Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00469-CV

Dana **HOUSTON**,
Appellant

v.

Desmund Jerrod **THORPE**,
Appellee

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2018CI23700
Honorable Angelica Jimenez, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Luz Elena D. Chapa, Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: July 1, 2020

REVERSED AND REMANDED IN PART, AFFIRMED IN PART

This is a restricted appeal of a default divorce decree. In six issues, the appellant, Dana Houston, argues the decree's provisions concerning conservatorship, possession and access, division of the marital estate, and other matters are not supported by sufficient evidence and must be reversed. We reverse and remand in part, and affirm in part.

BACKGROUND

In 2009, Dana married Desmund Jerrod Thorpe. The couple settled in San Antonio, Texas, and had two children. In November 2018, Dana took the children to Georgia to visit family. While

in Georgia, Dana told Desmund that she and the children would not return to San Antonio. In December 2018, Desmund filed a petition for divorce in Bexar County, Texas. Dana was served with the divorce petition, but she did not file an answer or otherwise appear in the case.

On March 4, 2019, the trial court held a final hearing on the divorce petition. Only Desmund and his lawyer appeared at the hearing. Desmund testified. At the end of the hearing, the trial court rendered a default judgment granting the divorce. Two days later, on March 6, 2019, the trial court signed a divorce decree, which appointed Desmund and Dana joint managing conservators of the two children; designated Desmund the joint managing conservator with "the exclusive right to designate the primary residence of the children with[]in Bexar County and contiguous counties;" and granted Dana possession and access to the children under a standard possession order. In addition, the divorce decree granted Desmund the right to claim the children on his income tax returns and required Dana to execute a form to allow Desmund to exercise this right; issued a permanent injunction against Dana and stated that she waived service of the writ of injunction; and contained "Decree Acknowledgment" and "Indemnification" provisions.

Dana did not file any post-judgment motions or a request for findings of fact and conclusions of law. Nor did she file a notice of appeal within thirty days after the divorce decree was signed.

Four months after the divorce decree was signed, on July 9, 2019, Dana filed a notice of restricted appeal. This appeal followed.

RESTRICTED APPEAL

In her first issue, Dana argues she satisfies the first three elements for a successful restricted appeal. "To sustain a proper restricted appeal, the filing party must prove: (1) she filed [a] notice of the restricted appeal within six months after the judgment was signed; (2) she was a party to the underlying lawsuit; (3) she 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." *Pike-Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014).

In the present case, Dana filed her notice of appeal within six months after the judgment was signed. Dana was a party to the underlying lawsuit. Dana did not participate in the hearing resulting in the final decree of divorce and did not file any post-judgment motions or requests for findings of fact and conclusions of law. Therefore, Dana satisfies the first three elements for a restricted appeal.

To determine if Dana satisfies the fourth element for a restricted appeal—error apparent on the face of the record—we must address Dana's other issues, which challenge the sufficiency of the evidence to support specific provisions in the divorce decree.

A petition for divorce may not be taken as confessed if the respondent does not file an answer. TEX. FAM. CODE § 6.701. When a respondent in a divorce case 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.). Therefore, even though Dana failed to answer the divorce petition or otherwise make an appearance in the case, Desmund was still required to present evidence at the final hearing to support the material allegations in his petition. *See id*. at 84.

"For purposes of a restricted appeal, the face of the record consists of all papers on file in the appeal, including the reporter's record." *Hodge v. Hanor*, No. 04-18-00255-CV, 2019 WL 73257, at *1 (Tex. App.—San Antonio Jan. 2, 2019, no pet.) (citing *Norman Commc'ns v. Tex. Eastman Co*., 955 S.W.2d 269, 270 (Tex. 1997)). "The absence of legally sufficient evidence to support a judgment is reviewable in a restricted appeal." *Id*. (citing *Norman Commc'ns*, 955

S.W.2d at 270). "[A] default judgment of divorce is subject to an evidentiary attack" in a restricted appeal. *Vazquez*, 292 S.W.3d at 84.

CONSERVATORSHIP AND POSSESSION AND ACCESS

In her second issue, Dana argues the evidence is insufficient to support the divorce decree provisions appointing Desmund the joint managing conservator with the exclusive right to designate the children's residence within Bexar County, Texas, and contiguous counties, and awarding her possession and access to the children pursuant to the standard possession order.

Standard of Review

"Most of the appealable issues in a family law case are evaluated against an abuse of discretion standard, be it the issue of property division incident to divorce or partition, conservatorship, visitation, or child support." *Sandone v. Miller-Sandone*, 116 S.W.3d 204, 205 (Tex. App.—El Paso 2003, no pet.). "A trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support [its] decision." *Garza v. Garza*, 217 S.W.3d 538, 549 (Tex. App.—San Antonio 2006, no pet.). "Because in family law cases the abuse of discretion standard of review overlaps with the traditional sufficiency standards of review, legal and factual sufficiency are not independent grounds of reversible error, instead they constitute factors relevant to our assessment of whether the trial court abused its discretion." *Id*. Generally, in considering whether the trial court abused its discretion because the evidence was legally or factually insufficient, we apply a two-prong test. *Id*. First, we determine if the trial court had sufficient evidence upon which to exercise its discretion. *Id*. Second, we determine if the trial court erred in its application of that discretion. *Id*. "The traditional sufficiency review comes into play with regard to the first [prong]." *Sandone*, 116 S.W.3d at 206.

Best Interest of the Children

The best interest of the children "shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child[ren]." TEX. FAM. CODE § 153.002; *see Villasenor v. Villasenor*, 911 S.W.2d 411, 419 (Tex. App.—San Antonio 1995, no writ) (stating the children's best interest is the primary consideration in determining residency and conservatorship). "Trial courts have great discretion in determining the best interest of a child." *Villasenor*, 911 S.W.2d at 419. In determining the children's best interest, courts consider the non-exhaustive factors articulated in *Holley v. Adams*: (1) the desires of the children, (2) the emotional and physical needs of the children now and in the future, (3) the emotional and physical danger to the children now and in the future, (4) the parental abilities of the individuals seeking custody, (5) the programs available to those individuals to promote the best interest of the children, (6) the plans for the children by these individuals, (7) the stability of the home, (8) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not proper, and (9) any excuse for the acts or omissions of the parent. 544 S.W.2d 367, 371-72 (Tex. 1976). Nevertheless, courts are not required to consider every *Holley* factor in determining the children's best interest. *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002).

There is "a rebuttable presumption that the appointment of the parents of [the] child[ren] as joint managing conservators is in the best interest of the child[ren]." TEX. FAM. CODE § 153.131. When appointing joint managing conservators, the trial court "shall designate the conservator who has the exclusive right to determine the primary residence of the child[ren] and" "establish" "a geographic area within which the conservator shall maintain the child[ren]'s primary residence; or specify that the conservator may determine the child[ren]'s primary residence without regard to geographic location." *Id*. § 153.134(b)(1)(A),(B).

"Joint managing conservatorship does not require the award of equal or nearly equal periods of physical possession of and access to the child to each of the joint conservators." *Id*. § 153.135. "[T]here is a rebuttable presumption that the standard possession order" "provides reasonable minimum possession of a child for a parent named as a [] joint managing conservator; and" "is in the best interest of the child." *Id*. § 153.252(1),(2).

The standard possession order is designed to apply to children three years of age or older. *Id*. § 153.251(d). For children less than three years old, the trial court must "render a[] [possession] order appropriate under the circumstances." *Id*. § 153.254(a). "In rendering the [possession] order, the court shall consider evidence of all relevant factors including" "the caregiving provided to the child before and during the current suit;" "the effect on the child that may result from separation from either party;" "the availability of the parties as caregivers and the willingness of the parties to personally care for the child;" "the physical, medical, behavioral, and developmental needs of the child;" "the physical, medical, emotional, economic, and social conditions of the parties;" "the presence of siblings during periods of possession;" "the child's need to develop healthy attachments to both parents;" "the child's need for continuity of routine;" "the location and proximity of the residences of the parties;" and "any other evidence of the best interest of the child." *Id*.

Evidence

At the final hearing, Desmund testified about his marriage to Dana and his relationship with their two children, who were currently five years old and eight months old. Desmund and Dana had been married for almost nine years. During their first year of marriage, Desmund was promoted to a job in San Antonio, and the couple moved from Florida to Texas. Desmund had a degree in information technology and was employed by AT&T. Desmund characterized the couple's move to San Antonio as "beneficial." His position with AT&T allowed him to provide

for his family. Desmund doubted he could find similar employment in the rural part of Georgia where Dana and the children were now staying.

Dana had worked outside of the home earlier in the marriage; however, after the birth of the couple's second son, Dana did not return to her job. Desmund's income was sufficient for Dana to stay at home with the children.

On November 6, 2018, Dana and the children left Texas to visit family in Georgia for Thanksgiving. Dana and the children were supposed to come home to San Antonio, Texas. However, Dana cancelled the plane tickets purchased for their return trip home and told Desmund that she and the children would not be returning to Texas. Dana and the children would be staying at her parents' house in Georgia. Desmund was "completely caught off guard" by Dana's decision to leave San Antonio with the children and remain in Georgia. In the following weeks, Desmund had phone conversations and exchanged text messages with Dana regarding the status of their marriage and the well-being of the children. Dana eventually blocked Desmund's calls and limited his phone contact with the children.

Before Dana took the children to Georgia, Desmund had enjoyed a close relationship with them. He "tucked [the children] in" at bedtime every night and saw them first thing every morning. When Dana was pregnant with the first child, Desmund accompanied her to every doctor's visit. He was in the delivery room when both children were born. The youngest child was born with a clubfoot and had special medical needs. Desmund attended every doctor visit with this child, who had undergone surgery on his foot. Additionally, when the child was four months old, his foot was fitted with a boot. The child was now almost eight months old and he had not been fitted with a new boot. By keeping the child in Georgia, Dana had caused the youngest child to miss his follow-up appointments with the orthopedic doctor in San Antonio who was treating the child's foot. Desmund carried health insurance for the children and he knew that no claims had been filed with

the insurance company since the children went to Georgia. Desmund was concerned that their youngest son had not received the post-surgical treatment required for his foot and his current round of immunizations.

In January 2019, Desmund took time off from work and went to Georgia and attempted to see Dana and the children. When he arrived in Georgia, Desmund tried to contact Dana by phone, but she blocked his calls. Desmund went to Dana's parents' house, where Dana and the children were staying. When he showed up, Dana's mother told him she did not appreciate him coming to their house. Dana's brother pulled a gun on him and told him to leave the property. Desmund left the property and called 9-1-1. Desmund asked the local police to assist him in enforcing the temporary orders issued in this case, but he was unsuccessful.[1] While he was still in Georgia, Desmund arranged a meeting with Dana at a neutral location, but she canceled the meeting. Although Desmund remained in Georgia for nine days, Dana never allowed him to see the children. Desmund nevertheless continued to provide Dana with financial support for the children.

A few days before the final hearing, Dana allowed Desmund to have contact with the children by FaceTime. However, Dana had not allowed Desmund to see the children in person for almost four months. Desmund and the children had never gone so long without seeing each other.

Desmund believed it would be in the children's best interest for the trial court to designate him as the joint managing conservator with the exclusive right to determine the children's primary residence because of the bond between him and the children. He wanted to provide the children with the best opportunities and give them an environment in which they could excel. Desmund stressed that he had provided financially for the children in the past and he would continue to provide for them in the future. He believed that access to quality medical care was better in San

[1]Among other things, the temporary orders appointed Desmund the temporary joint managing conservator with the exclusive right to determine the children's primary residence.

Antonio than in rural Georgia where the children were currently staying. If the children were to remain at his in-laws' house in Georgia, they would have to travel sixty miles to be treated by a specialist like the one who had treated the youngest child in San Antonio.

Desmund felt he was capable of co-parenting with Dana because she was the children's mother. He asked the trial court to award Dana possession and access to the children under a standard possession order. He was not seeking child support from Dana. Furthermore, Desmund confirmed that he had never been arrested, had no criminal history, and had no history with child protective services. Desmund advised the trial court that if he was designated the children's primary joint managing conservator, his father, who was a retired pastor, would come to live with them and would help him care for the children.

Discussion

On appeal, Dana argues Desmund failed to provide "any evidence as to why it would be in the children's best interest for him to be given the exclusive right to designate the primary residence within Bexar County, Texas and contiguous counties." Dana further argues Desmund failed to provide "any evidence pertaining to the *Holley* factors, evidence that a court could use to determine the best interest of the children, or any evidence as to the best interest of an infant child that requires special care."

Contrary to Dana's assertion, the evidence presented at the final hearing addressed multiple *Holley* factors, including the children's emotional and physical needs, Desmund's and Dana's parenting abilities, Desmund's plans for the children, and the stability of Desmund's home. The evidence showed that Desmund had participated in caring for the children in the past and that he had a strong bond with them. But Dana had upended the children's close relationship with their father by removing them from their home in San Antonio, taking them to Georgia, and cutting off almost all contact with their father. When Desmund traveled to Georgia for a visit, Dana did not

allow him to see the children in person. In addition, Dana had deprived the youngest child the medical treatment he needed. The evidence also showed that Desmund had concrete plans for caring for the children when they returned to San Antonio. These plans included enrolling the five-year-old in kindergarten at the same school where he had attended pre-kindergarten and having the children's grandfather assist Desmund in caring for the children. A trial court does not abuse its discretion when there is some evidence of a substantive and probative character to support its decision. *Garza*, 217 S.W.3d at 549. Here, some evidence supports the trial court's decision to appoint Desmund the joint managing conservator with the exclusive right to determine the children's primary residence. *See id*.

We also reject Dana's assertion that no evidence was presented to support the trial court's geographic restriction order.[2] The evidence showed that Dana and Desmund had lived in San Antonio in Bexar County, Texas, for about nine years. Desmund's employment was located in San Antonio. The children had a strong bond with their father, who continued to live and work in San Antonio. The children had additional ties to San Antonio. The eight-month-old had received specialized medical treatment in San Antonio. The five-year-old had attended daycare and pre-kindergarten in San Antonio. Again, there was some evidence of a substantive and probative character to support the trial court's decision that it was in the children's best interest to appoint Desmund the joint managing conservator with the exclusive right to designate the children's primary residence within Bexar County and contiguous counties. Because there was some evidence of a substantive and probative character to support the imposition of the geographic restriction, the trial court did not abuse its discretion. *See id.*

[2]The divorce decree further states that the geographic restriction is "lifted" if Dana does not reside in Bexar County, Texas, or the contiguous counties.

Dana next asserts the trial court abused its discretion by rendering an order for possession and access to a child under three years old without considering any of the section 153.254(a) factors. However, the record contains evidence regarding some of the relevant factors listed in section 153.254(a). The evidence showed that at the time of the final hearing Dana and Desmund were living in different states. The eight-month-old child had an older sibling who would be following the standard possession order. In rendering its possession order for the eight-month-old, the trial court likely considered "the presence of siblings during periods of possession;" "the child's need for continuity of routine;" and "the location and proximity of the residences of the parties;" all of which are relevant factors listed in section 153.254(a). *See Smith v. Payandeh*, No. 01-18-00463-CV, 2019 WL 2528197, at *7 (Tex. App.—Houston [1st Dist.] June 20, 2019, no pet.) (holding order limiting possession of and access to a two-year-old child was supported by evidence pertaining to some section 153.254(a) factors as well as evidence pertaining to the primary conservatorship determination).

We conclude that the trial court had sufficient evidence before it to exercise its discretion with regard to conservatorship, the geographic restriction, and possession and access to the children. Therefore, we overrule Dana's second issue.

DIVISION OF THE MARITAL ESTATE

In her third issue, Dana argues the evidence is insufficient to support the division of the marital estate in the decree of divorce.

When a respondent to a divorce petition 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. TEX. FAM. CODE § 7.001; *Sandone*, 116 S.W.3d at 207. In *Chapa v. Chapa*, which was a restricted appeal, we reversed the part of a divorce decree that divided the marital estate because no evidence was presented at trial regarding "the value of the community

estate or of any component parts of the estate." No. 04-17-00345-CV, 2018 WL 1934240, at *2 (Tex. App.—San Antonio Apr. 28, 2018, no pet.). We concluded that because the record contained "no evidence upon which the trial court could have concluded the division of the estate in the decree is just and right," the error was apparent on the face of the record. *Id*.

Here, no evidence was presented regarding the value of any of the property in the community estate, with the exception of Desmund's 401(k) account. Desmund testified he and Dana did not own any real property; he had a 401(k) account, stocks, and a pension; the value of his 401(k) was "about $12,000.00;" he did not know if Dana had a 401(k); he had two vehicles; the total balance owed on the two vehicles was $1600.00; and he did not know if Dana had incurred any debt, but if she had, the debt Dana had incurred was likely less than the debt he had incurred. In the divorce decree, the trial court awarded both vehicles to Desmund, ordered Desmund to pay the balance owed on the two vehicles; awarded each party "[a]ll household furniture, furnishings, fixtures, goods, art objects, collectibles, appliances, and equipment" in his or her possession or subject to his or her sole control; awarded each party all sums of cash in his or her possession or subject to his or her sole control; awarded each party half of all sums in any 401(k) and other retirement accounts accrued during the marriage; and ordered each party to pay any "debts, charges, liabilities, and obligations solely in [his or her] name." However, the trial court rendered these orders without any evidence of (1) the value of the two vehicles; (2) the value of the "household furniture, furnishings, fixtures, goods, art objects, collectibles, appliances, and equipment" in each party's possession or subject to his or her control; (3) the value of the cash in each party's possession or subject to his or her control; and (4) the amounts of the debts, charges, liabilities, and obligations solely in each party's name.

We conclude the trial court did not have sufficient evidence before it regarding the value of the community estate and its component parts to make a just and right division of the marital

estate in the decree of divorce. *See id.*; *Sandone*, 116 S.W.3d at 208 (concluding the trial court abused its discretion in dividing property in the divorce decree when there was no evidence of the value of the community estate). Because the trial court did not have sufficient evidence before it regarding the value of the community estate, it abused its discretion in dividing the marital estate. We sustain Dana's third issue.

REMAINING ISSUES

In her fourth issue, Dana argues the evidence is insufficient to support the provisions in the decree granting Desmund the right to claim the children as dependents for income tax purposes and requiring Dana to execute an Internal Revenue Service (IRS) form allowing Desmund to exercise this right.

In her fifth issue, Dana argues the evidence is insufficient to support the provisions in the decree issuing a permanent injunction against Dana and stating that Dana had waived service of the writ of injunction by stipulation or as evidenced by her signature on the decree.

In her sixth issue, Dana argues the evidence is insufficient to support the "Decree Acknowledgment" and "Indemnification" provisions in the decree. The decree acknowledgment provision states that Dana acknowledged that she read the decree and "voluntarily affixed" her signature to the decree. The indemnification provision states that "[e]ach party represents and warrants that he or she has not incurred any outstanding debt, obligation, or liability on which the other party is or may be liable, other than those described in this decree" and "each party agrees" to the indemnification provision.

The record contains no evidence regarding the right to claim the children as dependents for income tax purposes or the granting of a permanent injunction. Additionally, the record contains no evidence regarding any stipulation by Dana. Furthermore, Dana did not sign the divorce decree. Because there is no evidence to support the trial court's orders regarding the right to claim the

children as dependents for income tax purposes, the permanent injunction, the waiver of the writ of injunction, and the decree acknowledgment and indemnification provisions, the trial court abused its discretion by including these provisions in the divorce decree. *See Chapa*, 2018 WL 1934240, at *2 (concluding the trial court abused its discretion in dividing the community estate in a divorce decree when no evidence was presented on the issue). We sustain Dana's fourth, fifth, and sixth issues.

CONCLUSION

The absence of evidence to support the trial court's orders regarding the division of the marital estate, the right to claim the children as dependents for income tax purposes, the permanent injunction, the waiver of the writ of injunction, the "Decree Acknowledgment," and the "Indemnification" is error apparent on the face of the record. *See id*. (concluding the division of the community estate with no supporting evidence was error apparent on the face of the record). With regard to these provisions, Dana satisfies all the requirements for a successful restricted appeal. Therefore, we reverse the parts of the divorce decree (1) dividing the marital estate, (2) providing that Desmund has the right to claim the children as dependents on his income tax returns and requiring Dana to execute the corresponding IRS form, (3) issuing a permanent injunction against Dana and stating that Dana waived service of the writ of injunction, and (4) regarding the decree acknowledgment and indemnification, and remand the case to the trial court for further proceedings. We affirm the remainder of the divorce decree.

Irene Rios, Justice