



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00345-CV

Elvia Ayme **CHAPA**,
Appellant

v.

Hector **CHAPA**,
Appellee

From the 63rd Judicial District Court, Val Verde County, Texas
Trial Court No. 32,952
Honorable Enrique Fernandez, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: April 25, 2018

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Elvia Chapa files this restricted appeal from a default divorce decree, urging that the trial court abused its discretion in dividing the community estate. We agree and reverse and remand for a new trial as to that issue.

Appellee Hector Chapa filed a petition for divorce and obtained service on Elvia Chapa; however, Elvia did not file an answer. After an evidentiary hearing at which Hector was the only witness, the trial court rendered its decree. The decree, signed February 24, 2017, granted the

divorce on the ground of insupportability and divided the marital estate. Elvia filed a notice of restricted appeal on May 30, 2017.

To prevail on a restricted appeal, appellant must demonstrate: (1) she filed the notice of restricted appeal within six months of the date of the judgment or order; (2) she was a party to the suit; (3) she did not participate in the hearing that resulted in the judgment complained of and did not file a timely post-judgment motion or request for findings of fact and conclusions of law; and (4) error is apparent from the face of the record. TEX. R. APP. P. 26.1(c), 30; *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004). It is undisputed that the first three elements are met in this case, and only the fourth element is in issue.

A restricted appeal affords appellant the same scope of review as an ordinary appeal, that is, a review of the entire case, including insufficiency claims. *See Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam). The only restriction on the scope of the restricted appeal is that the error must appear on the face of the record. *Id.* For purposes of a restricted appeal, the face of the record consists of all the papers on file in the appeal, including the reporter's record. *Id.*; *In re E.M.V.*, 312 S.W.3d 288, 290 (Tex. App.—Dallas 2010, no pet.); *O'Neal v. O'Neal*, 69 S.W.3d 347, 348 (Tex. App.—Eastland 2002, no pet.). Elvia contends there is error on the face of the record because there is insufficient evidence to support division of the marital estate.

The Texas Family Code provides that “In a suit for divorce, the petition may not be taken as confessed if the respondent does not file an answer.” TEX. FAM. CODE ANN. § 6.701 (West 2006). Therefore, when a respondent defaults, the petitioner must present evidence to support the material allegations in the petition, including evidence to support a “just and right” division of the community estate. *See id.* § 7.001; *Sandone v. Miller Sandone*, 116 S.W.3d 204, 208 (Tex. App.—El Paso 2003, no pet.).

We review a trial court's division of property for abuse of discretion. *Murfff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981); *Garza v. Garza*, 217 S.W.3d 538, 548 (Tex. App.—San Antonio 2006, no pet.). In family law cases the abuse of discretion standard of review overlaps with the traditional sufficiency standards of review. *Garza*, 217 S.W.3d at 549. In reviewing whether the trial court abused its discretion because the evidence is legally or factually insufficient, we determine whether (1) the trial court had sufficient evidence upon which to exercise its discretion, and (2) the trial court erred in its application of that discretion. *Id.*

Elvia contends the trial court abused its discretion because there was insufficient evidence upon which to base a just and right division of the marital estate. We agree. To make a just and right division, the trial court must have had probative evidence about “the size of the community pie.” *Sandone*, 116 S.W.3d at 207-08. The only evidence presented to the trial court was Hector's testimony that he was asking the court to divide the property and debts in the manner set forth in the draft decree. In his questioning, counsel went through the list of real property, personal property, accounts, and debts in the draft decree, and asked Hector to agree that the item would be awarded to either Hector or Elvia. Hector also stated he had agreed to pay \$500.00 a month in contractual alimony. However, no evidence regarding the value of any of the accounts, properties, vehicles, or debts was presented. At the conclusion of the hearing, the trial court ruled it would “divide the property as contained in the final decree of divorce.”

The record does not contain any evidence of the value of the community estate or of any component parts of the estate. There is therefore no evidence upon which the trial court could have concluded the division of the estate in the decree is just and right. See *Santillan v. Campos*, No. 04-08-00904-CV, 2009 WL 3464867, at *3 (Tex. App.—San Antonio Oct. 28, 2009, no pet.) (mem. op.); *Sandone*, 116 S.W.3d at 208. This constitutes an abuse of discretion that is error apparent on the face of the record. See *In re E.M.V.*, 312 S.W.3d at 291 (holding trial court abused

its discretion because it had insufficient evidence to divide property fairly and equitably, and error was apparent from face of record); *Wilson v. Wilson*, 132 S.W.3d 533, 537–38 (Tex. App.—Houston [1st Dist.] 2004, pet denied) (same); *O’Neal v. O’Neal*, 69 S.W.3d at 350 (same).

We therefore reverse the part of the Final Decree of Divorce that divides the marital estate and remand the case to the trial court for a new division. *See Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex. 1985) (when there is reversible error affecting the just and right division of the community estate, court of appeals must remand the entire community estate for a new division). We affirm the trial court’s decree in all other respects.

Luz Elena D. Chapa, Justice