TRENESHA DANYAL BIGGERS SIMS,	§	No. 08-19-00193-CV
Appellant,	§	Appeal from the
v.	§	388th District Court
EPHRAM SIMS,	§	of El Paso County, Texas
Appellee.	§	(TC# 2016DCM7851)

O P I N I O N

Appellant Trenesha Danyal Biggers Sims appeals a final divorce decree entered in favor of Appellee Ephram Sims, specifically on the matter of conservatorship of their minor child. On appeal, Appellant raises seven issues where she contends the trial court abused its discretion and erred, warranting reversal. The crux of her issues stem from the trial court's decision to allow her attorneys to withdraw prior to trial, in combination with its decision to deny the motion for continuance she made shortly before trial in order for her to retain new counsel.

We overrule Appellant's first six issues and affirm the judgment of the trial court on those points. As to Appellant's seventh issue disputing the trial court's award of attorney's fees to Appellee, we reverse and remand.

BACKGROUND

The procedural history of this case leading up to trial is date-intensive, but relevant to the trial court's decisions and our review.

On January 24, 2017, Appellee filed a petition for divorce. He later amended, seeking sole

managing conservatorship of his child with Appellant. Appellant filed a counterpetition, also seeking appointment as sole managing conservator. She was initially represented by attorney Stephanie James.

On May 25, 2017, James filed a motion to withdraw as Appellant's attorney, which the court granted.

On July 12, 2017, Ouisa Davis entered her appearance as Appellant's second attorney. On August 9, 2017, Davis filed a motion to withdraw.

On August 4, 2017, Appellant filed her first jury request, which she withdrew on October 12, 2017.

On December 5, 2017, Bruce Tharpe took over as Appellant's counsel after Ouisa Davis withdrew.

On December 13, 2017, Tharpe filed a motion for continuance of the existing bench trial setting, and made another jury demand, which was Appellant's second jury request.

On December 20, 2017, Tharpe filed another motion for continuance, which the trial court granted.

On February 12, 2018, Tharpe filed a motion to withdraw as counsel, citing a conflict of interest and inability to reach his client. The trial court granted the withdrawal six days before the February 26, 2018 trial date, and subsequently entered a final divorce decree on March 9, 2018, appointing Appellee as sole managing conservator.

On March 26, 2018, Appellant filed a *pro se* motion for new trial, claiming a medical emergency kept her from appearing at the trial setting. The trial court granted the motion for new trial on May 8, 2018.

On August 23, 2018, Theola Hagger appeared on behalf of Appellant and filed a motion

for continuance of the existing August 24, 2018 trial setting. In the same pleading, Hagger renewed Appellant's request for a jury trial.

On August 31, 2018, Tharpe re-entered his appearance as co-counsel for Appellant.

On October 8, 2018, Hagger and Tharpe filed a motion for new trial and for sanctions and, in the alternative, motion to disqualify counsel. In that motion, counsel argued the trial court improperly required Appellant to appear *pro se* at "trial," despite being aware Appellant was represented by counsel and in spite of her counsel filing a motion for continuance. Other motions were made contemporaneously with the motion for new trial; however, no order regarding any of the motions was entered by the trial court.

On February 7, 2019, Tharpe filed a motion to withdraw as co-counsel, again citing conflicts of interest. The trial court granted his motion the following day.

On March 20, 2019, Hagger filed an agreed motion to withdraw as co-counsel, citing communication difficulties and a conflict of interest, which bore Appellant's signature indicating her consent to the withdrawal. At the hearing on the motion to withdraw, Appellant appeared in person and verbally consented to the withdrawal on the record. The trial court granted the withdrawal on March 22, 2019.

On April 5, 2019, Appellant filed a *pro se* motion for continuance, asking the court to first hear her request for a protective order and for additional time to find an attorney. She also filed a request to remove her jury demand.

On April 8, 2019, Appellant filed an amended motion for continuance indicating she had an attorney she wished to retain but who required additional time to prepare for trial.

The final hearing on the case occurred on April 9, 2019. Appellant stated she was not ready to proceed. The trial court heard her motion for continuance. Appellant's basis for the continuance

was discovery matters outstanding, her protective order had not been heard or ruled upon, and she wanted additional time to retain a new attorney. The trial court denied her motion for continuance. It likewise declined to hear her motion for protective order. Appellant then renewed her request for a jury trial. The trial court denied her request for a jury trial noting she had not filed a timely request prior to trial. Appellant asked the trial judge to recuse herself which the trial judge denied.

Appellee testified first. The substance of his testimony is discussed later in this opinion. Following his direct and cross-examinations, the trial court recessed for lunch. Prior to adjourning, Appellant stated she needed to "leave and come back" so she could "go grab some stuff." The trial court told the parties it would recess from 11:57 to 1:15. At 1:20, the trial court resumed but Appellant was not present. Appellee testified on re-direct. After his testimony, Appellee moved for a directed verdict. The trial court waited an additional six minutes, until 1:30, to see if Appellant would return. While waiting for Appellant, the trial court heard testimony from Appellee's counsel regarding his request for attorney's fees.

When Appellant had not returned by 1:30, Appellee renewed his request for judgment in Appellee's favor, specifically for sole managing conservatorship. The trial court issued its ruling from the bench:

> Due to Ms. Biggers's tradition of not showing up to hearings, making excuses for not being at hearings on time, always having an excuse for not coming -- I understand that she telephoned and stated she had run out of gas, and so she could not be here at the appropriate time.
>
> However, due to the history that Ms. Biggers has with this Court, the Court is going to grant the relief with the exception of the Court is going to name Mr. Sims sole managing conservator of the child.

The trial court outlined the remainder of its ruling, which is not relevant to this appeal.

On April 18, 2019, the trial court entered its final decree of divorce. The only issue on appeal is the award of sole managing conservatorship of the child to Appellee. Appellant was

named possessory conservator.

That same day, Teresa Caballero and Troy Brown entered their appearances as counsel for Appellant. Contemporaneous with the filing of their appearances, they filed a motion to recuse the trial court judge. The trial court judge filed an order of referral, and the case was transferred to County Court at Law No. 5. It was subsequently transferred to the 388th District Court.

On May 17, 2019, Appellant filed her motion for new trial, or, alternatively, motion to vacate, which, in part, forms the basis of this appeal. On July 25, 2019, Appellant's motion for new trial was denied.

DISCUSSION

Issue One: Whether the trial court abused its discretion when it allowed Appellant's attorneys to withdraw shortly before trial.

Standard of Review

The granting or denial of a motion to withdraw is reviewed under an abuse of discretion standard. *In re Marriage of Harrison*, 557 S.W.3d 99, 115 (Tex.App.—Houston [14th Dist.] 2018, pet. denied). A trial court's ruling on a motion to withdraw will only be overturned where the trial court "acted unreasonably or in an arbitrary manner, without reference to guiding rules or principles." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002). "A trial court does not abuse its discretion when some evidence reasonably supports its decision." *Harrison*, 557 S.W.3d at 112, (citing *Butnaru*, 84 S.W.3d at 211). "A court abuses its discretion by granting a motion to withdraw that fails to satisfy the requirements of Rule 10 of the Texas Code of Civil [P]rocedure." *Integrated Semiconductor Services, Inc. v. Agilent Technologies, Inc.*, 346 S.W.3d 668, 671 (Tex.App.—El Paso 2009, no pet.).

Applicable Law

Rule 10 of the Texas Rules of Civil Procedure provides the requirements for any attorney

wishing to withdraw from representing his or her client. *See* TEX.R.CIV.P. 10; *See Rogers v. Clinton*, 794 S.W.2d 9, 10 n.1 (Tex. 1990). First, a motion must set forth good cause for the withdrawal. *See* TEX.R.CIV.P. 10. If another attorney will be substituted for the withdrawing attorney, the motion must state the contact information for the substituting attorney; whether the party approves of the substitution; and the withdrawal is not sought for delay. TEX.R.CIV.P. 10. If another attorney is not being substituted, the motion must state whether a copy of the motion was delivered to the party; the party has been informed in writing of their right to object to the withdrawal; whether the party consents to the withdrawal; the party's last known address; and a listing of all pending settings and deadlines. *Id.*

Analysis

Attorney Tharpe's Motion to Withdraw

Appellant first asserts Tharpe's motion did not comply with Rule 10 because it did not state (1) whether a copy of the motion was delivered to Appellant; (2) whether Appellant was notified of her right to object; (3) whether she consented; (4) her last known address; or (5) a list of pending settings and deadlines. Appellant claims it is beyond dispute she was unaware of the motion's filing because her other attorney at the time, Attorney Hagger, was not aware of the attempted withdrawal until she received a copy of the court's order granting the motion. Appellant contends the improper notice and lack of a hearing or other opportunity to object constitute insufficient evidence to prove good cause existed to support the withdrawal. Appellee disagrees, alleging Tharpe's motion stated good cause for withdrawal--specifically, a conflict of interest which arose between Appellant and Tharpe, and continuing to represent her would result in a violation of professional conduct or other law. Appellee does not address the alleged deficiencies regarding notice as stated in Rule 10.

A case out of this Court is analogous to the instant case. In *Thompson v. Thompson*, 387 S.W.3d 769 (Tex.App.—El Paso 2012, no pet.), the trial court granted the respondent several continuances for various reasons. *Id.* at 770. The respondent's attorney filed a motion to withdraw which the trial court granted, without holding a hearing, six days prior to the final hearing. *Id.* At the final hearing, the trial court acknowledged the respondent's request for additional time to find an attorney, which it treated as an oral motion for continuance and denied. *Id.*

In *Thompson*, we reiterated our prior opinion that a trial court abuses its discretion when it grants a motion to withdraw which does not comply with Rule 10. *Id.* at 771, (citing *Integrated Semiconductor Services Inc.,* 346 S.W.3d at 671. However, we also acknowledged such error may be harmless when additional time is given to obtain counsel and otherwise prepare for trial. *Id.* at 771, (citing *Walton v. Canon, Short & Gaston,* 23 S.W.3d 143, 148 (Tex.App.—El Paso 2000, no pet.). However, when a continuance under the same circumstances is not permitted, the error is not harmless. *Id.,* (citing *Villegas v. Carter,* 711 S.W.2d 624, 626–27 (Tex. 1986)).

Under the standard set forth in *Thompson*, we look first to whether the subject motions to withdraw complied with Rule 10. *Thompson*, 387 S.W.3d at 771. Then proceed, if necessary, to determine whether harm resulted from the trial court's grant. *Id.*

Here, Tharpe filed two motions to withdraw. The second is the only one pertinent to this appeal, as the first was filed prior to the trial court's first judgment, which was vacated following the trial court's grant of Appellant's first motion for new trial. In his second motion to withdraw, Tharpe cited to Rule 1.15 of the Texas Disciplinary Rules of Professional Conduct, which addresses withdrawal from representation when continued representation would require the attorney to violate the rules of professional conduct or another law. He also stated Appellant had "discharged" him from representing her, and "one or more of the conditions set forth in Rule

1.15(b)" required him to withdraw.

The circumstances surrounding Tharpe's withdrawal are somewhat unique considering his status as Appellant's co-counsel, since Rule 10 contains different notice requirements for attorneys whose representation is being substituted, and attorneys whose representation is not being substituted. Neither situation exactly applies in Tharpe's situation. However, it is clear Tharpe's motion does not comply with the requirements set forth in Rule 10 pertaining to motions to withdraw in which another attorney is not being substituted for the withdrawing attorney. *See* TEX.R.CIV.P. 10. As Appellant observes, it did not state (1) whether a copy of the motion was delivered to Appellant; (2) whether Appellant was notified of her right to object; (3) whether she consented; (4) her last known address; or (5) a list of pending settings and deadlines. Further, Tharpe's motion failed to state it was not being made purely for the purpose of delay and does not comply with the requirements for motions where an attorney *is* being substituted. *See id.* We therefore agree to the extent that granting Tharpe's motion to withdraw when it failed to comply with either scenario under Rule 10 was an abuse of discretion. The question is whether that error was harmless or not.

At the time of Tharpe's withdrawal, Appellant was also represented by Hagger, who had been Appellant's counsel for approximately six months, and the trial setting was two months away. When Tharpe withdrew, the record does not give any indication that Appellant would be prejudiced by his withdrawal. Accordingly, we find the trial court's error in granting Tharpe's motion amounted to harmless error.

Attorney Hagger's Motion to Withdraw

Next, Appellant contends Hagger's motion to withdraw fails to meet Rule 10's requirements because it fails: to list the time or date of the hearing on the motion; state whether

Appellant was notified in person or by mail of the motion's filing; and incorporates an incorrect last known address for Appellant. Appellant also asserts her purported consent to the motion was the result of her signing the motion while "in utter distress" and she did not, in fact, consent to Hagger's withdrawal.

In support of her argument, Appellant cites to *Moss v. Malone*, 880 S.W.2d 45 (Tex.App.—Tyler 1994, writ denied). In that case, counsel for plaintiff moved to withdraw one day prior to the scheduled trial setting. *Id.* at 46. The motion to withdraw, which was granted, stated there was "a material difference of opinion between [counsel] and Plaintiff as to the presentation of the case[,]" and granting the motion would not adversely affect the defendant's interests or unreasonably delay the proceedings. *Id.* The following day, the date trial was scheduled, the trial court granted a continuance but cautioned the parties no further continuances would be allowed. *Id.* Trial was set approximately one month later, at which time the plaintiff had still not retained counsel due to the timing of the pending trial date. *Id.* at 46-47. The plaintiff was required to proceed *pro se*, and ultimately voluntarily dismissed the lawsuit rather than go to trial. *Id.* at 47-48. She subsequently filed a motion for new trial (with new representation) on the grounds the trial court abused its discretion in allowing the withdrawal and refusing to grant an additional continuance when the plaintiff was unable to obtain counsel for trial. *Id.* at 49.

The Tyler Court found plaintiff's counsel's motion to withdraw deficient pursuant to Rule 10's standards: (1) failure to send a copy to Appellant; (2) failure to indicate whether plaintiff had notice of the motion being filed or heard by the court; (3) failure to advise the plaintiff of her right to object to the motion; (4) failure to note whether the plaintiff consented to the motion; and (5) failure to include the plaintiff's last known address or a listing of pending settings and deadlines. *Id.* at 49. Accordingly, the Tyler Court found the trial court abused its discretion in allowing the

withdrawal.

The case at hand is distinguishable from *Moss*. First, as Appellee notes, Hagger's motion complies with Rule 10 on its face, as it states: (1) a copy of the motion was delivered to Appellant; (2) Appellant was notified of her right to object; (3) whether she consented; (4) her last known address; and (5) a list of pending settings and deadlines. The motion does not state the time or date of the hearing or how Appellant was notified, however, those are not Rule 10 requirements. *See* TEX.R.CIV.P. 10. Second, the accuracy of the last known address cited in the motion, as well as the other matters concerning notice to Appellant are not material because Appellant was present at the hearing on the motion. This is evidenced by her (a) signing indicating her consent to the withdrawal, and (b) physically present at the hearing and represented to the trial judge on the record she agreed to Hagger's withdrawal.

Appellant asserts in her motion for new trial and her brief on appeal that she consented to the motion while "in utter distress," as stated in her email to Hagger *after* the hearing, and did not in fact agree to Hagger's withdrawal. However, the change of heart she expressed after Haggar's withdrawal does not equate to the trial court abusing its discretion by granting the withdrawal when Appellant's signature consenting to it and her verbal representation on the record to the court indicating her agreement.

Second, Hagger's motion and her arguments to the court adequately demonstrate good cause existed for withdrawal. In her motion, Hagger states, "[g]ood cause exists for withdrawal of Theola M. Hagger as counsel, in that she is unable to effectively communicate with TRENESHA DANYAL BIGGERS SIMS in a manner consistent with good attorney-client relations and that a conflict of interest has arisen which makes further representation unfeasible." At the hearing on the motion to withdraw, the following exchange occurred between Hagger and the trial court:

THE COURT: Okay. And, Ms. Hagger, you have filed a motion to withdraw.

MS. HAGGER: I have, Your Honor.

THE COURT: Okay. All right. Let me hear it.

MS. HAGGER: Okay. Thank you. Earlier last month, I guess, or this month, my cocounsel withdrew with the basis of there were issues in regards to his representation. I actually was not aware he was withdrawing until after the order was signed that -- issues, but the main issue is that there's a creation of a conflict of interest that has made it where I cannot effectively represent my client at this point.

I tried to resolve it and to be able to still stay on the case, but there's no resolution that can happen at this point. It wasn't my intention for this to take place, but that's where it is. In addition to that, there's some -- there were some communication issues that make it -- made it ineffective for me to be able to continue, as well.

Mrs. Sims has signed off and agreed to release me from the case, she understands that there is hearings that are in place. I have given her all of her records, even though my motion says that I wouldn't, but I tried to do as much as I could to prepare her for today with the motion. But, other than that, there just isn't any possibility for me to continue, ethically.

THE COURT: Okay. Well, I mean, I told you and the other lawyer that I was not going to allow you to withdraw because I went out of my way to allow this to happen. So, if you could tell me what is the conflict, why can you no longer represent her?

MS. HAGGER: At this point I would reference the motion that was filed by cocounsel at this time. I cannot release that information because that would be a violation of attorney-client privilege, plus it could prejudice my client's case at this point.

If -- Your Honor, to be honest, if I could stay on this case and clean it up and finish it, I would. I wasn't aware of what was going on and it's created such a condition that it has involved me with other issues that I cannot disclose at this point, then, I cannot move forward.

And the Bar -- the State Bar has allowed in certain circumstances in cases such as this -- I understand about the deadline, I understand what you stated. However, that was not known that this would happen during the time that we had that conversation.

I've done everything I could to stay on this case. It's not me trying to increase the time or to be difficult or whatever, it's just -- I cannot ethically continue.

THE COURT: Okay.

. . .

THE COURT: Okay. Well, Ms. Sims is here, so I can get her information. Okay.

And Ms. Sims, you are in agreement with Ms. Hagger withdrawing from your case?

MS. SIMS: Yes.

We find Hagger's motion and her arguments adequately demonstrate good cause for her to withdraw from the case. We do not agree with Appellant's assertion that the trial court judge's "fail[ure] to attempt to discover the factual basis of Hagger's claimed 'conflict of interest' or the 'communication issues' between her and [Appellant] . . . could have been done *in camera*." Rather, the trial court inquired about the nature of the conflict and Hagger informed the court divulging the facts involved would violate the attorney-client privilege and potentially jeopardize Appellant's case. As our sister court in Fort Worth stated:

> Rule 1.15 . . . makes clear that a lawyer 'shall withdraw' if continued representation will violate the rules of professional conduct. TEX. DISCIPLINARY RULES PRO'L CONDUCT R. 1.15(a)(1). But perhaps most important to this case, the rules recognize the confidential nature of the relationship and note that, while a 'tribunal may wish an explanation for the withdrawal,' the lawyer is nonetheless 'bound to keep confidential the facts that would constitute such an explanation.' *Id.* The rule further guides the court that '[t]he lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.' TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.15, cmt. 3 (referring to rule 1.06(e)).

In re Reed, No. 02-18-00088-CV, 2018 WL 1974470, at *5 (Tex.App.—Fort Worth Apr. 26, 2018, no pet.)(mem. op.).

We find adequate inquiry was made into the nature of the conflict and Hagger justifiably withheld the nature of the conflict so as to preserve her client's confidences and not jeopardize Appellant's case.

We are unpersuaded the trial court erred in granting Hagger's motion under these

circumstances.

Appellant's first issue is overruled.

Issue Two: Whether the trial court abused its discretion when it denied Appellant's motion for continuance, and thus required her to proceed to trial without an attorney.

Standard of Review and Applicable Law

Whether to grant a party's motion for continuance "rests within the sound discretion of the trial judge." *State v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984). Where a trial court denies a party's motion, the court of appeals will not disturb the decision "unless the record discloses a clear abuse of discretion." *Id.* The test for determining whether denial of a continuance is an abuse of discretion is not "mechanical[;]" rather, the case's individual circumstances must be examined, "particularly in the reasons presented to the trial judge at the time the request is denied." *Crank*, 666 S.W.2d at 94-95, (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1994)).

Where the absence of counsel is put forth as the bases for urging a continuance or new trial, Texas courts historically require showing the failure of a party to have representation at trial was not the result of the party's "own fault or negligence." *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986).

Analysis

We return to *Thompson* and this Court's analysis of the propriety of granting a motion for continuance after a party's attorney has been allowed to withdraw. *Thompson* distinguishes its facts from *Villegas*, where an attorney was allowed to withdraw two days prior to trial, with the client receiving less than a week's notice of the attorney's intent to withdraw before the case went to trial. *See Thompson*, 387 S.W.3d at 771-72, (citing *Villegas*, 711 S.W.2d at 625). The Supreme Court reversed the trial court's denial of the motion for continuance and this Court's affirmance of same, "holding that the denial of the continuance constituted an abuse of discretion because

Villegas was not negligent or otherwise at fault in causing his attorney's withdrawal." *Id.,* (citing *Villegas*, 711 S.W.2d at 625). The Supreme Court determined the motion to withdraw was granted too close to the trial date and did not allow Villegas adequate time to secure another attorney. *Id.* at 772.

Unlike *Villegas*, the appellant in *Thompson* failed to cooperate with her attorneys, including failing to appear for mediation, and failing to file a sworn inventory, a proposed division of property, or a proposed parenting plan. *Id.* Multiple continuances were already granted to the appellant before the subject motion was denied. *Id.* at 771.This Court also noted appellant went through four attorneys during the pendency of the case. *Id.* at 772. The cumulative effect of appellant's actions during the litigation demonstrated the likelihood that her lack of counsel was the result of some fault or negligence on her part. *See id.* at 772. The appellant in *Thompson* failed to show her lack of trial counsel was not the result of her "own fault or negligence." *See Villegas*, 711 S.W.2d at 626.

We find this case analogous to *Thompson*. Hagger was Appellant's fourth attorney to appear on her behalf in the case, which occurred approximately a year and a half after Appellee initiated his lawsuit. *See Thompson*, 387 S.W.3d at 772. In the time leading up to the final hearing, Appellant had twice previously failed to be present and ready for a final hearing setting: once when she was *pro se* and a second time when her attorney did not appear. Before filing her motion for continuance on April 5, 2019, an amended version of which she filed on April 8, 2019, Appellant had previously moved for continuance of the final hearing date four times, each of which the trial court granted. Finally, and perhaps most notably, three of Appellant's four attorneys predating her representation by Hagger cited inability to communicate effectively as their reason for seeking

withdrawal.[1]

Under the circumstances of this case, we find the trial court did not abuse its discretion in denying Appellant's April 8, 2019 motion for continuance because Appellant has not demonstrated her failure to have representation at trial was not the result of her own fault or negligence.

Appellant's second issue is overruled.

Issue Three: Whether the trial court abused its discretion when it denied Appellant's motion for new trial.

Appellant next urges the trial court erred in denying Appellant's motion for new trial. Specifically, Appellant complains her failure to appear following the lunch recess at her final hearing, which she believes to be the basis for the trial court entering its final decree in favor of Appellee, was not intentional or done with conscious disregard, and thus should not have been the basis for "default." The first basis of her motion for new trial was the trial court's alleged error in allowing Hagger to withdraw prior to trial. However, we have found there was no abuse of discretion by granting Hagger's motion to withdraw.

Second, Appellant's motion for new trial argues the trial court erred in entering a "post-answer default" against her when she failed to appear in court following the lunch recess. The following analysis discusses the alleged error.

Standard of Review and Applicable Law

Appellant relies upon *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939), which addresses no-answer default judgments, and inapplicable to the instant case. *Id.* at 126. Here, no default judgment was rendered against Appellant; rather, when Appellant did not appear following the trial court's recess for lunch, Appellee's counsel moved for "directed

[1] Appellant's fourth attorney, Ouisa Davis, was substituted for Tharpe. No reason was given for the substitution; however, the trial court noted in its substitution order that "good cause exists for withdrawal of OUISA D. DAVIS as counsel."

verdict." A motion for directed verdict, procedurally speaking, may be sought in a non-jury trial; however, because there is no jury to "direct," the correct motion is one for judgment. *See McKinley Iron Works, Inc. v. TEC*, 917 S.W.2d 468, 470 (Tex.App.—Fort Worth 1996, no writ).

Preservation of Error and Briefing Waiver

All matters on which a party seeks review by the court of appeals must be timely brought before the trial court, stating "the grounds for the ruling . . . with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context[.]" TEX.R.APP.P. 33.1(a)(1)(A); *see Pacheco v. Rodriguez*, 600 S.W.3d 401, 406 (Tex.App.—El Paso 2020, no pet.). Here, the complaint in Appellant's motion for new trial regarding the divorce award against her relies on the *Craddock* factors and whether it was proper for the trial court to enter "default judgment" against her.

Our review will examine whether the trial court abused its discretion by denying Appellant's motion for new trial based on the allegedly improper "post-answer default" it entered against her when she failed to appear in court following the lunch recess.

Analysis

Since we have already determined it was not a default judgment entered against Appellant, but rather a motion for judgment made by Appellee, we find the trial court did not abuse its discretion in denying Appellant's motion for new trial that a default judgment was entered against her. As it pertains to the motion for judgment rendered against Appellant, we analyze the sufficiency of the trial court's decision in our review of Appellant's sixth issue, herein.

Appellant's third issue is overruled.

Issue Four: Whether the trial court abused its discretion when it denied Appellant's motion to recuse.

In her fourth issue, Appellant claims the trial court abused its discretion when it denied her

oral request for recusal raised on the day of trial. Her position is the trial judge had a duty to either recuse herself or refer the case to the regional presiding judge, regardless of the motion's "procedural defects." *See* TEX.R.CIV.P. 18a(j)(1).

Standard of Review and Applicable Law

When a trial court refuses a motion to recuse, we review its action under the abuse of discretion standard. *Kemp v. State*, 846 S.W.2d 289, 306 (Tex.Crim.App. 1992); *see also* TEX.R.CIV.P. 18a(f).

Texas Rule of Civil Procedure 18a discusses recusal and disqualification of judges. Part (a) of the rule includes the mandatory requirements the motion must contain to include that it must be written and filed, verified, assert one or more grounds for recusal or disqualification pursuant to Rule 18b, must assert details and facts in support of recusal or disqualification, and cannot arise solely from the judge's rulings. TEX.R.CIV.P. 18a(a). Part (b) of the rule requires, among other things, the motion must be filed no later than ten days "before the date set for trial or other hearing . . . ." TEX.R.CIV.P. 18a(b). Part (f) of Rule 18a describes the judge's obligations after recusal is sought, and states:

> Regardless of whether the motion complies with this rule, the respondent judge, within three business days after the motion is filed, must either: (A) sign and file with the clerk an order of recusal or disqualification; or (B) sign and file with the clerk an order referring the motion to the regional presiding judge. . . . If a motion is filed before evidence has been offered at trial, the respondent judge must take no further action in the case until the motion has been decided, except for good cause stated in writing or on the record.

TEX.R.CIV.P. 18a(f).

Analysis

Texas case law has long required strict adherence to the requirements set forth in Rule 18a(a) and the timing restrictions of 18a(b) to preserve issues of recusal for appellate review. *See, e.g.*, *Gonzalez v. Gonzalez*, 659 S.W.2d 900, 901 (Tex.App.—El Paso 1983, no writ); *McElwee v.*

McElwee, 911 S.W.2d 182, 185-86 (Tex.App.—Houston [1st Dist.] 1995, writ denied); *Wirtz v. Massachusetts Mut. Life Ins. Co.*, 898 S.W.2d 414, 422-23 (Tex.App.—Amarillo 1995, no pet.).

Appellant cites *In re Marshall*, 515 S.W.3d 420, 422 (Tex.App.—Houston [14th Dist.] 2017, orig. proceeding), wherein a trial court erred by denying a motion to recuse because it was handwritten and otherwise did not meet the requirements of Rule 18a. *Id.* There, the Houston court held the numerous cases cited by the real party in interest that the requirements of Rule 18a are mandatory and failure to comply results in a waiver of the right to recusal were decided prior to the Legislature's 2011 amendment to the rule which added the "'regardless of whether the motion complies with this rule[]'" language in Rule 18a(f). *Id. Marshall* also cites to *Barnhill v. Agnew*, No. 12-12-00080-CV, 2013 WL 5657644, at *2 (Tex.App.—Tyler Oct. 16, 2013, no pet.)(mem. op., per curiam), in which the Tyler Court held Rule 18a(f) requires the trial judge to "adhere to its mandates" in spite of any procedural deficiencies in a recusal motion. *See In re Marshall*, 515 S.W.3d at 422. At least one other Texas intermediate court of appeals has also opined an abuse of discretion occurs when, regardless of a motion for recusal's procedural deficiencies, the trial court fails to either recuse itself or refer the case to the administrative presiding judge. *See, e.g.*, *In re Amir-Sharif*, No. 13-19-00573-CV, 2019 WL 6795864, at *2 (Tex.App.—Corpus Christi Dec. 12, 2019, orig. proceeding)(mem. op.).

We have not previously weighed in expressly on the scope of Rule 18a(f) since amended by the Legislature to include the "[r]egardless of whether the motion complies with this rule" language. *See* TEX.R.CIV.P. 18a(f)(1). In *Molinar v. Rafaei*, No. 08-14-00299-CV, 2016 WL 5121988 (Tex.App.—El Paso Sep. 21, 2016, pet. denied)(mem. op.), we held unequivocally oral motions to recuse are not valid under Rule 18a. *Id.,* at *3, (citing *Barron v. State Attorney General*, 108 S.W.3d 379, 382 (Tex.App.—Tyler 2003, no pet.). We further reiterated, "[a] motion to recuse

must be verified, must assert one or more of the grounds listed in Rule 18b, and must not be based solely on the judge's rulings in the case. *See id.,* (citing TEX.R.CIV.P. 18a(a)(1), (2), (3)). However, we have not reconciled those directives with the broadened language in Rule 18a(f). Happily, we do not need to address that issue today given the specific and limited facts presented here.

We do not have to resolve the apparent conflict in the mandatory language contained in Rule 18a(a) and (b) with the mandates described in part (f) because it is our opinion no valid motion to recuse was made by Appellant under Rule 18a. Rule 18a describes a motion to recuse as one that is, under the most skeletal standards, written and filed with the clerk of the court. *See* TEX.R.CIV.P. 18a(a). The "motion" Appellant claims to have made was an oral request on the day of trial as the Appellee was beginning to put on its evidence. To allow an oral motion for recusal on the day of trial which fails to satisfy any other enumerated requirement of Rule 18a not only flouts the intent of the rule and its mandatory requirements, but also opens the door for litigants to use such a tactic to further delay a case and exhaust judicial resources.

In this case, the trial judge presided over the case from its inception, over a span of more than two years, and entered innumerable number of orders. At any time, Appellant or one of her attorneys could have sought to recuse the trial judge by filing a written motion, regardless of whether it complied with the requirements of Rule 18a. If she or they had, the trial judge would under Rule 18a(f), been required to recuse herself or refer the case to the regional presiding judge for a decision on the recusal. That did not occur. Accordingly, we find the trial court did not err in denying Appellant's oral request for recusal on the day of trial.

Appellant's fourth issue is overruled.

Issue Five: Whether the trial court abused its discretion when it denied Appellant's request for a jury trial.

In her fifth issue, Appellant alleges the trial court abused its discretion when it denied her

request for a jury trial.

Standard of Review and Applicable Law

The right to a jury trial, as Appellant points out, is fundamental to our democracy. *See* U.S. CONST. Amend. VII; TEX.CONST. art. 1, § 15. Cases determining conservatorship may be heard by a jury. *See* TEX.FAM.CODE ANN. § 105.002(c)(1). In order to receive a jury trial, a party must make a written request for a jury at least thirty days prior to trial and pay the required fee. TEX.R.CIV.P. 216(a), (b). Failure to timely request a jury trial or pay the required fee, among other things, results in the waiver of a litigant's right to trial by jury. *See In re Wells Fargo Bank Minn. N.A.,* 115 S.W.3d 600, 606-07 (Tex.App.—Houston [14th Dist.] 2003, orig. proceeding). Denial of a jury trial is reviewed for an abuse of discretion considering the entire record by the reviewing court. *See Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996).

Analysis

Here, Appellant admits she made a request for a jury trial three times over the course of the litigation. However, after each of those requests, Appellant subsequently withdrew her requests for a jury trial. The final withdrawal of her request for a jury trial occurred the day before trial. Nothing in the record before us indicates Appellant tendered a jury fee and Appellant does not claim to have paid it.

Appellant argues her renewed request for a jury trial in open court on the day of trial could not have amounted to waiver and cites *In re D.R.*, 177 S.W.3d 574, 580 (Tex.App.—Houston [1st Dist.] 2005, pet. denied) for the proposition that a party waives its request for a jury trial if, at the start of a bench trial, no objection is made. However, even if one objects to a non-jury trial, waiver can still occur when the party neglects to pay its fee or make a timely request for a jury trial. *See In re Wells Fargo Bank Minn. N.A.,* 115 S.W.3d at 606-07. We find Appellant waived a jury trial,

since the jury request was not in writing, was not timely, and no jury fee was paid. TEX.R.CIV.P. 216(a), (b). Accordingly, there was no abuse of discretion in the trial court's denial of Appellant's request for a jury on the day of trial.

Appellant's fifth issue is overruled.

Issue Six: Whether Appellee presented sufficient evidence to support the trial court's award of managing conservator in his favor.

In her sixth issue, Appellant claims either no evidence or insufficient evidence supports the trial court's appointment of Appellee as managing conservator. In support, Appellant relies on the standard for reviewing default judgments. However, as previously determined the trial court did not render default judgment against Appellant; rather, it was the non-jury trial equivalent of a directed verdict which the trial court rendered in Appellee's favor. Accordingly, we proceed with our sufficiency analysis as it pertains to a motion for judgment.

Standard of Review

Determinations of conservatorship are reviewed for an abuse of discretion and may only be reversed where the trial court's decision was arbitrary and unreasonable. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). "The trial court is given wide latitude in determining the best interests of a minor child." *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982). Where a trial court's decision is based on conflicting evidence, there is no abuse of discretion so long as some evidence of a substantive and probative character support the trial court's decision. *In re M.M.M.*, 307 S.W.3d 846, 849 (Tex.App.—Fort Worth 2010, no pet.)(citing *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007) and *In re Barber*, 982 S.W.2d 364, 366 (Tex. 1998)(orig. proceeding)). Factual and legal findings underlying a trial court's determination of conservatorship are subject to sufficiency review on appeal. *In re J.A.J.*, 243 S.W.3d at 616 n.5.

When the trial court grants a motion for judgment in a bench trial, we examine the record

as if the judgment is granted based on all the facts. *See Qantel Bus. Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 303-04 (Tex. 1988). Our ruling is not based on whether there was no evidence of a particular claim or whether any matter was established as a matter of law. *See id.* In other words, we review the judgment under the legal sufficiency standard. *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005).

"When no findings of fact or conclusions of law are filed, the trial court judgment [will] be upheld on any legal theory supported by the record." *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 686 (Tex. 2007)(orig. proceeding). When the trial court is the fact finder, the same legal and factual sufficiency standards are applied to its findings as those found by a jury in a jury trial. *In re Doe*, 19 S.W.3d 249, 253 (Tex. 2000).

In this case, findings of fact were neither requested nor filed. However, the reporter's record of the final hearing is part of our record on appeal. Accordingly, our standard of review is the same as if we were reviewing jury findings or findings of fact filed by the trial court. *See Wade v. Comm'n for Lawyer Discipline*, 961 S.W.2d 366, 374 (Tex.App.—Houston [1st Dist.] 1997, no writ). We "must uphold the judgment on any theory of law applicable to the case" when the evidence supports the trial court's implied findings. *Giangrosso v. Crosley*, 840 S.W.2d 765, 769 (Tex.App.—Houston [1st Dist.] 1992, no writ); *accord Point Lookout W., Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987). In making this determination, we consider only evidence which favors the implied factual findings and disregard all evidence in opposition to them. *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 613 (Tex. 1950).

Applicable Law

Where the parents of a child are or will be separated, the trial court is required to appoint "at least one managing conservator" of the child and may appoint a sole managing conservator or

joint managing conservators. TEX.FAM.CODE ANN. § 153.005(a). In making its appointment, the trial court "shall consider whether, preceding the filing of the suit or during the pendency of the suit: (1) a party engaged in a history or pattern of family violence…; (2) a party engaged in a history or pattern of child abuse or child neglect; or (3) a final protective order was rendered against a party." *Id.,* at § 153.005(c).

Analysis

In his case-in-chief, Appellee put on the following evidence which we find supports the implied findings of the trial court regarding conservatorship:

- Appellee lives in his home with his mother. It is a three-bedroom, two-bathroom home. Appellee was concerned for his child's safety and welfare if conservatorship was given to Appellant. He did not know where his child was living at the time of trial, or who else was living in the home with her. At one point during a court hearing, Appellee was made aware Appellant was living in a homeless shelter, which concerned him for their child.

- When he saw the child on October 8, 2017, she was lethargic when he picked her up. Her condition improved after she ate a meal. One of the times he picked up his child, she had lice and a fever, which he was not informed about but discovered after she arrived in his care. A different occasion, in August of 2017, Appellee picked up his daughter and discovered scrapes across her face on her forehead, cheek, nose, and shoulder. Appellant told him their daughter fell, which caused the scrapes on her body.

- Appellee testified Appellant demoralized and degraded him in front of their child if he did not complete tasks according to her preference. When disciplining her other daughter, Appellee testified Appellant would make that child sit in a corner for ten or twenty minutes facing a wall. In describing this incident, Appellee testified the child in question was three years' old at the time.

- He stated Appellant has used drugs. Appellee claims Appellant was using marijuana "more frequently" around September of 2016, which she claimed was to treat anxiety and depression. Appellee claimed Appellant used marijuana daily in front of their child. Appellee testified when he would see their child, she appeared "very lethargic as if -- as if like she's drugged. She just looked -- she's out of it." Appellee testified he was concerned about "[t]he mental level of care that [Appellant] provides; abuse." Appellee testified "in chapters of [her] parenting, [Appellant], even as a spouse, is abusive emotionally, physically. And I feel that she would basically implement those same things on my child, too." He testified to seeing bruises on their child when he would pick her up.

- Appellee described an incident where he and Appellant were arguing in front of her other child and he claims Appellant pushed him into the wall. In September of 2017, on a night which Appellee had custody, Appellant called the police to go to his house. In another incident, Appellee testified that shortly into their marriage, following a disagreement, Appellant "ran on a rampage throwing things, slamming doors, put[ting] holes in walls, breaking things. She threw my cell phone at my head while I was in the bed laying there." In the same episode, Appellant allegedly screamed obscenities at Appellee, all of which purportedly happened while her other child was present, and she was pregnant with Appellee's child. Appellee testified to an incident in September of 2017 where Appellant jumped on him and physically attacked him while he was holding their daughter.

- Appellee testified he was willing and able to take care of the child, and physically support her. He stated he has support from his mother and cousin to help with childcare if necessary. He requested primary custodial rights to his child, which he testified he believed would be in her best interest.

- On cross-examination, Appellee testified he recently took a plea deal with the Bexar County District Attorney's office for charges that he beat Appellant unconscious. He was required to do community service, the BIPP program, make a donation to the domestic violence shelter, and serve a probationary period. On redirect, Appellee clarified that after he fulfilled those conditions, the case would be dismissed, and the case would not reflect a guilty plea having been entered by him.

We find the evidence supports the trial court's decision to award conservatorship to Appellee. It is clear from his testimony he had concerns regarding the child's health while she is in her mother's care. Furthermore, he testified to Appellant's history of drug abuse, and her history of domestic violence against him. He also testified regarding his desire for conservatorship of their daughter, and his ability to care for her while she is in his possession. Accordingly, we find there is some evidence of a substantive and probative character to support the trial court's decision, and no abuse of discretion has occurred. *See In re M.M.M.*, 307 S.W.3d at 849.

Appellant's sixth issue is overruled.

Issue Seven: Whether the trial court abused its discretion in awarding attorney's fees to Appellee.

In her final issue, Appellant claims no evidence supports the trial court's award of attorney's fees to Appellee.

Standard of Review and Applicable Law

In suits affecting the parent-child relationship, the Texas Family Code allows for an award of reasonable attorney's fees. *See* TEX.FAM.CODE ANN. § 106.002(a). Whether to award those fees lies within the discretion of the trial court. *Bruni v. Bruni*, 924 S.W.2d 366, 368 (Tex. 1996). The party seeking fees must prove both reasonableness and necessity of the fees sought. *See In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 809 (Tex. 2017)(orig. proceeding). The reasonableness of a judgment for attorney's fees is a question of fact, for which competent evidence must be put forth. *Tull v. Tull*, 159 S.W.3d 758, 760 (Tex.App.—Dallas 2005, no pet.)(citing *Reyna v. Reyna*, 584 S.W.2d 926, 927 (Tex.Civ.App.—Houston [14th Dist.] 1979, no writ)); *see also Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 547 (Tex. 2009).

On appeal, "a reviewing court may not substitute its judgment" for that of the fact finder. *Smith*, 296 S.W.3d at 547. "'[W]here the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon, [the witness's testimony] is taken as true, as a matter of law.'" *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990)(citing *Cochan v. Wool Growers Central Storage Co.*, 166 S.W.2d 904, 908 (Tex. 1942)). In those circumstances, "'[t]he court, as a trier of fact, may award attorneys' fees as a matter of law[.]'" *Id.*

The Texas Supreme Court summarized the method to determine the reasonableness and necessity of attorney's fees in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 501-502 (Tex. 2019)(*citing El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012)):

> Under the lodestar method, the determination of what constitutes a reasonable attorney's fee involves two steps. First, the [fact finder] must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. The [fact finder] then multiplies the number of such hours by the applicable

> rate, the product of which is the base fee or lodestar. The [fact finder] may then adjust the base lodestar up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case.

Rohrmoos Venture, 578 S.W.3d at 501, (*citing El Apple*, 370 S.W.3d at 760). "General, conclusory testimony devoid of any real substance will not support a fee award." *Id.* The minimum sufficient evidence necessary to meet the claimant's burden includes "evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." *Id.* at 502, (*citing El Apple*, 370 S.W.3d at 762-63). While the Supreme Court does not require billing records to prove reasonableness and necessity of fees, they "are *strongly* encouraged," particularly when reasonableness and necessity are disputed. *Id*.

Analysis

Appellant argues the testimony by Appellee's counsel is insufficient to show reasonableness or necessity of the attorney's fees. She cites to the factors set forth in *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997), as a guideline for fact finders to use in determining reasonability of attorney's fees. *Id.* The *Arthur Andersen* factors are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
>
> (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;

> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Id., at 818. The *Arthur Andersen* factors are considerations the fact finder may reference to determine the fees' reasonability; the *El Apple* checklist discussed in *Rohrmoos Venture* is the minimum evidentiary standard that must be met to justify the award. *See Arthur Anderson*, 945 S.W.2d at 818; *Rohrmoos Venture*, 578 S.W.3d at 502; *see also Gerges v. Gerges*, 601 S.W.3d 46, 66-67 (Tex.App.—El Paso 2020, no pet.).

In support of his claim for attorney's fees, Appellee's counsel offered the following testimony:

> I'm a licensed attorney in the State of Texas in good standing. We are requesting attorney's fees for this particular case. This case has been pending for roughly three years. There's been motions upon motions and hearings to the amount of about 50 -- well, to the amount of 50 hours of work at $250 an hour, which is a fair and reasonable price here in El Paso County.
>
> And we would ask for attorney's fees in the amount of $12,500, Your Honor. We have had six different attorneys -- opposing counsels, that have come in and out of the case, and every single time we've had to do a litany of petitions and so forth. And for those reasons we would ask for attorney's fees for that amount, Judge.

In accordance with the guidance provided by the Texas Supreme Court in *Rohrmoos Venture* and consistent with our previous opinion in *Gerges,* we find the trial court abused its discretion in awarding attorney's fees for Appellee. Here, Appellee's counsel's testimony generally described the length of the case, the volume of motion practice and hearing attendance involved, and the number of hours he spent on the case. He likewise testified to his rate of $250 per hour, which he testified was reasonable for attorney's in El Paso County. Although Appellant failed to controvert Appellee's evidence of attorney's fees, we find Appellee failed to meet his initial burden proving the reasonableness and necessity of his incurred fees. Appellee did not offer

billing records substantiating the tasks performed or time spent thereon, nor did he offer specific testimony regarding the "particular services performed, . . . who performed those services, . . . approximately when the services were performed, [or] the reasonable amount of time required to perform the services[.]" *Rohrmoos Venture*, 578 S.W.3d at 502. Accordingly, the evidence was insufficient to justify awarding attorney's fees to Appellee, and the trial court abused its discretion in doing so.

For these reasons, we sustain Appellant's seventh issue.

CONCLUSION

We overrule Appellant's first six issues and affirm the judgment of the trial court as to each of those points.

We sustain Appellant's seventh issue and reverse the trial court's judgment for attorney's fees, and remand the case to the trial court for a redetermination of fees consistent with this opinion.

April 8, 2021

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.