Affirmed as Modified; Opinion Filed May 3, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01463-CV

YAN BENJAMIN WILHELM ASSOUN, Appellant
V.
ANAIS AMBER GUSTAFSON (A/K/A ANAIS AMBER ASSOUN) AND JOHN CHARLES GUSTAFSON, JR., Appellees

On Appeal from the 429th Judicial District Court
Collin County, Texas
Trial Court Cause No. 429-02323-2014

OPINION

Before Justices Myers, Evans, and Whitehill
Opinion by Justice Evans

Appellant Yan Benjamin Wilhelm Assoun ("Yan") appeals the trial court's granting of a summary judgment motion declaring his former wife and another man are not informally married. Yan also asserts that the trial court abused its discretion by (1) denying Yan the opportunity to conduct discovery prior to the summary judgment hearing and (2) awarding appellate attorney's fees. We conclude Yan did not raise a genuine issue of material fact controverting the traditional motion for summary judgment on the first element of an informal marriage—that the former wife and man with whom she is romantically involved do not have an agreement to be married. We, also, decide the trial court did not abuse its discretion when it denied Yan certain discovery and a continuance, but no evidence supports the award of appellees' appellate attorney's fees. We, therefore, affirm in part and modify in part.

BACKGROUND

Yan and appellee "Anais Amber Gustafson (a/k/a Anais Amber Assoun)" ("Anais")[1] married in 1995 and had two children. In 1997, Yan and Anais divorced in London, England and a Financial Dispute Resolution Order was rendered by the London court. The order required that Yan pay alimony to Anais in the amount of $132,000 per year until such time as she remarries or until further order from the court. Anais subsequently moved with her two children to Collin County, Texas and began a relationship with appellee John Gustafson ("John"). On December 5, 2013, the London court entered a judgment modifying its previous order and increased the amount of Yan's alimony payments to $380,000 per year. Anais sought enforcement of Yan's support obligation in New York and then in Texas.

In June 2014, Yan filed a petition against Anais and John with the following claims: (1) a request for declaratory judgment that Anais and John are informally married; (2) common law fraud;[2] and (3) attorney's fees. On August 26, 2014, Anais filed a counterclaim seeking a declaratory judgment that no marriage existed, informal or otherwise, between herself and John. Anais also filed a motion for partial summary judgment seeking summary judgment on the declaratory judgment claim. John filed a joinder in Anais's summary judgment motion in which he adopted and asserted all of Anais's arguments. He also adopted and asserted all of the evidence attached to Anais's motion including, but not limited to, his affidavit.[3]

[1] Yan filed the original case using the name "Gustafson" as Anais's last name. In Anais's brief, she notes that she does not use the name "Gustafson" and it is not her last name. There is no evidence in the record that Anais has taken "Gustafson" as her last name.

[2] Before the summary judgment hearing, Yan filed an amended petition in which he added a claim against both Anais and John for conspiracy to commit fraud.

[3] John attached a copy of his affidavit and the referenced exhibits to his joinder.

Following the hearing on September 26, 2014, the trial court granted Anais's and John's motions for partial summary judgment. Yan subsequently nonsuited his other claims and a final judgment was signed on October 16, 2014. Yan then filed this appeal.

ANALYSIS

A. The Trial Court Properly Granted Partial Summary Judgment

Yan argues that the trial court erred in granting summary judgment in favor of appellees because there is a genuine issue of material fact as to Yan's claim that Anais and John are informally married. We disagree.

1. Standard of review

We review the trial court's traditional summary judgment de novo. *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). The party moving for summary judgment bears the burden of proof. *Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex. 2013). Under Texas Rule of Civil Procedure 166a(c), the moving party must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). Further, in reviewing a summary judgment, we consider the evidence in the light most favorable to the non-movant and resolve any doubt in the non-movant's favor. *Id.*

2. Analysis

The Texas Family Code provides that an informal marriage may be proven by evidence that the couple "*agreed to be married* and after the agreement they lived together in this state as husband and wife and there represented to others that they were married." *See* TEX. FAM. CODE ANN. § 2.401(a) (West 2006) (emphasis added). An agreement to be informally married, like any ultimate fact, may be established by direct or circumstantial evidence. *See Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993). Evidence of cohabitation and "holding out" in some

cases may constitute some evidence of an agreement to be married. *See id*. at 932–33 (citing Joseph W. McKnight, *Family Law; Husband and Wife*, 44 Sw.L.J. 1, 2–3 (1990)). However, it is difficult to infer an agreement to be married from cohabitation in modern society. *See id*. at 932. Thus, evidence of holding out must be particularly convincing to be probative of an agreement to be married. *See id*. Occasional informal references to another as their spouse will not prove an agreement to be married. *See id*. Circumstantial evidence can entirely fail to overcome direct evidence from both members of the alleged marriage that there is no agreement to be married. *See Clack v. Williams*, 189 S.W.2d 503, 505 (Tex. Civ. App.—San Antonio 1945, writ ref'd w.o.m.) (A marital "agreement can not [sic] be implied contrary to direct evidence which definitely shows that there was no agreement."); *Ferrell v. Celebrezze*, 232 F. Supp. 281, 283 (S.D. Tex. 1964) ("The agreement to enter a common law marriage may be implied. Indeed, the required agreement may in some instances be implied from the cohabitation of the parties and their holding out to the public that they are man and wife. But this implication of a marriage contract cannot be drawn where there is direct evidence that the requisite agreement to henceforth be husband and wife was never reached by the parties.") (internal citations omitted); *accord U.S. Fid. & Guar. Co. v. Dowdle*, 269 S.W. 119, 124 (Tex. Civ. App.—Dallas 1924, no writ) ("Courts cannot marry parties by mere presumption without their consent. In the absence of consent, the status of marriage is never created by any government. The law compels no one to assume the matrimonial status. Without assent, no statute or constitution can create this relation.").

In her motion for summary judgment, which John adopted,[4] Anais asserted she disproved as a matter of law that she and John had an agreement to be married—the first element of an

[4] Yan did not challenge in the trial court or in his briefs before us John's adoption of Anais's motion for summary judgment, so no issue is presented for our review regarding one party adopting another party's motion for summary judgment. *See generally* TEX. R. APP. P. 33.1, 38.1(i).

informal marriage[5]—based on her affidavit and John's affidavit that she attached and incorporated by reference. In her affidavit, Anais stated the following and attached supporting documents:

1. Anais and John do not have and have never had an agreement to be married.
2. Her marriage to Yan was formalized by two wedding ceremonies in two countries "in two religions . . . just so all the bases got covered."
3. Anais declared that as demonstrated by the multiple ceremonies of her marriage to Yan, she would not agree to be married without a formal, religious, marriage ceremony and she and John have not had a marriage ceremony in a church, home, courthouse, or privately because they have not agreed to be married.
4. She then testified that after her divorce from Yan she would never marry again without a premarital agreement so that by agreement she could define her marital property rights rather than have a state's laws determine her property rights. Anais further averred she and John do not have a premarital agreement because they have not agreed to be married.
5. Anais incorporated by reference attached documents about which she also testified beginning with a London judgment. She declared that at a five-day hearing in late 2013 at a court in London, one of the issues was her relationship to John. She specifically directed the trial court to ten paragraphs of the attached London judgment. The London judgment indicates Yan sought a reduction of his $132,000 per year obligation to Anais but the court increased it to $380,000 per year. The judgment details Yan's evidence regarding Anais's relationship with John including

[5] Anais and John did not challenge the other two elements of an informal marriage: whether they were living together or representing to others that they were married.

Yan's employment of a private detective and documentation such as hotel bills, photographs of Anais and John, and material from social media about Anais and John. In the judgment, John is characterized as Anais's boyfriend with whom she has a steady, intimate relationship including international travel together for which John paid the bills, gave her gifts, and allowed her to use one of his cars. The financial determinations in the judgment, including the increase in the amount Yan was required to pay Anais, followed the court's determination that Anais's relationship with John "more likely than not . . . will continue."[6] The judgment states Yan was to transfer their ranch in Pottsboro, Texas to Anais but because construction of the ranch house was incomplete Anais moved into her parents' home in Texas in July 2008. The judgment further states Anais later bought the house from her parents.

6. Anais testified her attached automobile insurance application dated 2012 is the last such application she has made and she has not changed her marital status with her insurance company since that time. In the attached automobile insurance application, Anais declared her marital status as divorced. She listed her address as her house in Frisco.

7. Anais averred she executed the attached homestead and marital status affidavit in connection with her sale of her house in Frisco in July 2014. In the homestead and marital status affidavit, she declared the house as her homestead and her marital status as "~~Divorced~~ Single" and that her status had not changed during her ownership of the house.

[6] There are extensive factual findings in the judgment including findings about the credibility of Anais and misrepresentations to the court by Yan. Also, certain claims asserted by Yan demonstrated a "willingness to oppress the wife through proceedings and undermine her will and resources to pursue her claims for maintenance against him," and that "he has not paid a penny under" certain orders.

8. Anais further testified in her affidavit that she attached her 2013 federal income tax form 1040 which she filed as head of household claiming her two children as her dependents and that only a single person could select that category.[7] Anais's attached form 1040 is completed as she stated and lists her address as a property in Pottsboro which the London Judgment stated Yan was to transfer to her. The form indicates signature is under penalties of perjury.
9. Anais further swore she applied for an apartment as a single person. Her rental application for an apartment in Pottsboro is dated June 30, 2014 and contains information about Anais while all requested information in a box labeled "YOUR SPOUSE" is blank. The form contains information about her previous addresses at her home in Frisco and the ranch in Pottsboro. The box at the bottom of the form labeled "EMERGENCY" lists John's name and contact information. "Boyfriend" is the response to a request to specify the relationship.

John's affidavit attached to Anais's motion for summary judgment contains John's testimony that he does not have and has never had an agreement to be married to Anais. He declared he has not had a marriage ceremony with Anais in a church, home, courthouse, or private location. John attached his 2012 tax return which he filed as a single person. John testified when he files his 2013 tax return he intends to file as single.

Anais's motion which John adopted argued that "this case is an instance where circumstantial evidence cannot overcome the direct evidence, which unequivocally negates the possibility of finding an agreement to be married." Her motion argued, "There are no genuine issues of material fact in this case; therefore, the Court may decide the issue of the non-existence

[7] The IRS form 1040 has other filing status options including "Married filing jointly" and "Married filing separately." The form directs to "Check only one box" and Anais checked "Head of household."

of a common law marriage on the summary judgment evidence included in the appendix to this motion, which evidence is incorporated herein by reference." Anais's motion noted that in a case "such as this the agreement can not [sic] be proven and no finding of common law marriage can survive." Specifically, appellees point to their affidavits in which they both testify that they do not have, and have never had, an agreement to be married to each other. Having argued that the evidence negated the existence of an agreement to be married as a matter of law, the burden then shifted to Yan to raise a fact issue on that element of his claim.

In his attempt to create an issue of fact, Yan referenced the same or same types of circumstantial evidence as is described in the London judgment to support his assertion that appellees agreed to be married: (1) appellees are living together; (2) Anais wears a ring on her ring finger; (3) John's children refer to Anais as "stepmom"; and (4) appellees occasionally registered as husband and wife at hotels in foreign countries. Since the existence of an informal marriage is a question of fact that can be proven by circumstantial evidence, Yan argues that summary judgment was precluded by the above-described evidence. *See Russell*, 865 S.W.2d at 933 ("Proof of an agreement to be married may be made by circumstantial evidence or conduct of the parties.").

Here, Anais and John submitted their sworn statements that each does not have, and has never had, an agreement to be married to the other in conjunction with their representations to government agencies made under oath that they were single. Based on this they moved for summary judgment that they were not informally married as a matter of law because they negated the first element of an informal marriage that they had no agreement to be married. The circumstantial evidence of a marriage presented by Yan fails to create a fact issue on the first element of an informal marriage—an agreement to be married—in light of Anais's and John's direct evidence that the parties never agreed to be married and informed government agencies

that each was single.[8] *See Ferrell*, 232 F. Supp. at 283; *see also Clack*, 189 S.W.2d at 505 ("If there be no meeting of the minds, and there certainly was none in this case, there can be no contract, and hence no marriage."). The trial court stated the motion was based on "the affidavits on file . . . and on all of the papers and documents filed in support of the motion" and granted Anais's and John's motions for summary judgment after considering the "affidavits submitted, and all other papers and documents filed by the parties . . . ."

Anais's and John's counsel conceded in oral argument that there could be a genuine issue of material fact in some cases even where two people sign affidavits averring they are not married but that the evidence raised by Yan failed to do so in this case. We agree and decide appellees are correct when they argued in the motion for summary judgment, "There are no genuine issues of material fact in this case; therefore, the Court may decide the issue of the non-existence of a common law marriage on the summary judgment evidence included in the appendix to this motion," because "[t]his is an instance where [Yan's] circumstantial evidence cannot overcome the direct evidence, which unequivocally negates the possibility of finding an agreement to be married." We conclude that the trial court properly granted partial, traditional summary judgment on this record, so we resolve the first issue against Yan.

B. The Trial Court Properly Denied Discovery

Yan asserts that the trial court abused its discretion by denying him the opportunity to conduct discovery prior to the hearing on his motion for summary judgment. We disagree.

[8] Yan argues that the affidavits of interested witnesses are not conclusive summary judgment evidence. Yan cites *Reilly v. Jacobs*, 536 S.W.2d 406, 408 (Tex. App.—Dallas 1976, writ ref'd n.r.e.) in support of the proposition that conflicting evidence regarding the existence of an informal marriage will go to the credibility of the witnesses and the weight of the evidence presented. *Reilly* involves a factual situation where one party to the alleged informal marriage was deceased and the surviving party and the heirs of the deceased differed in opinion as to the existence of an informal marriage. *Id.* at 406–07. Here, however, both parties to the purported informal marriage deny the existence of a marriage and it is a third party who seeks a declaration that they married contrary to their agreement.

1. Standard of review

The trial court may order a continuance of a summary judgment hearing if it appears from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition. *See* TEX. R. CIV. P. 166a(g); *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). The affidavit must explain why the continuance is necessary; conclusory allegations are insufficient. *Doe v. Roman Catholic Archdiocese of Galveston-Houston*, 362 S.W.3d 803, 809 (Tex. App.—Houston [14th Dist.] 2012, no pet.). When reviewing a trial court's order denying a motion for continuance, we consider whether the trial court committed a clear abuse of discretion on a case-by-case basis. *Two Thirty Nine Joint Venture*, 145 S.W.3d at 161. A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Id.*

2. Additional facts

In early August 2014, Yan filed three notices of intent to issue subpoenas for documents and tangible things to three non-parties—Kelleher International, LLC, J.T. Thomas Builders, Inc., and Starfire Equestrian Center, Inc. The subpoenas requested numerous documents including, but not limited to, invoices and billing statements, telephone records, interoffice documents, and correspondence with appellees from January 1, 2010.

On August 21, 2014, Anais filed a motion to quash the subpoenas and requested a protective order. Anais asserted that the third-party document requests were overbroad and "not likely to lead to the discovery of evidence" relevant to the matters at issue.

On August 26, 2014, the trial court held a hearing on Anais's motion to quash and request for a protective order. Although the hearing was conducted to address the third-party subpoenas, the trial court extended the hearing beyond that motion to generally address the discovery

parameters in this case.[9] Anais's counsel explained to the court that discovery had already been conducted in connection with a five-day trial held in London in November 2013. During that trial, the parties litigated the issue of Anais and John's relationship because Yan argued that he should be entitled to pay Anais less alimony since John was paying some of her expenses and they were essentially acting as a married couple. Anais's attorney argued that no discovery was necessary in this case because no amount of documentation can overcome the fact that a government cannot impose a marriage on two people who have agreed to be unmarried, and that a summary judgment motion would be filed with this same argument. Yan's attorney argued that Yan was entitled to discovery because Anais and John are cohabitating and holding themselves out as married and the documents would help establish this argument. The court then noted:

> Trial court: So my concern is: If you truly want a summary judgment -- and this is an issue that has never been ruled upon by a court that has at least been reflected in case law -- then doesn't it help you on the inevitable appeal that you have some discovery out there?
>
> [Anais's attorney]: I think tax returns, health insurance forms, the things we traditionally look at, since November of 2013, that it might help on an appeal.

After hearing additional argument from both sides, the following exchange took place:

> Trial court: I am going to order the production of the 2013 tax returns by both -- well, I guess this is just Anais Assoun's motion to quash and protective order. And then any health insurance forms. I can't think of any other governmental documents that would require disclosing husband or wife.
>
> [Yan's attorney]: We're also going to be seeking car insurance forms.
>
> Trial court: All right. Car insurance forms and homeowners insurance, if that's something where you also hold yourself out as

[9] For example, the trial court asked whether there had been any previous discovery on issues such as government documents, health insurance, or taxes. The trial court specifically asked Yan's counsel whether there were "any documents that have already been produced that indicate that either Mr. Gustafson or Ms. Assoun have represented to a governmental entity that they are married."

husband and wife. It's not really a governmental entity, though, it's a private insurance.

[Anais's attorney]: Is that all, again, since 2013?

Trial court: Yes, since November of 2013.

[Yan's attorney]: Your Honor, would it be possible to go back to 2010 on these issues, because we believe that's when she started --

Trial court: No. There was a five-day trial in England, so --

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[Yan's attorney]: We've covered those issues, but what about the subpoenas that have been issued, Your Honor?

[Anais's attorney]: These are all to third parties. None of them would have a tax return, health insurance application, car insurance or homeowners insurance.

Trial court: Okay. I'll quash those.

[Yan's attorney]: Again -- Your Honor, so am I to understand from the Court that pretty much any further discovery besides what has been authorized today is void?

Trial court: Until after the summary judgment hearing, which has been set for --

[Anais's attorney]: September 26. And we will -- we'll voluntarily produce all of those documents right away.

Trial court: Okay.

By its discovery order dated November 12, 2014,[10] the trial court clarified the document production:

> 4) Further discovery in this case is limited to the following documents ("Limited Discovery Documents") in the actual or constructive possession of Defendant

[10] The record reflects the trial court did not actually sign the discovery order until after the September 26, 2014 summary judgment hearing and order granting partial summary judgment. No complaint has been raised on appeal, however, that Anais failed to comply with the trial court's oral pronouncement of its discovery rulings by producing the documents timely after the discovery hearing and before the summary judgment hearing.

> ANAIS AMBER ASSOUN pending the outcome of the Motion for Partial Summary Judgment set for September 26, 2014:
>
> a. 2013 federal income tax returns;
>
> b. Post-November 2013 health insurance policies and applications;
>
> c. Post-November 2013 automobile insurance policies and applications; and
>
> d. Post-November 2013 homeowner's insurance policies and applications.
>
> 5) Defendant ANAIS AMBER ASSOUN shall produce the aforementioned Limited Discovery Documents immediately.
>
> IT IS ORDERED that any discovery other than the limited discovery documents ordered herein is void pending the September 26, 2014 summary judgment hearing and no further discovery shall be conducted until the Court rules on the summary judgment.

In Yan's response to appellees' motion for partial summary judgment, Yan again re-asserted his argument that he was denied the right to conduct discovery:

> Additionally, summary judgment in this case is inappropriate [sic] has been denied the ability to conduct discovery in this case. On or about August 26, 2014, the Court quashed all of MR. ASSOUN's then-outstanding subpoenas and stayed all discovery in the case pending the outcome of the summary judgment hearing on September 26, 2014. However, the Court did order Defendants to produce an extremely limited amount of information. As such, MR. ASSOUN has not been able to conduct any meaningful discovery in this case to gather information and evidence to support his claims.

3. Analysis

In this case, the trial court quashed the third-party subpoenas to Kelleher International, LLC, J.T. Thomas Builders, Inc., and Starfire Equestrian Center, Inc.[11] Yan asserts that this discovery was "essential to his ability to prove an agreement of [John] and [Anais] to be married and to contradict their self-serving affidavits denying the existence of a marriage" and that the

[11] Yan asserts that Kelleher International, LLC is an international matchmaking company. Anais's attorney noted that J.T. Thomas Builders, Inc., was Anais's home builder. The record and the briefing do not reflect the relation of Starfire Equestrian Center, Inc. to either Anais or John.

trial court abused its discretion by limiting the discovery before determining summary judgment.[12] We disagree.

Yan has failed to explain, either at the hearing on the protective order or in his briefing, why the additional discovery was necessary. At the hearing, Yan's counsel argued that "with the scope of the issues here and the fact that Anais has gone to great lengths that are obvious to us at this point without even getting into discovery yet, to be deceptive and avoid exposing what we believe is her marriage to [John], that is why the discovery is necessary." In his brief, Yan argues that the "discovery diligently sought by [Yan] and denied by the trial court was essential to his ability to prove an agreement of [John] and [Anais] to be married and to controvert their self-serving affidavits denying the existence of a marriage that ANAIS offered in favor of her summary judgment action." Yan merely argues that when the trial court quashed the three third-party subpoenas that he was deprived of essential evidence relating to the alleged marital relationship between Anais and John. Yan, however, fails to allege any reason—at either the hearing or in his briefing—why these three non-party subpoenas would provide essential information to his case. As stated above, conclusory allegations are insufficient to warrant a continuance. *See Roman Catholic Archdiocese of Galveston-Houston*, 362 S.W.3d at 809. Further, the trial court itself noted that it ordered production of tax returns and health insurance forms because they involved governmental entities. The court allowed production of the car insurance forms but noted that "[i]t's not really a governmental entity, though, it's a private insurance." As such, it appears that the trial court ordered the production of documents which could be considered more official than the third-party documents which Yan requested. Further,

[12] Although Yan did not file an affidavit asserting facts that would entitle him to seek a continuance until discovery could be completed prior to summary judgment, it is clear that the trial court heard oral argument on this issue at the hearing on the protective order. Accordingly, we review the trial court's decision to limit discovery under the same standard of review.

as Yan himself could not document any particular reason for the production of additional documents, we disagree that the trial court abused its discretion in limiting the discovery and we resolve the second issue against Yan.[13]

C. The Trial Court Improperly Awarded Appellate Attorney's Fees

Yan asserts that the trial court abused its discretion by awarding appellate attorney's fees without sufficient evidence. We agree.

1. Standard of review

The amount of an attorney's fees award rests in the sound discretion of the trial court, and its judgment will not be reversed on appeal without a clear showing of an abuse of that discretion. *Keith v. Keith*, 221 S.W.3d 156, 169 (Tex. App.—Houston [1st Dist.] 2006, no pet.). A trial court abuses its discretion when it acts arbitrarily or unreasonably, without reference to any guiding rules and principles. *Id.*

2. Additional facts

On October 16, 2014, the trial court held a prove-up hearing regarding Anais's request for attorney's fees. Clint Westhoff, former counsel for Anais, testified at the hearing about what attorney's fees had been incurred and the reasonableness of the fees. Westhoff requested a judgment for the full amount of fees ($24,951.36) in addition to conditional attorney's fees.[14] Yan's attorney noted during the hearing that he had stipulated that John's attorney's fees were reasonable and necessary, but that he disagreed that either John or Anais should be awarded fees.[15]

[13] Yan also argues that the denial of discovery by the trial court in this case has had a "grave impact" on his ability to present defenses in a concurrently-pending contempt case in Collin County. As Yan failed to cite any authority for the proposition that a trial court must consider the impact of its discovery decisions on litigation pending in other courts, we decline to address this argument. *See* TEX. R. APP. P. 38.1.

[14] Aside from the request for conditional attorney's fees, there was no testimony about the reasonableness of the amount requested for appellate attorney's fees.

[15] The reporter's record reflects the parties agreed to a written stipulation regarding attorney's fees that they filed with the court. A stipulation is noted on the clerk's docket sheet but is not included in the clerk's record. Neither party argues that Anais's and John's appellate attorney's fees were included in the stipulation.

At the conclusion of the hearing, the trial court awarded attorney's fees for Anais in the amount of $24,951.36 and attorney's fees for John in the amount of $1,000.

In the final judgment dated October 16, 2014, the trial court awarded Anais incurred attorney's fees in the amount of $24,951.36 as well as a conditional judgment of $22,500 against Yan for attorney's fees on appeal. In addition, the trial court awarded John incurred attorney's fees in the amount of $1,000 as well as a conditional judgment of $2,500 against Yan for attorney's fees on appeal.

3. Analysis

As a general rule, the party seeking to recover attorney's fees carries the burden of proof. *Keith*, 221 S.W.3d at 169. The trial court's award of attorney's fees may include appellate attorney's fees. *Id.* However, there must be evidence of the reasonableness of fees for appellate work to support the award of appellate attorney's fees. *Id.* Factors to be considered in reviewing the reasonableness of the attorney's fees include the difficulties in the nature of the case; the amount of money involved; the time devoted by the attorney to the case; and the attorney's experience and skill in presenting the case. *Id.*

Here, Westhoff testified about the reasonableness of the amount of attorney's fees which had already been incurred, but did not provide any evidence as to the reasonableness of the fees pertaining to the appellate work. The testimony 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. *State & Cnty. Mut. Fire Ins. Co.*, 228 S.W.3d 404, 408 (Tex. App.—Fort Worth 2007, no pet.). As there was no evidence to support the conditional award of appellees' reasonable appellate attorney's fees, we sustain Yan's third issue.

CONCLUSION

We affirm the trial court's judgment granting summary judgment declaring that Anais Amber Assoun and John Charles Gustafson, Jr. are not married and the trial court's order limiting Yan's opportunity to conduct discovery prior to the summary judgment hearing. We modify the trial court's judgment to delete the portion granting appellees conditional appellate attorney's fees. As modified, we affirm the judgment of the trial court.

/David Evans/
DAVID EVANS
JUSTICE

Whitehill, J., dissenting

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

YAN BENJAMIN WILHELM ASSOUN,
Appellant

No. 05-14-01463-CV V.

ANAIS AMBER GUSTAFSON (A/K/A ANAIS AMBER ASSOUN) AND JOHN CHARLES GUSTAFSON, JR., Appellees

On Appeal from the 429th Judicial District Court, Collin County, Texas
Trial Court Cause No. 429-02323-2014.
Opinion delivered by Justice Evans.
Justices Myers and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> delete the entirety of paragraph 2 (subparagraphs a, b, c and d) regarding appellee Anais Assoun's award of appellate attorney's fees on page 3 of the Final Judgment and delete paragraph 2 (subparagraphs a, b, c and d) regarding appellee John Gustafson, Jr.'s award of appellate attorney's fees on pages 4 and 5 of the Final Judgment.

It is **ORDERED** that, as modified, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 3rd day of May, 2016.