce and appointing Jason and Christina as joint managing conservators of the children. We reverse the remainder of the decree and remand for further proceedings.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Kelly and Landau.