



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-20-00040-CV

**IN THE MATTER OF THE MARRIAGE OF NORBERTO AGUILAR
AND MAIRA ALEXANDRA AGUILAR AND IN THE INTEREST
OF N.A., JR., A.A.A., AND N.I.A., CHILDREN**

**On Appeal from the County Court at Law
Wise County, Texas¹
Trial Court No. CV19-03-240, Honorable Brock Smith, Presiding**

January 7, 2021

MEMORANDUM OPINION

Before PIRTLE and PARKER and DOSS, JJ.

This is a restricted appeal from a no-answer default judgment of divorce and final order in suit affecting the parent-child relationship. Raising two issues, Maira Alexandra Aguilar, appellant, contends the trial court erred in entering a default judgment because the return of service does not comply with Rule 107 of the Texas Rules of Civil Procedure,

¹ Originally appealed to the Second Court of Appeals, this appeal was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Second Court of Appeals and this Court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

and the trial court failed to make a record of the proceedings.² We reverse and remand this case for a new trial.

Background

In March of 2019, Norberto filed his original petition for divorce and suit affecting the parent-child relationship. Two months later, the trial court signed an order on Norberto's motion for alternative service authorizing citation to be posted on the front door of Maira's residence. A private process server filed an unverified return of service indicating that a citation addressed to "Maria" had been served on May 20. Maira did not file an answer or otherwise respond to the petition.

On June 24, the trial court held a hearing on the merits. Norberto and his counsel appeared, but Maira did not appear or participate. At the conclusion of the hearing, the trial court signed a default decree of divorce which stated that a record of the proceedings was waived by the parties with the consent of the court. In its judgment, the trial court included provisions that divided the marital estate, appointed conservators, and ordered child support.

On December 19, Maira timely filed this restricted appeal. In two issues, Maira contends that error is apparent on the face of the record as it relates to the return of service and the absence of a reporter's record at trial.

² For the sake of clarity, we will refer to the parties by their first names, Maira and Norberto. Norberto has not filed an appellee's brief.

Discussion and Law

A restricted appeal is a procedural device available to a party that did not participate either in person or through counsel, in a proceeding that resulted in a judgment against the party. See TEX. R. APP. P. 30; see also *Ulusal v. Lentz Eng'g L.C.*, 491 S.W.3d 910, 914 (Tex. App.—Houston [1st Dist.] 2016, no pet.). It constitutes a direct attack on a default judgment. *Arnell v. Arnell*, 281 S.W.3d 549, 551 (Tex. App.—El Paso 2008, no pet.). To prevail in a restricted appeal, Maira must prove that: (1) she filed a notice of restricted appeal within six months after the judgment was signed; (2) she was a party to the underlying suit; (3) she did not participate in the hearing that resulted in the challenged judgment and did not file any post-judgment motions or request findings of fact and conclusions of law; and (4) error is apparent on the face of the record. See *Watson v. Watson*, 286 S.W.3d 519, 522 (Tex. App.—Fort Worth 2009, no pet.) (citing *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004)). The face of the record, for the purpose of a restricted appeal, consists of all papers on file in the appeal, including the reporter's record. *Id.* (citing *Norman Comms., Inc. v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997)).

The record reflects Maira perfected this appeal within the jurisdictional time limits, was a party to the underlying suit, and did not participate in the hearing of the case. Having determined Maira meets three of the four elements of a restricted appeal, we must next determine if there is error on the face of the record. In so doing, we address Maira's second issue first, as it is dispositive of this appeal.

Lack of Reporter's Record

In her second issue, Maira contends the trial court erred by failing to provide a reporter's record of the default judgment hearing. Section 105.003 of the Texas Family Code requires a record to be made in a suit affecting the parent-child relationship unless waived by the parties with the consent of the court. See TEX. FAM. CODE ANN. § 105.003(c) (West 2019). This provision places an affirmative duty on the trial court to make a record of the proceedings, and failure to do so constitutes error on the face of the record requiring reversal. *Stubbs v. Stubbs*, 685 S.W.2d 643, 645 (Tex. 1985).

In this case, the record reflects that Maira requested a copy of the reporter's record and the court reporter certified to the Clerk of the Second Court of Appeals that "the parties waived a record" and no record of the default proceeding was filed. Although the judgment in question recites that the parties waived the making of a record, Maira was neither present nor represented by counsel at the hearing; therefore, the making of the record could not be waived as to Maira, and the trial court erred in consenting to the waiver of the record. *In re Vega*, 10 S.W.3d 720, 722 (Tex. App.—Amarillo 1999, no pet.); *G.S.K. v. T.K.N.*, 940 S.W.2d 797, 799 (Tex. App.—El Paso 1997, no writ) (trial court's duty to ensure the making of a record may not be waived upon consent of only those parties present at the time of trial). Because a record was not made of the hearing that resulted in the underlying default judgment, error is apparent on the face of the record. *Thompson v. Thompson*, No. 02-13-00292-CV, 2014 Tex. App. LEXIS 8686, at *4 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.). Accordingly, we sustain Maira's second issue, and, as requested in Maira's prayer for relief, we reverse the trial court's decree of divorce

and suit affecting the parent-child relationship and remand this case to the trial court for a new trial. See *Perez v. Mejia*, No. 04-19-00867-CV, 2020 Tex. App. LEXIS 7685, at *5-6 (Tex. App.—San Antonio Sept. 23, 2020, no pet.) (mem. op.).

Conclusion

Having sustained Maira's second issue, we reverse the trial court's default judgment and remand the case for a new trial.³

Judy C. Parker
Justice

³ Because Maira's argument regarding the trial court's error in failing to make a record of the hearing that resulted in the underlying default judgment is dispositive, we need not address Maira's remaining issue on appeal. See TEX. R. APP. P. 47.1.