

Affirmed and Memorandum Opinion filed October 5, 2010.



In The

**Fourteenth Court of Appeals**

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NO. 14-09-00344-CV

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**MICHAEL C. SCALLY, M.D., Appellant**

**V.**

**TONI SUZANNE SCALLY, Appellee**

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**On Appeal from the 312th District Court  
Harris County, Texas  
Trial Court Cause No. 1990-01012B**

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**MEMORANDUM OPINION**

This is an appeal from an award of attorney's fees and attorney/guardian ad litem's fees to appellees, Joseph Indelicato and Daniel J. Lemkuil. In seven issues, appellant, Michael C. Scally, contends the trial court erred by awarding attorney's and attorney/guardian ad litem's fees to appellees.

**FACTUAL AND PROCEDURAL BACKGROUND**

The trial court appointed Daniel Lemkuil as an attorney/guardian ad litem for appellant's three children in a suit between appellant and his ex-wife. Lemkuil retained Joseph Indelicato to aid him in obtaining attorney/guardian ad litem's fees from

appellant. Eventually, the trial court severed Lemkuil's claim for fees from the suit between appellant and his ex-wife.<sup>1</sup> On December 15, 2008, the trial court held a bench trial on the issue of Lemkuil's and now Indelicato's fees.<sup>2</sup> The trial court awarded Lemkuil and Indelicato their requested fees. Appellant appeals from the judgment awarding appellees their fees.

## DISCUSSION

### I. Standard of Review

Appellant chose not to bring forward the reporter's record in this case because, as he explained, the issues relate solely to matters that appear on the face of the judgment and in the clerk's record. Because appellant failed to bring forth a reporter's record or a partial reporter's record under Rule 34.6(c) of the Texas Rules of Appellate Procedure, we presume the proceedings support the trial court's judgment. *Sam Houston Hotel, L.P. v. Mockingbird Rest., Inc.*, 191 S.W.3d 720, 721 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

### II. Analysis

#### A. Lack of pleadings

In appellant's first issue, he argues the clerk's record contains no pleadings requesting attorney's fees or attorney/guardian ad litem's fees and, therefore, there can be no judgment on fees in favor of appellees. Originally, the appellate record did not contain a request for attorney's fees or attorney/guardian ad litem's fees. However, this court determined the motion requesting fees had been omitted from the clerk's record. This court ordered a supplemental record containing the omitted item. Tex. R. App. P.

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<sup>1</sup> Although the case was granted a new cause number, the style of the case remained the same, *Scally v. Scally*.

<sup>2</sup> A record was made of the bench trial; however, appellant chose not to submit it on appeal because he contends all his issues are questions of law, which, he asserts can be determined without the reporter's record.

34.5(c). Thus, the “Attorney/Guardian Ad Litem’s First Amended Original Answer In Suit Affecting The Parent-Child Relationship”—containing a request for attorney’s fees and guardian ad litem’s fees—is now a part of the appellate record. Tex. R. App. P. 34.5(c)(3). Therefore, appellant’s contention is without merit. Accordingly, we overrule appellant’s first issue.

**B. Fees “as necessities for the children”**

In issues two through five, appellant contends the trial court erred in its characterization of attorney/guardian ad litem’s fees, attorney’s fees, and prejudgment interest as necessities for the children. Attorney’s fees rendered in a suit affecting the parent-child relationship may be awarded as “necessaries” to the children. *London v. London*, 94 S.W.3d 139, 146 (Tex. App.—Houston [14th Dist.] 2002, no pet.). We review an award of attorney’s fees in the nature of child support for an abuse of discretion. *See Hardin v. Hardin*, 161 S.W.3d 14, 24–25 (Tex. App.—Houston [14th Dist.] 2004, pet. granted, judgm’t vacated w.r.m.).

Because we have no record of what evidence was presented at trial, we have no basis to review the trial court’s decisions based on that evidence. *See Sam Houston Hotel*, 191 S.W.3d at 721. We thus presume the proceedings support the trial court’s judgment. *Id.* Consequently, we conclude the trial court did not abuse its discretion. Accordingly, issues two through five, regarding the award of necessities, are overruled.

**C. Prejudgment Interest on Attorney’s Fees and Payment by Date Certain**

In his sixth issue, appellant argues the trial court erred by awarding prejudgment interest on attorney’s fees. In his seventh issue, appellant contends the trial court abused its discretion by requiring appellant to pay attorney’s fees by a date certain in the event of an unsuccessful appeal. Based upon the record provided to this court, appellant never objected at the trial court level. Consequently, appellant failed to preserve the error. The

issues are waived. *See* Tex. R. App. P. 33.1(a); *Willis v. Willis*, 826 S.W.2d 700, 702 (Tex. App.—Houston [14th Dist.] 1992, no writ) (failure to preserve objection to the trial judgment creates waiver on appeal). Appellant’s sixth and seventh issues are overruled.

#### CONCLUSION

We affirm the trial court’s judgment.

/s/ John S. Anderson  
Justice

Panel consists of Justices Anderson, Frost, and Seymore.