Opinion issued December 1, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-01031-CV

ERICA DAVENPORT, Appellant/Cross-Appellee

V.

CHRIS DAVENPORT, Appellee/Cross-Appellant

On Appeal from the 306th Judicial District
Galveston County, Texas
Trial Court Case No. 09-FD-1574

MEMORANDUM OPINION

Appellant/cross-appellee Erica Davenport and appellee/cross-appellant Chris Davenport appeal from the trial court's order on their counter-petitions to modify the parent-child relationship. In three issues, Erica challenges the portions of the

trial court's order regarding access to and possession of the child, the parties' rights to make medical and psychological decisions concerning the child, and the trial court's reduction of the jury's award of trial and appellate attorney's fees. In her fourth issue, Erica argues that the court lacks jurisdiction over Chris's appeal. In his cross-appeal, Chris challenges the portion of the trial court's order awarding appellate attorney's fees to Erica. We modify the judgment, and affirm as modified.

Background

Erica and Chris were divorced in August 2005, the year after their daughter, K.D., was born. On July 2, 2015, Erica filed her first amended petition to modify parent-child relationship seeking to modify the trial court's previous modification order rendered on May 4, 2012 ("2012 order").

In its 2012 order, the trial court appointed Erica and Chris joint managing conservators of K.D. but did not grant either party the exclusive right to designate K.D.'s residence. The order granted both parties the independent right to make decisions regarding K.D.'s medical and psychological care, and education after conferring with the other parent. Under the 2012 order, neither party was ordered to pay child support to the other but Chris was ordered to provide health insurance for K.D. Additionally, Erica and Chris were granted alternating one-week periods of possession during the school year and alternating two-week periods of possession during the summer.

In her amended petition, Erica sought to be appointed as sole managing conservator of K.D. or, in the alternative, the primary joint managing conservator with the exclusive right to designate K.D.'s primary residence, to make educational and legal decisions concerning K.D., and to consent to medical, dental, psychiatric, psychological, and surgical treatment involving invasive procedures. She also requested that Chris be granted possession and access to K.D. pursuant to a standard possession order and that he pay monthly child support. In his second amended counter-petition, Chris sought to be appointed joint managing conservator with the exclusive right to designate K.D.'s primary residence, to make educational and legal decisions concerning K.D., to consent to medical, dental, psychiatric, psychological, and surgical treatment involving invasive procedures, and that Erica be ordered to pay child support. With regard to possession, Chris requested that the terms of possession in the 2012 order remain in place in the event Erica was appointed sole managing conservator or joint managing conservator, but that Erica be granted possession pursuant to a standard possession order if Chris was appointed sole managing conservator or primary joint managing conservator. Both parties sought attorney's fees. The jury trial began on July 13, 2015.

At trial, Erica testified that the current custodial arrangement of one-week alternating periods of possession was problematic because it caused changes in K.D.'s demeanor. In particular, Erica testified that K.D. ate a lot more, and became

agitated, irritable, and frustrated before she returned to her father's house, and that it was difficult to get K.D. "back on track" when she returned to Erica's home. Erica also testified that she and Chris had difficulty communicating other than through email, and that she did not get along with Panadda, K.D.'s stepmother.

According to Erica, the problems with the current custodial arrangement were compounded by the fact that Chris has "a lot of money," he has sued her twice for contempt and once for custody since 2012, and that he hired a private investigator to follow her after she was charged with driving while intoxicated (a charge that was later dismissed). Erica testified that Chris had done little to cooperate with her or foster a positive relationship with K.D. She stated that the discord resulted in disputes over medical bills and the choice of health care professionals for K.D., as well as caused psychological problems for K.D. including a distrust of adults. She also testified that K.D.'s stepmother, Panadda, interfered in Erica's relationship with K.D. According to Erica, the two-week alternating summer possession schedule under the 2012 order prevented her from seeing K.D. during the summer when she had time off.

Chris testified that when K.D. comes back from Erica's house, she is typically excited and wants to know what she missed while she was gone. Chris testified that he and K.D. have a very good father-daughter relationship, they share a lot of interests, and they do a lot of activities together such as swimming and cooking.

The court also heard evidence that K.D. wants to establish a relationship with her father. Chris testified that he has a flexible work schedule and works at his office as well as from home and does not travel much for work. Chris testified that he takes the children to school in the morning, and that K.D. has a regular bedtime when she is at his house, but that when she is at Erica's she typically stays out late at least once a week on a school night, and frequently past 10:30 p.m. Chris began taking K.D. to counseling sessions because K.D. was having problems in school and with her stepsister. He testified that he takes K.D. to counseling sessions during his weeks of possession. Although the therapist would like to see K.D. once a week, Erica will not take K.D. to therapy when she is with her. Chris testified that he paid for the sessions and did not ask Erica to share in the costs.

Panadda testified that she has seen great improvement in K.D.'s behavior with her stepsister and conduct at school since K.D. began going to counseling sessions. She testified that K.D. gets along well now with her stepsister, with whom she is close in age, and loves her baby stepbrother.

On July 17, the jury rendered its verdict and found that the circumstances of K.D., Erica, or Chris had materially and substantially changed since March 7, 2012 (Question 1); it was not in K.D.'s best interest that Erica be appointed sole managing conservator of K.D. (Question 2); it was in K.D.'s best interest that Erica be appointed joint managing conservator with the exclusive right to designate K.D.'s

primary residence with a geographical restriction (Question 3-5);[1] that Chris should pay the attorney's fees for the services of Erica's attorney in the lawsuit, and that $35,000 was a reasonable fee for representation at trial and $100,000 was a reasonable fee for representation through the court of appeal (Questions 8-9).

On August 17, 2015, in accordance with the jury's verdict, the court ruled that (1) Erica had the exclusive right to designate K.D.'s primary residence within Galveston County, Clear Creek I.S.D., or Friendswood I.S.D., represent K.D. in legal actions, and make educational decisions concerning K.D.; (2) Erica and Chris had the right to consent to medical, dental, psychological, and psychiatric treatment, as well as surgical procedures, for K.D. after conferring with the other parent; (3) possession and access would remain the same as under the 2012 order with a specified exception related to summer possession schedules; (4) Chris was ordered to pay $1,000 per month in child support to Erica, and provide medical and dental insurance; and (5) Chris was ordered to pay $35,000 in attorney's fees to Erica on or before the ninetieth day after entry of the order and, in the event an appeal was filed, $100,000 in attorney's fees on the date Chris filed a notice of appeal. The court set September 4, 2015, as the date for entry of judgment.

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[1] In response to Question 6, the jury answered that K.D.'s primary residence must be designated in Galveston County, Clear Creek Independent School District, or Friendswood Independent School District.

On August 28, 2015, Chris filed a motion to disregard the jury's findings in which he argued, among other things, that there was no evidence to support the jury's findings to Questions 8 and 9, i.e., that Chris should pay Erica's attorney's fees, and that $35,000 and $100,000 were reasonable amounts for representation in the trial court and through the court of appeal, respectively. On September 3, 2015, Erica filed a request for findings of fact and conclusions of law. On September 11, 2015, the trial court held an entry hearing at which it indicated that it intended to reconsider its August 17, 2015 ruling (with respect to the award of attorney's fees). On September 25, 2015, Erica filed a notice of past due findings of fact and conclusions of law. On October 15, 2015, Erica filed a motion to enter judgment and set the motion for hearing.

The trial court subsequently amended its August 17 ruling. Under the amended order, the trial court ordered Chris to pay $1,496 per month in child support, and it reduced the award of trial attorney's fees to $26,000 and the award of appellate attorney's fees to $20,000. The terms regarding access to and possession of the child and conservatorship remained the same as in the August 17 ruling. The court found that the orders were in the best interest of the child and it signed the final order on November 17, 2015.

On December 9, 2015, Erica filed her second amended notice of appeal. On December 14, 2015, Chris filed a motion to modify the final judgment or, in the

alternative, a motion for new trial. On February 2, 2016, Chris filed his notice of appeal.

Possession and Conservatorship Issues

In her first issue, Erica contends that the trial court erred in failing to enter a standard possession order and, instead, continuing the parties' alternating weeks of possession under the 2012 order. In her second issue, she argues that the court erred in granting both parties the right to make medical and psychological decisions concerning K.D.

A. Standard of Review

"The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." TEX. FAM. CODE ANN. § 153.002 (West 2014). The trial court is in the best position to determine what is in the best interest of the child because it has the opportunity to view the parties and their witnesses, observe their demeanor, and evaluate the claims made by each parent. *Coleman v. Coleman*, 109 S.W.3d 108, 111 (Tex. App.—Austin 2003, no pet.).

We review a trial court's decision regarding custody, control, and possession matters involving a child under an abuse of discretion standard. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982); *Burkhart v. Burkhart*, 960 S.W.2d 321, 323 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). The judgment of the trial

judge will be reversed only if it appears from the record as a whole that the judge abused her discretion. *Gillespie*, 644 S.W.2d at 451. The test for abuse of discretion is whether the trial judge acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

B. Possession of and Access to Child

In its November 17, 2015 order, the trial court ordered that the possession schedule outlined in the May 2012 order, under which Erica and Chris had one-week alternating periods of possession, remain in place with the exception of the parties' summer possession schedule. Erica contends that the trial court abused its discretion in making this order because the evidence presented at trial supported giving her a greater right of possession than Chris.

As a preliminary matter, we consider Erica's argument that Family Code section 153.252 imposes a rebuttable presumption that required the trial court under the facts of this case to enter a standard possession order in her favor. Section 153.252 states that "[i]n a suit, there is a rebuttable presumption that the standard possession order in Subchapter F[]: (1) provides reasonable minimum possession of a child for a parent named as a possessory conservator or joint managing conservator; and (2) is in the best interest of the child." TEX. FAM. CODE ANN. § 153.252 (West 2014). Family Code section 153.312 sets forth the standard

possession order regarding minimum possession of a child whose parents reside one hundred miles or less from the primary residence of the child, as is the case here.[2] *See* TEX. FAM. CODE ANN. § 153.312 (West 2014).

Contrary to Erica's assertion, section 153.252's rebuttable presumption did not require the trial court to enter a standard possession order. Section 153.251 makes clear that "[t]he guidelines established in the standard possession order are intended to *guide* the courts in ordering the terms and conditions for possession of a child by a parent named as a possessory conservator or as the minimum possession for a joint managing conservator." *Id.* § 153.251 (West 2014) (emphasis added). Furthermore, the presumption in section 153.252 is that the standard possession order provides a reasonable *minimum* possession of a child and does not prohibit the court from varying from the standard possession order, including ordering equal

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[2] Under section 153.312, a possessory conservator who resides one hundred miles or less from the primary residence of the child shall have the right to possession of the child as follows:

> (1) on weekends throughout the year beginning at 6 p.m. on the first, third, and fifth Friday of each month and ending at 6 p.m. on the following Sunday; and
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> (2) on Thursdays of each week during the regular school term beginning at 6 p.m. and ending at 8 p.m., unless the court finds that visitation under this subdivision is not in the best interest of the child.

TEX. FAM. CODE ANN. § 153.312 (West 2014).

possession by the parents, where it finds such a variation to be in the best interest of the child.[3] *See id*. § 153.252. It is the policy of this state to encourage frequent contact between a child and each parent for periods of possession that optimize the development of a close and continuing relationship between each parent and child. TEX. FAM. CODE § 153.251.

Erica also argues that the trial court erred when it did not file findings of fact and conclusions of law. The record that reflects Erica filed a request for findings of fact and conclusions of law pursuant to Rules of Civil Procedure 296 and 297 and Family Code section 153.258 on September 3, 2015. On September 25, 2015, Erica filed her notice of past due findings of fact and conclusions of law. On November 17, 2015, the trial court entered its final order. Erica contends that the trial court's failure to state the reasons it deviated from the standard possession order constitutes presumed harm under the facts of this case.

"A trial court is only required to make findings on ultimate controlling issues, not on mere evidentiary issues." *In re S.A.W., Jr.*, 131 S.W.3d 704, 707 (Tex.

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[3] Section 153.256 states that when a court orders the terms of possession of a child under an order other than a standard possession order, "the court shall be guided by the guidelines established by the standard possession order and may consider: (1) the age, developmental status, circumstances, needs, and best interest of the child; (2) the circumstances of the managing conservator and of the parent named as a possessory conservator; and (3) any other relevant factor." TEX. FAM. CODE ANN. § 153.256 (West 2014).

App.—Dallas 2004, no pet.) (citing *In re Marriage of Edwards*, 79 S.W.3d 88, 94 (Tex. App.—Texarkana 2002, no pet.)). "An ultimate issue of fact is one that is essential to the cause of action and seeks a fact that would have a direct effect on the judgment." *Id.* "Other factual determinations the court may have considered in determining the controlling issues were merely evidentiary issues." *Id.* The ultimate or controlling issue when addressing questions of conservatorship and possession is the best interests of the child. TEX. FAM. CODE ANN. § 153.002 (West 2014). Here, the trial court entered a finding of fact in its order that it was in the best interest of the child to equally divide access and possession of the child, with each parent having K.D. on a one-week alternating schedule. By its order, the trial court expressly addressed the ultimate or controlling fact essential to the claim and necessary to the judgment. Any other findings would be merely evidentiary. *See In re S.A.W., Jr.*, 131 S.W.3d at 707; *see also In re A.A.E.*, No. 13-03-00528-CV, 2005 WL 1364084, at *5 (Tex. App.—Corpus Christi June 9, 2005, no pet.) (mem. op.) (concluding that because ultimate or controlling issue involved in issue of possession was "the best interest of the child," and trial court had entered finding that it was in best interest of the child to equally divide access and possession between parents on rotating three-day schedule, no additional findings were necessary).[4]

[4] We further note that Rules of Civil Procedure 296 and 297, upon which Erica relies, apply to "any case tried in the district court or county court *without a jury* . . . ." TEX. R. CIV. P. 296 & 297. This case was tried to a jury.

There was testimony from each parent about K.D.'s behavior and demeanor when she returned from her week at the other parent's house. The trier of fact is the judge of the credibility and weight to be given to the testimony of any witness. *Wilkerson v. Wilkerson*, 321 S.W.3d 110, 116 (Tex. App.—Houston [1st Dist.] 2010, pet. dism'd). We hold that there is sufficient evidence to support the jury's verdict and the trial court's decision that the best interest of the child would be served by continuing the one-week alternating periods of possession by Erica and Chris. *See Gillespie*, 644 S.W.2d at 451. Because the trial court did not abuse its discretion, we overrule Erica's first issue.

C. Conservatorship

In her second issue, Erica contends that the trial court erred in failing to modify the 2012 order, which granted both parents the independent right to consent to medical, dental, and surgical treatment involving invasive procedures, as well as psychiatric and psychological treatment after conferring with the other parent. Erica argues that the evidence supported granting her the exclusive right to make these decisions.

In support of her contention, Erica points to evidence showing that she and Chris do not get along, Panadda does not like her (Erica), and K.D. does not trust adults. She contends that the current arrangement was further complicated by the continuous litigation initiated by Chris, his disparate wealth, and the fact that Chris

hired a private investigator to follow Erica. The court also heard evidence that Chris arranged for K.D. to see a therapist and regularly took K.D. to her sessions during his weeks of possession. Chris testified that he paid for the sessions and did not ask Erica to share in the costs. The therapist testified that she preferred to have a weekly visit with K.D. but that Erica refused to cooperate during her weeks of possession.

We conclude that there is sufficient evidence supporting the trial court's decision that it is in the child's best interest to grant both parents the independent right to consent to medical and psychological treatment for K.D. after conferring with the other parent. Because the trial court did not abuse its discretion, we overrule Erica's second issue. *See Gillespie*, 644 S.W.2d at 451.

Attorney's Fees

In her third issue, Erica argues that the trial court erred in reducing the award of trial and appellate attorney's fees. In her fourth issue, she argues that this Court lacks jurisdiction over Chris's cross-appeal challenging the appellate attorney fee award to Erica because Chris failed to pay the fees at the time he filed his notice of appeal.

A. Applicable Law

Family Code section 106.002(a) authorizes a trial court to award attorney's fees and expenses in suits affecting the parent-child relationship, including modification proceedings. *See* TEX. FAM. CODE ANN. § 106.002 (West 2014); *Lenz*

v. Lenz, 79 S.W.3d 10, 21 (Tex. 2002). The award of attorney's fees in a suit affecting the parent-child relationship is within the trial court's discretion. *Bruni v. Bruni*, 924 S.W.2d 366, 368 (Tex. 1996).

Factors that a factfinder should consider when determining the reasonableness of a fee include: the time, labor and skill required to properly perform the legal service; the novelty and difficulty of the questions involved; the customary fees charged in the local legal community for similar legal services; the amount involved and the results obtained; the nature and length of the professional relationship with the client; and the experience, reputation and ability of the lawyer performing the services. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). The trial court does not need to hear evidence on each factor but can consider the entire record, the evidence presented on reasonableness, the amount in controversy, the common knowledge of the participants as lawyers and judges, and the relative success of the parties. *Messier v. Messier*, 458 S.W.3d 155, 166–67 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *In re Marriage of C.A.S. & D.P.S.*, 405 S.W.3d 373, 387 (Tex. App.—Dallas 2013, no pet.).

B. Analysis

Erica argues that the trial court erred in reducing the award of trial attorney's fees from $35,000 to $26,000, and the award of appellate attorney's fees from $100,000 to $20,000, because the evidence was more than sufficient to support the

jury's finding that $35,000 and $100,000 were reasonable fees for representation at trial and on appeal.

We initially address Erica's contention that Chris waived any error with regard to the award of attorney's fees because he requested submission of the issue to the jury. Erica points to the discussion between the attorneys and the trial court during the charge conference regarding how to draft the questions related to attorney's fees. In support of her argument, Erica relies on *General Chemical Corp. v. De La Lastra* for the proposition that a party may not invite error by requesting an issue and then object to its submission on appeal. *See* 852 S.W.2d 916, 920 (Tex. 1993). In *General Chemical*, the Texas Supreme Court held that the defendant waived application of maritime law by failing to object to evidence and jury questions regarding damages that submitted elements recoverable under Texas law but not maritime law. *See id.* at 920.

Erica's argument is unavailing for two reasons. First, the issue in *General Chemical*—whether maritime law, although properly invoked, can be waived—is inapplicable to a family law case in which advisory questions are submitted in the jury charge. Second, the Court's holding regarding waiver was subsequently limited in *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91 (Tex. 1999). In *Holland*, the Court held that "'[a] claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict,

regardless of whether the submission of such question was requested by the complainant.'" *Id.* at 94 (quoting TEX. R. CIV. P. 279) (emphasis in original). Here, Chris timely objected to the award of attorney's fees post-trial in his motions to disregard jury findings and to modify final judgment. Thus, Chris preserved his complaint for review.

1. Trial Attorney's Fees

We now consider Erica's complaint that the trial court erred in reducing her attorney's fee awards.[5] The record reflects that in response to Questions 8 and 9 regarding attorney's fees, the jury answered that Chris should pay the attorney's fees for the services of Erica's attorney in the lawsuit, that $35,000 was a reasonable fee for representation at trial, and that $100,000 was a reasonable fee for representation through the court of appeal (Questions 8-9). In its August 17 letter ruling, the trial court initially ordered that Chris pay $35,000 in trial attorney's fees and $100,000 in appellate attorney's fees to Erica. On August 28, Chris filed a motion to disregard the jury's findings in which he argued, among other things, that there was no evidence to support the jury's findings regarding attorney's fees. The trial court subsequently amended its order, reducing the award of trial attorney fees to $26,000

[5] Chris is not appealing the award of $26,000 in trial attorney fees awarded to Erica, acknowledging in his brief that the award was not likely an abuse of discretion.

and the award of appellate attorney fees to $20,000. The final order was entered on November 17, 2015.

At trial, Erica testified that she had paid a total of $16,650 in attorney's fees for her attorney's representation in two matters: (1) to defend against Chris's motion for contempt related to a passport issue and (2) in the modification suit. Petitioner's Exhibit 10, admitted at trial, reflects that her attorney's billing rate is $285.00 an hour, and that her attorney billed $2,921.25 in fees for defense of the contempt motion and $9,922.16 in fees in the modification suit, for the period up through pretrial proceedings, for a total amount of $12,150.41. The evidence did not include the fees incurred during the several days of trial. The parties' attorneys stipulated to the other's qualifications and that fees in their respective billing statements were reasonable and necessary.

A jury's findings regarding attorney's fees are not binding on a trial court but merely advisory. *Satterfield v. Huff*, 768 S.W.2d 839, 841 (Tex. App.—Austin 1989, writ denied) (citing former FAMILY CODE § 11.18(a), recodified as §§ 106.001–.002). Accepting the evidence of the larger of the two amounts ($16,650.00), the $26,000 award included an additional $9,350 for fees presumably incurred representation during trial. We conclude that the evidence is sufficient to support the trial court's award of $26,000 in trial attorney's fees.

2. Appellate Attorney Fees

Erica argues that the trial court also erred in reducing the award of appellate attorney's fees from $100,000 to $20,000 because the evidence supported the jury's finding that $100,000 was a reasonable fee for representation on appeal. In his first issue on cross-appeal, Chris contends that the trial court abused its discretion in awarding appellate attorney's fees to Erica because there was no evidence regarding reasonable or necessary appellate attorney's fees presented at trial. In her related fourth issue, Erica argues that this Court lacks jurisdiction over Chris's cross-appeal. We address the jurisdictional challenge first.

(a) Jurisdiction over Cross-Appeal

Erica argues that we lack jurisdiction over Chris's cross-appeal challenging the award of appellate attorney's fees because Chris failed to pay the appellate fees as ordered by the trial court. In its final order, the trial court stated, "Respondent is ORDERED to pay one hundred thousand dollars ($20,000.00)[6] to Erica Davenport . . . by cash, cashier's check, or money order on the date a notice of appeal is filed with Clerk of the Court." She argues that because payment of the fees was a prerequisite to filing an appeal, Chris's failure to do so deprives this Court of jurisdiction over his cross-appeal.

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[6] The parties agree that the "one hundred thousand dollars" is a typographical error and request that this Court correct the error.

We are authorized by statute to consider an appeal from a "final order" rendered under Title 5 of the Family Code. TEX. FAM. CODE ANN. § 109.002(b) (West 2014). Erica and Chris filed petitions seeking to modify the parent-child relationship pursuant to Chapter 156, and the trial court's November 17, 2015 final order disposed of all pending parties and claims in the record with respect to that proceeding. We are aware of no authority—nor has Erica directed us to any—for the proposition that the payment of attorney's fees is a prerequisite to a party's right to appeal or that a party's failure to pay such fees deprives a court of jurisdiction over the appeal.[7] Rule of Appellate Procedure 25.1(b) states "[t]he filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from. Any party's failure to take any other step required by these rules . . . does not deprive the appellate court of jurisdiction but is ground only for the appellate court to act appropriately, including dismissing the appeal." TEX. R. APP. P. 25.1(b). We therefore have jurisdiction over Chris's cross-appeal.

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[7] Erica urges us to adopt the court's rationale in *In re Jafarzadeh*, No. 05-14-01576-CV, 2015 WL 72693 (Tex. App.—Dallas 2015, no pet.) (mem. op.). In that case, the court upheld the trial court's temporary order pending appeal issued under Family Code section 109.001(a)(5) awarding unconditional appellate attorney's fees. *See id*. at *2. We decline to do so. Here, the award of appellate attorney's fees is part of the trial court's final order, not a temporary order issued under Family Code section 109.001(a)(5).

(b) Evidence of Appellate Attorney's Fees

We generally review a trial court's award of appellate attorney's fees for an abuse of discretion. *See Messier*, 458 S.W.3d at 169. In order to sustain such an award, there must be evidence of the fees' reasonableness pertaining to appellate work. *See id*.; *Keith v. Keith*, 221 S.W.3d 156, 159 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Although there was evidence presented regarding the reasonableness of the amount of attorney's fees which had already been incurred, there was no evidence whatsoever regarding the attoreny's fees for appellate work. The only mention of appellate attorney's fees occurred during closing arguments during which Erica's attorney suggested what the jury should award if it awarded appellate attorney's fees.[8] Statements made by counsel during closing arguments do not constitute evidence. *See Keith*, 221 S.W.3d at 159 (observing that remarks made by attorneys

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[8] Erica's attorney argued in closing,

> If you appoint—award any attorney fees, that's up to you. I don't really care. I don't think Erica really cares. We didn't really talk about it. But up to the date of trial, we have billed out approximately $16,000. Through trial, it's $2,000 every day. If you want to award her attorney's fees for payment of her expenses, up to trial, that would be 16,000. Through trial that would be 26,000.
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> Interestingly, they want in there a Court of Appeals, which means that this will be appealed. If you want to award attorney fees for Court of Appeals, put another 20,000.

during course of trial do not constitute evidence unless attorney is actually giving testimony). The evidence should have included an opinion of what a reasonable attorney's fee would be for the services that would be necessary in the event of an appeal. *See Assoun v. Gustafson*, 493 S.W.3d 156, 168 (Tex. App.—Dallas 2016, pet. filed) (concluding trial court erred in awarding appellate attorney's fees without sufficient evidence). Because there was no evidence presented at trial about fees for an appeal, we sustain Chris's first cross-issue.[9]

Error in Judgment

Erica and Chris request that this Court correct the typographical errors in the trial court's order. The November 17, 2015 order states, in relevant part, "IT IS ORDERED that good cause exists to award Erica Davenport, for the benefit of [] Kathleen Collins, a judgment in the amount of twenty six thousand dollars ($26,000.00) for reasonable attorney's fees, expenses, and costs through the jury trial and entry of this judgment in this case incurred by Erica Davenport, with interest at 6% [] per year compounded annually from the date the payment of thirty five thousand dollars (26,000.00) is due . . . ." We agree that the language "thirty five thousand dollars" is incorrect. Because we have the necessary information before us, we may reform the judgment. *See* TEX. R. APP. P. 43.2(b); *Mullins v. Mullins*,

[9] Because of our disposition of Chris's first cross-issue, we need not address Erica's third issue complaining about the reduction of the amount of appellate attorney's fees or Chris's remaining cross-issues. *See* TEX. R. APP. P. 47.1.

202 S.W.3d 869, 878 (Tex. App.—Dallas 2006, pet. denied). The amount should be corrected to read "twenty-six thousand dollars."

Conclusion

Having sustained Chris's first issue, we modify the trial court's order to delete the portion granting appellate attorney's fees to Erica. We further modify the trial court's judgment to reflect that Erica is awarded trial attorney's fees, expenses, and costs in the amount of "twenty-six thousand dollars ($26,000.00)." As modified, we affirm the judgment of the trial court.

Russell Lloyd
Justice

Panel consists of Justices Bland, Massengale, and Lloyd.