NUMBER 13-22-00323-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

GEORGE TRAVIS CERVENKA JR., **Appellant,**

v.

KAREN MARIE CERVENKA, **Appellee.**

On appeal from the 25th District Court of Lavaca County, Texas.

OPINION

Before Justices Tijerina, Silva, and Peña
Opinion by Justice Silva

Appellant George Travis Cervenka Jr. filed a restricted appeal from the trial court's order granting a divorce from appellee Karen Marie Cervenka. By four issues, appellant argues that the trial court abused its discretion in: (1) dividing the marital estate; (2) awarding the amount of child support that it assessed; (3) awarding support for adult

children; and (4) awarding financial obligations against him as part of the division of the marital estate. By a fifth alternative issue, appellant argues that appellee was not entitled to a default judgment because she failed to produce the required disclosures. *See* TEX. R. CIV. P. 194.1(a), 194.2(a). We affirm as modified in part and reverse and remand in part.

I. BACKGROUND

Appellee filed an original petition for divorce from appellant, listing one child, L.R.C., who was eighteen years old at the time. The petition alleged that appellee owned some separate property and asked the trial court to confirm it as such. Otherwise, the petition requested that the trial court divide the marital estate in a just and right manner. The petition also requested that the trial court enter orders relating to conservatorship, possession, access, and support for L.R.C.

Appellant failed to answer the petition, and the trial court held a hearing and granted a default judgment. *See* TEX. R. CIV. P. 239. At the hearing for the default judgment, appellee offered the following relevant testimony:

Q. [by counsel]	Were there two children born during this marriage?
A. [by appellee]	Yes.
Q.	Is one of the children 25 years of age?
A.	24.
Q.	24. And you have—is your other child, [L.R.C.], aged 18?
A.	Yes.
Q.	Is she currently still enrolled in high school?

. . . .

A. Yes.

. . . .

Q. Have you provided a fair and equitable division of your property and debts that is contained within your proposed final decree of divorce?

A. Yes, sir.

Q. Do you think the agreement is a just and right division of the community estate?

A. Yes.

Appellee did not otherwise offer evidence relating to the value or character of the community estate or appellant's net resources. The trial court granted the divorce as requested and divided the assets as set in the proposed divorce decree. Further, the divorce decree required appellant to pay child support for L.R.C. through her eighteenth birthday or high school graduation, whichever was later. This restricted appeal followed. *See* TEX. R. APP. P. 30.

II. RESTRICTED APPEAL

To prevail on a restricted appeal, an appellant must demonstrate:

(1) he filed notice of the restricted appeal within six months after the judgment was signed;

(2) he was a party to the underlying lawsuit;

(3) he did not participate in the hearing that resulted in the judgment complained of, and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law; and

(4) error is apparent on the face of the record.

Ex parte E.H., 602 S.W.3d 486, 495 (Tex. 2020) (citing *Pike-Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014) (per curiam)); *see* TEX. R. APP. P. 30. "For these purposes, the 'face

of the record' consists of all the papers that were before the trial court at the time it rendered judgment." *Ex parte Vega*, 510 S.W.3d 544, 547 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.); *see also Tex. Dep't of Pub. Safety v. Salazar*, No. 13-12-00771-CV, 2013 WL 4399185, at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 15, 2013, no pet.) (mem. op.) ("The 'face of the record' includes all papers on file in the appeal and the reporter's record, if any."). "The requirement that error be apparent on the face of the record means that 'error that is merely inferred [from the record] will not suffice.'" *Id.* (quoting *Ginn v. Forrester*, 282 S.W.3d 430, 431 (Tex. 2009) (per curiam) (alteration in original)). However, restricted appeals may include challenges to the legal and factual sufficiency of the evidence. *Norman Commc'n v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam). "Review by [restricted appeal] affords an appellant the same scope of review as an ordinary appeal, that is, a review of the entire case." *Id.*

Here, the record plainly demonstrates that appellant satisfied the first three elements. *See Ex parte E.H.*, 602 S.W.3d at 495. The final component—whether error is apparent from the face of the record—was also met as explained below by our review of the record, including the evidence presented by appellee. *Id.*

III. STANDARD OF REVIEW AND APPLICABLE LAW

A. Division of the Marital Estate

We review a trial court's division of the marital estate for abuse of discretion. *Roberts v. Roberts*, 531 S.W.3d 224, 231 (Tex. App.—San Antonio 2017, pet. denied) (citing *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981)). When reviewing the division of the marital estate, we engage in a two-prong inquiry: first, we ask whether the trial court

had sufficient evidence to exercise its discretion, and, if so, we then ask if it erred in its application of that discretion. *Id.* "Each spouse has the burden to present sufficient evidence of the value of the community estate to enable the trial court to make a just and right division." *Fuentes v. Zaragoza*, 555 S.W.3d 141, 162 (Tex. App.—Houston [1st Dist.] 2018, no pet.). The marital estate includes both assets and liabilities, such as debt. *Newberry v. Newberry*, 351 S.W.3d 552, 559 (Tex. App.—El Paso 2011, no pet.). "A trial court abuses its discretion in dividing the community estate if insufficient evidence supports the division." *Fuentes*, 555 S.W.3d at 162. Such is true even when the trial court "divi[des] the community estate based on the respondent's default where the record does not support the valuation and division of the estate." *Id.*

> In making a division, the trial court may consider the following non-exclusive factors: (1) the spouses' capacities and abilities; (2) benefits which the party not at fault would have derived from continuation of the marriage; (3) business opportunities; (4) education; (5) relative physical conditions; (6) relative financial condition and obligations; (7) disparity of ages; (8) sizes of separate estates; (9) the nature of the property; (10) fault in the breakup of the marriage; and (11) any wasting of the community assets by one of the spouses.

Alonso v. Alvarez, 409 S.W.3d 754, 758 (Tex. App.—San Antonio 2013, pet. denied).

B. Child Support

A trial court's award of child support is reviewed for an abuse of discretion. *Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011). "[L]egal and factual sufficiency of the evidence are not independent grounds of error, but rather are relevant factors in assessing whether the trial court abused its discretion." *Miles v. Peacock*, 229 S.W.3d 384, 388–89 (Tex. App.—Houston [1st Dist.] 2007, no pet.). "A trial court does not abuse its discretion when there

is some evidence of a substantive and probative character to support the trial court's judgment." *Id.* at 389.

Texas Family Code Chapter 154 establishes the guidelines by which a trial court may set child support. TEX. FAM. CODE ANN. §§ 154.001–.309. To set child support, the trial court must first determine the obligor's net resources. *Id.* § 154.062. Those resources include wages and salary, self-employment income, interest, dividends, royalty income, net rental income, as well as income from several benefits. *Id.* § 154.062(b). "'There must be some evidence of a substantive and probative character of net resources' in order for the trial court to discharge its duty under [§] 154.062." *Miles*, 229 S.W.3d at 389 (quoting *Newberry v. Bohn-Newberry*, 146 S.W.3d 233, 236 (Tex. App.—Houston [14th Dist.] 2004, no pet.)). However, in the absence of evidence of a party's net income, "the court shall presume that the party has income equal to the federal minimum wage for a 40-hour week to which the support guidelines may be applied." TEX. FAM. CODE ANN. § 154.068(a).

A parent may be ordered to pay child support past the child's eighteenth birthday if the child is enrolled in and attending high school. *Id.* § 154.002(a). However, one or both parents may be ordered to provide support beyond that time for an adult disabled child. *Id.* § 154.302.

IV. ANALYSIS

A. Marital Property

By his first issue, appellant argues the trial court abused its discretion in dividing the marital estate because there was a complete absence of evidence concerning the nature, character, and value of the property. Relatedly, by his fourth issue, appellant

argues the trial court abused its discretion in awarding him financial obligations due to a complete lack of evidence. Because these issues are related, we consider them together.

The extent of appellee's evidence regarding the value or character of the marital estate was her conclusory testimony that the proposed divorce decree constituted a just and right division. Appellee did not provide estimates regarding the value of the property being divided or evidence of the factors considered when making a division of the property. *See Fuentes*, 555 S.W.3d at 162; *Alonso*, 409 S.W.3d at 758. Thus, there is no evidence that the trial court considered any of the factors in making a division. *See Alonso*, 409 S.W.3d at 758. Accordingly, there was insufficient evidence to support the division of the marital estate—assets and liabilities—even in a default judgment. *See Fuentes*, 555 S.W.3d at 162; *Alonso*, 409 S.W.3d at 758. Appellant's first and fourth issues are sustained.

B. Child Support

By his second issue, appellant argues that the trial court abused its discretion by ordering him to pay child support in the amount assessed absent any evidence regarding his net resources.

At the outset, we note that L.R.C. was eighteen years old at the time of the divorce decree; thus, any provision relating to conservatorship of, possession of, or access to her is moot. *See In re Marriage of Comstock*, 639 S.W.3d 118, 127 (Tex. App.—Houston [1st Dist.] 2021, no pet.) ("Once the child has become an adult, 'there is no live controversy' with respect to custody, possession, and access."). However, a controversy still exists to the extent the determination implicates financial obligations such as previously accrued

child support. *Id.* at 128.

Appellee failed to present any testimony relating to appellant's net resources in accordance with the family code. *See* TEX. FAM. CODE ANN. § 154.062; *Miles*, 229 S.W.3d at 389. Accordingly, the trial court was required to presume that appellant's net resources were equal to the federal minimum wage for a 40-hour work week. The trial court found appellant's net resources to be $1,142.79 and ordered him to pay appellee "child support of three hundred dollars ($228.56) [sic] per month." The federal minimum wage is $7.25 per hour. 29 U.S.C. § 206(a)(1)(C). At a forty-hour work week, appellant would be presumed to have a gross monthly income of $1,256.67.[1] *See* TEX. FAM. CODE ANN. § 154.068. According to the 2022 Tax Charts provided by the Office of the Attorney General, which we take judicial notice of, appellant's net monthly resources would be $1,142.79.[2] *See* OFFICE OF THE ATTORNEY GENERAL, 2022 TAX CHARTS (2022), https://csapps.oag.texas.gov/system/files/2021-12/2022_Tax_Chart.pdf (last visited June 20, 2023). Thus, the trial court correctly assessed appellant's net resources using the federal minimum wage. *See* TEX. FAM. CODE ANN. § 154.068. For one child, the trial court was required to presumptively apply 20% of appellant's net resources as appellant's child support obligation. *See id.* § 154.125(b). That amount calculates to $228.56. *See id.*

[1] To calculate gross monthly income, we first multiplied the federal minimum wage by forty to calculate a weekly income, which is $290.00. We then multiplied the weekly income by fifty-two to calculate annual income, which is $15,080, and divided that by twelve.

[2] "[A]n appellate court has the power to take judicial notice for the first time on appeal of adjudicative facts that are matters of public record and not subject to reasonable dispute because they can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned."

County of El Paso v. Navar, 584 S.W.3d 73, 77–78 (Tex. App.—El Paso 2018, no pet.) (first citing TEX. R. EVID. 201(b), and then citing *Off. of Pub. Util. Couns. v. Pub. Util. Comm'n of Tex.*, 878 S.W.2d 598, 600 (Tex. 1994)).

Appellant's second issue is overruled.[3]

However, we modify the judgment to reflect only the correct amount of child support of "two-hundred twenty-eight dollars and fifty-six cents ($228.56)." *See* TEX. R. APP. P. 43.2(b).

C. "Additional Division of Property"

By his third issue, appellant argues that the trial court abused its discretion by ordering him to pay for two phone bills for both adult children as well as car insurance for L.R.C. The divorce decree characterizes these payments as "additional division of property," whereas appellant characterizes the payments as "post-majority [child] support." However, it does not matter precisely which way the payments are characterized because there was no evidence to support the trial court's order as either post-majority support, a division of property, or even post-divorce maintenance. *See* TEX. FAM. CODE ANN. § 8.051 (eligibility for post-divorce maintenance); *id.* § 154.302 (court-ordered support for adult disabled children); *Fuentes*, 555 S.W.3d at 162; *Miles*, 229 S.W.3d at 389. Appellant's third issue is sustained.

D. Disclosures

By his fifth issue, appellant argues that appellee "is not entitled to a default judgment when she failed to provide initial disclosures, because all such evidence should be excluded from consideration." *See* TEX. R. CIV. P. 194.1(a), 194.2(a). However, the rule's plain language only creates a deadline to make the initial disclosures "after the filing

[3] Appellant does not challenge the trial court's order of child support on the grounds that he should not have been ordered to pay it, merely the amount of support assessed. Further, appellant does not challenge the trial court's order that he provide medical support and dental support for L.R.C.

of the first answer or general appearance." *Id.* § 194.2(a). Because appellant did not file an answer to the suit or make a general appearance, appellee was not required to produce the initial disclosures. *See id.* Appellant's fifth issue is overruled.

V. CONCLUSION

We affirm the trial court's judgment as modified as it relates to child support for L.R.C. through graduation from high school and reverse and remand the provisions of the divorce decree relating to marital property division.

CLARISSA SILVA
Justice

Delivered and filed on the
13th day of July, 2023.