

**Affirmed in Part, Reversed and Remanded in Part, and Memorandum Opinion filed April 27, 2017.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-15-00951-CV**

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**IN THE MATTER OF THE MARRIAGE OF VIRGINIA W. LUCIO AND  
VICTOR M. LUCIO**

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**On Appeal from the 309th District Court  
Harris County, Texas  
Trial Court Cause No. 2015-30977**

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**M E M O R A N D U M   O P I N I O N**

Victor M. Lucio appeals from a final decree of divorce dissolving his marriage to Virginia W. Lucio. Virginia obtained a default divorce decree when Victor failed to timely file an answer in the divorce proceedings. Victor contends the trial court abused its discretion in its division of the community estate because the evidence at trial was legally insufficient to establish the value of the property to be divided. We reverse and remand the division of the community estate for further proceedings.

### ***Background***

Virginia and Victor were married in February 1982. Virginia filed her original petition for divorce on July 3, 2015. When Victor failed to file a timely answer, the trial court held a brief evidentiary hearing on August 10, 2015. The entirety of the evidence produced at that hearing regarding the couple's assets and liabilities was Virginia's testimony as follows:

Q. Okay. You have set forth in the decree a proposed division of your property and debts?

A. Yes.

Q. And you believe that the division is fair and equitable?

A. Fair, yes.

Q. And just and right?

A. Yes.

Q. And you're asking the Court to approve that division as part of your divorce, correct?

A. Correct.

Although not admitted into evidence at the hearing, Virginia also filed with the trial court a proposed final decree assigning certain community property and debts to Virginia and certain community property and debts to Victor. However, the proposed decree did not provide any values for either the individual pieces of property or the community estate as a whole, and it did not list any outstanding amounts for the debts. In short, the trial court received no evidence regarding the value of the community assets or liabilities.

Nonetheless, the trial court issued a final decree of divorce on August 10, 2015, dissolving the parties' marriage, awarding particular property to each party, and ordering each party to pay specified debts. The trial court did not make any findings regarding the values of any assets or liabilities. Victor thereafter filed his

original answer on August 21, 2015, a motion for new trial on August 26, 2015, and a notice of appeal on November 11, 2015.

### *Analysis*

In two issues on appeal, Victor contends the trial court abused its discretion in dividing the community estate because the evidence was legally insufficient to support the trial court's division. The Texas Family Code requires the trial court in a divorce proceeding to "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. We review a trial court's division of property under an abuse of discretion standard. *Quijano v. Quijano*, 347 S.W.3d 345, 349 (Tex. App.—Houston [14th Dist.] 2011, no pet.). A trial court abuses its discretion when it acts arbitrarily or unreasonably or without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). Assessments of the legal and factual sufficiency of the evidence are not independent grounds for reversal in this context, but they are relevant factors in assessing whether the trial court abused its discretion. *Quijano*, 347 S.W.3d at 349.

The value of community assets is generally determined as of the date of divorce or as close to that date as possible. *Id.* The values of individual items are evidentiary to the ultimate issue of whether the trial court divided the properties in a just and right manner. *Walsh v. Walsh*, No. 14-10-00629-CV, 2012 WL 3016845, at \*1 (Tex. App.—Houston [14th Dist.] July 24, 2012, no pet.).

In a suit for divorce, the petition may not be taken as confessed if the respondent does not file an answer. Tex. Fam. Code § 6.701. Thus, if a respondent in a divorce case fails to answer, the petitioner still must 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.); *Osteen v. Osteen*, 38 S.W.3d 809, 814 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Therefore, a default judgment of divorce is subject to an evidentiary attack on appeal. *Vazquez*, 292 S.W.3d at 84; *Osteen*, 38 S.W.3d at 814.

When reviewing for legal sufficiency, we consider the evidence in the light most favorable to the trial court’s finding and indulge every reasonable inference that supports the challenged finding. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005); *Reagins v. Walker*, No. 14-15-00764-CV, 2017 WL 924498, at \*3 (Tex. App.—Houston [14th Dist.] Mar. 7, 2017, no pet. h.). We credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *City of Keller*, 168 S.W.3d at 827; *Reagins*, 2017 WL 924498, at \*3. “[W]hen the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence.” *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). When legally insufficient evidence supports a default judgment, the proper remedy is remand, not rendition. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 930 (Tex. 2009) (per curiam); *Alexander v. Alexander*, No. 14-09-01092-CV, 2011 WL 1123530, at \*4 (Tex. App.—Houston [14th Dist.] Mar. 29, 2011, no pet.) (mem. op.).

Here, as set forth above, the trial court received no evidence regarding the value of any community property or the community estate as a whole. The court also did not receive any evidence establishing the amount of the community debts. In fact, the only evidence the trial court received pertaining to the community assets and liabilities was Virginia’s testimony that the division she included in her proposed decree was fair, just, and right. This was not sufficient evidence either for

the trial court to make its own assessment of a just and right division of the marital estate—as required by Texas Family Code section 7.001—or for this court to review that assessment. *See Alexander*, 2011 WL 1123530, at \*4 (holding petitioner’s request to be awarded certain property was legally insufficient to support trial court’s property division); *Vazquez*, 292 S.W.3d at 85 (holding testimony that proposed division was just and right was insufficient to support trial court’s division where the record did not contain any evidence regarding value); *Wilson v. Wilson*, 132 S.W.3d 533, 538 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (“Given the dearth of evidence identifying, describing, and valuing the community estate, we hold that there is insufficient evidence to support the division of assets.”). The trial court abused its discretion in dividing the estate in the absence of evidence of value. Accordingly, we sustain Victor’s appellate issues.

We reverse those portions of the divorce decree addressing the division of the community estate and remand the case to the trial court for further proceedings consistent with this opinion. We affirm the decree in all other respects.

/s/ Martha Hill Jamison  
Justice

Panel consists of Justices Christopher, Jamison, and Donovan.