AFFIRM; and Opinion Filed March 9, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01534-CV

IN THE INTEREST OF V.J.A.O., A CHILD

On Appeal from the 303rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-13-20429

MEMORANDUM OPINION

Before Justices Myers, Evans, and Richter[1]
Opinion by Justice Richter

This is an appeal from the trial court's Order Adjudicating Parentage and Final Judgment (the Order) in a suit affecting the parent-child relationship. In six issues, the father of V.J.A.O. (Father) challenges the Order's provisions (1) setting Father's child support obligation, (2) awarding V.J.A.O.'s mother (Mother) the right to designate the child's primary residence and refusing to award Father a schedule allowing "50/50 possession" of V.J.A.O., and (3) awarding Mother attorney's fees. For the reasons discussed below, we modify the trial court's award of attorney's fees, but we otherwise affirm the trial court's Order.

Background

V.J.A.O. was born in France, where Mother resided and held citizenship. Father, a dual citizen of Australia and the United States, was working in France at the time. Father was present

[1] The Hon. Martin Richter, Justice, Court of Appeals, Fifth District of Texas at Dallas, Retired, sitting by assignment.

at V.J.A.O.'s birth, and—when V.J.A.O. was six weeks old—Mother and V.J.A.O. moved to the United States to live with Father. Mother and Father never married, but they purchased a home together and lived together for approximately two years. In 2013, Father moved out of the shared home. At the time of trial, Father had married someone else, and Mother and Father shared custody of V.J.A.O. under temporary orders.

The trial court's Order, among other directives, named the parents joint managing conservators.[2] It gave Mother the exclusive right to designate V.J.A.O.'s primary residence within Dallas and contiguous Texas counties. Mother was also granted the right to make decisions concerning V.J.A.O.'s education. Father was granted a standard possession schedule that could be expanded according to family code provisions; he was also ordered to pay $5000 monthly for child support. Mother was awarded $30,639.13 in attorney's fees.

Father appeals.

Child Support

In his first two issues, Father challenges the Order's requirement that he pay $5000 monthly, an amount higher than standard guidelines would require, for support of V.J.A.O. We review a trial court's judgment on child support for an abuse of discretion. *In re J.G.L.*, 295 S.W.3d 424, 426 (Tex. App.—Dallas 2009, no pet.).

Factors Considered by the Trial Court in Making the Above-Guidelines Award

In his first issue, Father contends the trial court misapplied the law in determining the amount of his child support obligation. Specifically, Father argues the trial court erroneously considered factors from an incorrect section of chapter 154 of the family code in setting that

[2] The Order adjudicated Father's parentage, but there was no issue at trial concerning either Father's status or knowledge of his status as V.J.A.O.'s father.

amount. The argument requires a brief summary of the Code's procedure for determining child support awards.

The Texas Family Code employs different analyses in setting child support, depending on whether an obligor has net monthly resources above or below $8550.[3] When the obligor's monthly net resources are less than $8550, then the code sets a presumptive award based on a percentage of those resources and the number of children to be supported. Under this scheme, the presumptive award for an obligor with one child would be 20% of his net resources. That award is presumed to be reasonable, and an order conforming to these guidelines is presumed to be in the best interest of the child. TEX. FAM. CODE ANN. § 154.122(a) (West 2014). However, the trial court may determine that application of the guidelines would be unjust or inappropriate in a particular case. *Id* § 154.122(b). And the Code provides a list of seventeen factors that the trial court may consider when determining whether the best interest of the child justifies a variance from the presumptive award (the Below-Threshold Factors). *Id.* § 154.123(b).[4]

---

[3] This threshold has increased over time. To reflect inflation, the amount automatically adjusts every six years based on the consumer price index. TEX. FAM. CODE ANN. § 154.125 (a–1) (West Supp. 2016). Effective September 1, 2013, the cap was increased to $8,550. 38 TEX. REG. 4647 (2013). But, for example, an opinion from 1993 will speak to a threshold of $4000, and an opinion from 1997 employs a threshold of $6000. *See Rodriguez v. Rodriguez*, 860 S.W.2d 414 (Tex. 1993); *Nordstrom v. Nordstrom*, 965 S.W.2d 575 (Tex. App.—Houston [1st Dist] 1997, pet. denied).

[4] The Below-Threshold Factors include:

> (1) the age and needs of the child;
>
> (2) the ability of the parents to contribute to the support of the child;
>
> (3) any financial resources available for the support of the child;
>
> (4) the amount of time of possession of and access to a child;
>
> (5) the amount of the obligee's net resources, including the earning potential of the obligee if the actual income of the obligee is significantly less than what the obligee could earn because the obligee is intentionally unemployed or underemployed and including an increase or decrease in the income of the obligee or income that may be attributed to the property and assets of the obligee;
>
> (6) child care expenses incurred by either party in order to maintain gainful employment;
>
> (7) whether either party has the managing conservatorship or actual physical custody of another child;
>
> (8) the amount of alimony or spousal maintenance actually and currently being paid or received by a party;
>
> (9) the expenses for a son or daughter for education beyond secondary school;
>
> (10) whether the obligor or obligee has an automobile, housing, or other benefits furnished by his or her employer, another person, or a business entity;
>
> (11) the amount of other deductions from the wage or salary income and from other compensation for personal services of the parties;

In this case, though, the trial court found that Father's statutory net resources exceeded $8,550 per month, and the parties do not dispute this finding. The statute governing calculation of support for an obligor who has more than $8,550 in monthly net resources begins:

> If the obligor's net resources exceed [$8550], the court shall presumptively apply the percentage guidelines to the portion of the obligor's net resources that does not exceed that amount. Without further reference to the percentage recommended by these guidelines, the court may order additional amounts of child support as appropriate, *depending on the income of the parties and the proven needs of the child*.

Id. § 154.126(a) (emphasis added). This section grants the trial court discretion to order additional amounts of support—over and above the presumptive award determined by the Code's guidelines—based on the income of the parties and the proven needs of the child.

The statute continues:

> The proper calculation of a child support order that exceeds [$8550] requires that the entire amount of the presumptive award be subtracted from the proven total needs of the child. After the presumptive award is subtracted, the court shall allocate between the parties the responsibility to meet the additional needs of the child *according to the circumstances of the parties*. However, in no event may the obligor be required to pay more child support than the greater of the presumptive amount or the amount equal to 100 percent of the proven needs of the child.

Id. § 154.126(b) (emphasis added). While subsection 154.126(a) grants authority for increasing the presumptive award, subsection (b) explains the mechanics of such a calculation: (1) determine the "proven needs of the child"; (2) subtract the presumptive award from the amount determined to be the proven needs of the child; (3) allocate, according to the circumstances of

---

> (12) provision for health care insurance and payment of uninsured medical expenses;
>
> (13) special or extraordinary educational, health care, or other expenses of the parties or of the child;
>
> (14) the cost of travel in order to exercise possession of and access to a child;
>
> (15) positive or negative cash flow from any real and personal property and assets, including a business and investments;
>
> (16) debts or debt service assumed by either party; and
>
> (17) any other reason consistent with the best interest of the child, taking into consideration the circumstances of the parents.

TEX. FAM. CODE ANN. § 154.123(b).

the parties, the amount each will pay of the remaining amount that is necessary to meet the needs of the child. The court has discretion in this allocation so long as no obligor is required to pay more than 100% of the proven needs of the child.

Because Father's monthly net resources exceeded the threshold amount, a section 154.126 analysis was the proper way to determine his child support obligation. And as we have explained, a section 154.126 analysis yields an additional amount of child support determined by (1) the proven needs of the child and (2) the income of the parties, and an allocation of this additional amount based upon (3) the circumstances of the parties (together, the Above-Threshold Factors).

In this first issue, Father argues that the trial court depended on the Below-Threshold Factors rather than the Above-Threshold Factors in determining his child support obligation. The issue is one of statutory construction, which we review de novo. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008).

Pursuant to the family code, Father requested, and the trial court filed, findings specific to the child support award. *See* TEX. FAM. CODE ANN. § 154.130. As the statute requires, the court stated that application of the code's presumptive guidelines would be "unjust or inappropriate." *See id.* § 154.130(b). The court found further that Father's net monthly assets were no less than $35,000, Mother's net resources were $9000, and the percentage applied to the resources would be 20%. *See id.* § 154.130(b)(1–3). Finally, as the statute mandates, the court listed its specific reasons for making an award that varies from the presumptive one determined by the guidelines. *See id.* § 154.130(b)(4). The court's specific reasons were:

(1) the age and needs of the child;

(2) the ability of [Father] and [Mother] to contribute to the child's needs;

(3) the financial resources available to [Father] for the support of the child;

(4) the amount of each parent's possession of and access to the child;

(5) the amount and type of [Father's] resources, his earnings, earning capacity, the kind and nature of his assets and the revenues and value available to him from his real, personal and financial assets;

(6) the child care expenses and needs incurred and necessitated to allow each party to retain and continue their gainful employment;

(7) the actual physical custody exercised by [Mother], her role as managing conservator;

(8) the other direct and indirect financial benefits [Father] has access to by virtue of his employment and investments;

(9) the provision by the parties to the child of health insurance and payment of the child's past uninsured medical expenses;

(10) the identified special, extraordinary bilingual educational and cultural expenses of the child;

(11) the positive cash flow enjoyed by [Father] by virtue of his real, personal property and assets as well as his businesses and investments; [and]

(12) the nationality, cultural and educational considerations related to this child's education and her best interests taking into consideration the circumstances of the parties.

This list of twelve reasons was repeated in the court's Order and in its second set of findings, made in response to Father's post-trial request under the rules of civil procedure.

Father equates the court's list of reasons with the Below-Threshold Factors.[5] He relies on *Rodriguez v. Rodriguez*, 860 S.W.2d 414 (Tex. 1993), which concluded that the below-threshold factors of the statute then in effect could apply only to adjust the amount of the presumptive award under the guidelines and could not not be used to perform an above-threshold analysis. *Id.* at 417. The statute in effect in that case permitted only the needs of the child to be used as justification for an award over and above the presumptive award, and the trial court had based its award on both the needs of the child and the net resources of the parents. *Id.* The latter factor—

[5] We note at the outset that, regardless of Father's allegation, the lists of Below-Threshold Factors and the trial court's specific reasons are far from identical. We note further that it would not be surprising if a thoughtful trial court reviewed many sources to identify considerations that could give insight into the Above-Threshold Factors.

the net resources of the parents—was found in the statute only among other factors that could be used to adjust the presumptive award under the guidelines, i.e., Below-Threshold factors.

Father acknowledges the statute has changed since *Rodriguez*, but he argues the same separation should be maintained in our case between use of Below-Threshold Factors and Above-Threshold Factors. We conclude that the change in the statute has so broadened the factors to be considered that there is little cause for concern regarding inappropriate considerations in determining the above-threshold child support award. In this case, we conclude that any factors used by the trial court in its determination are clearly subsumed within the three headings of the Above-Threshold Factors: the needs of the child, the resources of the parties, and the circumstances of the parties. Indeed, the reasons listed by the trial court for its award could be grouped under those headings in this manner:

> Needs of the Child
>
> (1) the age and needs of the child;
>
> (10) the identified special, extraordinary bilingual educational and cultural expenses of the child;
>
> (12) the nationality, cultural and educational considerations related to this child's education and her best interests taking into consideration the circumstances of the parties.
>
> Resources of the Parties
>
> (2) the ability of [Father] and [Mother] to contribute to the child's needs;
>
> (3) the financial resources available to [Father] for the support of the child;
>
> (5) the amount and type of [Father's] resources, his earnings, earning capacity, the kind and nature of his assets and the revenues and value available to him from his real, personal and financial assets;
>
> (6) the child care expenses and needs incurred and necessitated to allow each party to retain and continue their gainful employment;
>
> (8) the other direct and indirect financial benefits [Father] has access to by virtue of his employment and investments;

(9) the provision by the parties to the child of health insurance and payment of the child's past uninsured medical expenses;

(11) the positive cash flow enjoyed by [Father] by virtue of his real, personal property and assets as well as his businesses and investments;

Circumstances of the Parties

(4) the amount of each parent's possession of and access to the child;

(7) the actual physical custody exercised by [Mother], her role as managing conservator;

Reasonable minds may differ as to which category best describes each of the various trial court's reasons, but the trial court could have concluded that all of its reasons fell within at least one of the three proper Above-Threshold Factors. Accordingly, the trial court did not act without regard for guiding principles, and we discern no abuse of discretion in the reasoning it employed to set Father's child support obligation.

We overrule Father's first issue.

Sufficiency of Evidence Supporting Above-Guidelines Award

In his second issue, Father argues the trial court's child-support award is based upon insufficient evidence. In family law cases, the abuse-of-discretion standard of review overlaps with the traditional sufficiency standards of review; as a result, insufficiency of the evidence is not an independent ground of reversible error, but instead it constitutes a factor relevant to our assessment of whether the trial court abused its discretion. *In re A.B.P.*, 291 S.W.3d 91, 95 (Tex. App.—Dallas 2009, no pet.). To determine whether the trial court abused its discretion we consider whether the trial court (a) had sufficient evidence upon which to exercise its discretion and (b) erred in its exercise of that discretion. *Id.* We conduct the applicable sufficiency review with regard to the first question. *Id.* However, the court's child support order will not be disturbed on appeal unless the complaining party can show a clear abuse of discretion. *Worford v. Stamper,* 801 S.W.2d 108, 109 (Tex. 1990).

Private School

Father's primary challenge to the calculation of his above-guideline child support obligations is to the cost for V.J.A.O. to attend the Dallas International School (DIS), a private French-American school in Dallas. He contends that Mother did not establish that attendance at DIS was a "proven need" of V.J.A.O.. What constitutes the "proven needs" of a child is not defined by statute. *Nordstrom*, 965 S.W.2d at 579. Nor has the supreme court defined the term other than to state that those needs include "more than the bare necessities of life." *Rodriguez*, 860 S.W.2d at 417 n. 3 (interpreting predecessor child-support statute). The supreme court has made clear, though, that in child support decisions, the "paramount guiding principle" should always be the best interest of the child. *Iliff v. Iliff*, 339 S.W.3d 74, 81 (Tex. 2011). Moreover, the trial court has "broad discretion" to determine the needs of a child. *In re Marriage of Grossnickle*, 115 S.W.3d 238, 248 (Tex. App.—Texarkana 2003, no pet.). To establish private school as a proven need, the evidence must show something special that makes the particular child need or especially benefit from some aspect of non-public schooling. *In re M.A.M.*, 346 S.W.3d 10, 17 (Tex. App.—Dallas 2011, pet. denied).

Mother testified at length in support of V.J.A.O.'s need to attend DIS. She testified V.J.A.O. had outgrown her daycare placement and was ready to attend school. In researching options, Mother was unable to locate a public school or a private school in Dallas—other than DIS—that offered a dual (French-English) curriculum and focused on French culture and linguistics. DIS would also offer V.J.A.O. cultural activities embedded in her curriculum as well as after-school activities. Referring to DIS, Mother said "it's a blessing to have a school available here in Dallas that offers [a] multicultural environment and a dual curriculum to [V.J.A.O.] that perfectly matches her profile." Mother testified that DIS would give V.J.A.O. the opportunity to be comfortable relating to Mother's family in France.

Father, who himself is bilingual, agreed in his testimony that his daughter would be advantaged in a global economy by being bilingual. He testified his research established that DIS was the only French immersion school in Dallas. However, he also testified that strong academics, and not bilingualism, was his primary concern for V.J.A.O.'s education. And he believed V.J.A.O. could learn French adequately from her time with Mother.

Our review of the record establishes that Mother initially sought the right to designate V.J.A.O.'s primary residence, without limitation. Although the trial court ultimately allowed her to choose the child's primary residence, that choice was limited to Dallas and contiguous counties in Texas. The Order also allowed each parent to travel internationally with V.J.A.O. only once each year without approval of the other parent. The result of these restrictions is that Mother can return to France with V.J.A.O. only once a year, a significant limitation on V.J.A.O.'s exposure to half of her family members and their culture. V.J.A.O.'s unique ties to—and separation from—the culture of her mother makes her "need or especially benefit from" the bilingual and cultural aspects of DIS. *See In re M.A.M.*, 346 S.W.3d at 17.

What is more, this need for a unique education for V.J.A.O. should have been anticipated by Father, who impregnated Mother in France and acquiesced in a move to the United States by Mother and the infant V.J.A.O. so that they might live with him. Indeed, Father acknowledged that Mother moved to the United States only after V.J.A.O. was born, that she left a job and career in France, and that her move required alterations in her career path. We do not conclude that every child born outside the United States and living here requires private schooling to become immersed in the child's original culture and language. Like all family law issues, such a decision must be made on a case-by-case basis. However, we conclude that the specific needs of V.J.A.O. and the resources of her parents support the trial court's decision to order DIS expenses as part of Father's child support obligation.

If there is some probative and substantive evidence to support the judgment, then the trial court did not abuse its discretion. *Marriage of Grossnickle,* 115 S.W.3d at 246. In this case, the trial court heard a significant amount of evidence concerning V.J.A.O.'s background and her cultural and linguistic needs. The court could certainly have accepted evidence indicating a need for V.J.A.O. to attend DIS and, importantly, that attending DIS was in her best interest. *See Iliff,* 339 S.W.3d at 81 ("paramount guiding principle" in child support decisions should always be best interest of child). We conclude the trial court did not abuse its discretion in including tuition for DIS in its calculation of child support.

Living Expenses

Father also makes a general challenge to Mother's entire list of proven needs for V.J.A.O. other than the private school expenses addressed above. Both parents offered exhibits identifying V.J.A.O.'s "proven needs" at trial. The exhibits included nearly identical entries of household and personal expenses. The significant difference was Mother's inclusion of private school and summer camp expenses. Nevertheless, Father's exhibit set the value of V.J.A.O.'s proven needs at $5797.29, an amount well in excess of Mother's estimate, which included the hotly disputed cost of DIS tuition. Indeed, Father's estimate also exceeded the amount of support actually ordered by the trial court. *See Marriage of Grossnickle,* 115 S.W.3d at 248 (court's discretion included consideration of evidence of current expenses for child that well exceeded amount of support ordered). Father challenges Mother's exhibit, stating there is no evidence in the record of the living and personal expenses she identifies as needs of V.J.A.O.. But Mother testified she helped create the exhibit, relying upon original documents that she maintained related to expenses for herself and V.J.A.O.. "The managing conservator is in the best position to explain the child's needs." *In re Gonzalez,* 993 S.W.2d 147, 159–60 (Tex. App.—San Antonio 1999, no pet.); *Scott v. Younts,* 26 S.W.2d 415, 421 (Tex. App.—Corpus

Christi 1996, writ denied). We conclude Mother's exhibit and testimony represent substantive and probative evidence of V.J.A.O.'s needs. *See In re C.F.C.*, No. 07-03-0183-CV, 2005 WL 3072826, *3 (Tex. App.—Amarillo Nov. 16, 2005, no pet.) (mem. op.).

In the end, the parents did not disagree on any significant category of expenses to be considered as needs of the child except for private school costs. Both parents offered a list of expenses. The trial court had broad discretion to accept the testimony and evidence it found credible. *See id.* (mother's credibility and weight to be given her testimony concerning children's needs were matters for trial court). We conclude there is ample evidence supporting the trial court's findings of the proven needs of V.J.A.O. in terms of her living and personal expenses. Accordingly, the court did not abuse its discretion in including these expenses in its calculation of child support.

Allocation of Additional Child Support

In his final complaint under this issue, Father argues the record contains insufficient evidence to support the trial court's allocation of additional child support between him and Mother. The trial court found the child's monthly proven needs total no less than $5131.38. The Code's presumptive guideline award for Father would have been $1710. Thus, V.J.A.O.'s needs exceed the presumptive award by $3421.38. The trial court was to allocate that additional amount between the parents; the sole limitation on that allocation was that neither parent be allocated 100% of the amount. *See* TEX. FAM. CODE ANN. § 154.126(b). The trial court complied with the statute by allocating $3290 of the additional amount to Father, yielding a total child support award of $5000. By necessary implication, Mother was allocated the remaining monthly obligation of $131.38.

Allocation of the additional support is to be made "according to the circumstances of the parties." *Id.* In this case, Mother's primary possession of the child means she is already

absorbing more of the daily costs associated with feeding, sheltering, and raising the child. And significantly, it is undisputed that Father's net monthly resources are many times those of Mother. We conclude there is sufficient evidence supporting the trial court's allocation of the additional child support as between Father and Mother. Accordingly, the court did not abuse its discretion in making its allocation of the additional child support.

We overrule Father's second issue.

We have decided both of Father's issues challenging the trial court's child support award against him. Accordingly, we affirm the trial court's Order insofar as it orders Father to pay $5000 monthly in child support.

Findings of Fact

In his third issue, Father argues the trial court failed to provide findings of fact as required by section 154.130 of the family code and rules 296 and 297 of the rules of civil procedure. Father timely requested findings of fact under both of those provisions, and the trial court timely made both sets of findings. But Father complains the trial court's findings merely repeated the court's Order and failed to identify the evidence upon which the trial court made its findings. His complaint encompasses the trial court's findings on possession, child support, retroactive child support, and attorney's fees.

Father relies on *Hanna v. Hanna*, 813 S.W.2d 626 (Tex. App.—Houston [1st Dist.] 1991, no pet.), to argue the trial court's findings amount to reversible error. *Hanna*, however, speaks to the situation in which a trial court fails completely to file findings requested pursuant to section 154.130. *See id.* at 628. The trial court here did make findings that conform to section 154.130's requirements. The trial court also made findings, as requested, pursuant to the rules of civil procedure. Thus *Hanna* is not instructive here.

Father's real complaint is that the findings do not sufficiently detail the facts and the evidence on which each finding is based. But Father did not make any request for a specific finding under this section that would "comport with the evidence adduced at trial" or that would speak specifically to evidence supporting the original findings.[6] By failing to request specified additional findings, Father failed to meet the requirements for a request for additional findings. *See* TEX. R. CIV. P. 298 ("After the court files original findings of fact and conclusions of law, any party may file with the clerk of the court a request for *specified* additional or amended findings or conclusions.") (emphasis added); *In re Marriage of C.A.S. & D.P.S.*, 405 S.W.3d 373, 380 n.2 (Tex. App.—Dallas 2013, no pet.); *Heard v. City of Dallas*, 456 S.W.2d 440, 445 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.) (op. on reh'g).[7]

We overrule Father's third issue.

Possession of V.J.A.O.

In his fourth issue, Father argues the trial court abused its discretion in ordering a possession schedule that was not in the child's best interest. Father first contends that he should have been appointed as conservator with the exclusive right to designate V.J.A.O.'s primary residence. A trial court is vested with broad discretion to determine which conservator will have the exclusive right to establish the child's primary residence. *Strong v. Strong*, 350 S.W.3d 759, 765 (Tex. App.—Dallas 2011, pet. denied). Thus, unless the trial court acted arbitrarily or unreasonably or without reference to any guiding principles, we will uphold its decision on this matter. *See id.*

[6] We do not imply that a state trial court can be required to marshal the evidence supporting adequate findings.

[7] We note that the trial court specifically invited counsel for Father to submit any specific findings she was requesting concerning the child support issue. Instead, Father filed a request for findings under the rules of civil procedure and, subsequently, a request for more specific findings under that authority. Our record contains no submission of specific findings requested by Father.

Father cites testimony from both parents supporting the conclusion he was an involved father who participated in V.J.A.O.'s daily care as well as the logistics of her attendance at day care. However, he does not point to any reason why Mother is not an appropriate person to determine their child's primary residence within the geographical limits set by the Order. He does not identify a location he would choose for the child's primary residence, nor does he identify any problem or concern with the location chosen by Mother. Indeed, at the time of trial both parents lived in the city of Dallas. We see nothing arbitrary or unreasonable in the trial court's decision to award Mother the right to designate V.J.A.O.'s primary residence.

Father's second argument under this issue addresses the trial court's granting him standard possession of V.J.A.O., rather than the 50/50 arrangement Father requested. When the trial court decides issues of possession and access, the primary consideration is always the best interest of the child. *See* TEX. FAM. CODE ANN. § 153.002; *Lenz v. Lenz*, 79 S.W.3d 10, 14 (Tex. 2002). And again, we review those decisions for an abuse of discretion. *Strong*, 350 S.W.3d at 765.

Here, Father cites his testimony in the record to establish that he and Mother had operated under a 50/50 arrangement after they stopped living together, and he asserts that the arrangement had been successful. He states that Mother's only problem with their previous 50/50 arrangement had been the excessive number of required exchanges of the child. He contends that concern could be remedied by a week-on/week-off arrangement, which would minimize exchanges. However, the trial court does not abuse its discretion by choosing one party's workable possession preference rather than the other party's workable possession preference. Nor does the court disregard the child's best interest by making this kind of choice. Our review of the record does not identify any such abuse or disregard on this issue.

We overrule Father's fourth issue.

Attorney's Fees

Father raises two issues concerning the attorney's fees awarded Mother in the trial court. We address them in turn.

Legal Basis for the Award of Fees

In his fifth issue, Father contends—without citing authority—that the trial court's failure to identify the legal basis for its attorney's fee award amounts to reversible error. We disagree. Father concedes in his brief that "attorney's fees may be awarded in any suit arising under Title 5 of the Texas Family Code," but he argues that because the Order and the court's Findings of Fact and Conclusions of Law do not cite the specific statutory basis for the award, we should render judgment that Mother take nothing on her claim for fees. Mother's Amended Petition in Suit Affecting Parent-Child Relationship and Father's Counterpetition in Suit Affecting the Parent-Child Relationship both sought attorney's fees in this suit using nearly identical language; neither party cited specific statutory authority for the requested recovery in their pleading. Attorneys for both parties testified at trial and offered exhibits concerning their reasonable and necessary fees; in both cases, opposing counsel stipulated to qualifications, and neither witness elicited an objection or cross examination concerning the legal basis for their request for fees. In his request for additional findings of fact and conclusions of law filed January 22, 2016, Father requested further findings on the factual basis for the attorney's fee award, but he did not address or challenge the legal basis for Mother's award.

Our review of the record does not disclose even a suggestion that any participant was unaware the family code provides for recovery of attorney's fees in the discretion of the trial court. *See* TEX. FAM. CODE ANN. § 106.002(a) ("In a suit under this title, the court may render judgment for reasonable attorney's fees and expenses and order the judgment and postjudgment

interest to be paid directly to an attorney."). We discern no good faith reason to challenge that basis for the trial court's award to Mother in this case. Nor do we find any authority for the proposition that a trial court must include a citation to section 106.002 when making its award of attorney's fees in a suit affecting the parent-child relationship.

We overrule Father's fifth issue.

Sufficiency of Evidence Supporting the Award of Fees

In his sixth issue, Father challenges the sufficiency of the evidence to support the amount of attorney's fees awarded to Mother. As we have discussed, the trial court may award reasonable attorney's fees and costs in a family law case. *See id.* The reasonableness of attorney's fees is a question of fact that must be supported by the evidence. *Diamond v. San Soucie*, 239 S.W.3d 428, 431 (Tex. App.—Dallas 2007, no pet.). In addition, the reasonableness of attorney's fees must be supported by expert testimony. *In re Marriage of Pyrtle*, 433 S.W.3d 152, 160–61 (Tex. App.—Dallas 2014, pet. denied). Sworn testimony from an attorney designated as an expert satisfies this expert requirement. *Id.* Importantly, testimony from a party's attorney about that party's attorney's fees is taken as true, as a matter of law, so long as the testimony has not been contradicted by any other witness and is clear, positive, direct, and free from contradiction. *In re A.B.P.*, 291 S.W.3d 91, 98 (Tex. App.—Dallas 2009, no pet.). In *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997), the supreme court outlined factors to guide the determination of whether fees are reasonable and necessary: the time, labor, and skill required to properly perform the legal service; the novelty and difficulty of the questions involved; the customary fees charged in the local legal community for similar services; the amount involved and the results obtained; the nature and length of the professional relationship with the client; and the experience, reputation, and ability of the lawyer

performing the service. *Id.* (*citing* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(b), *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R. art. X, § 9)).

The testimony of Mother's trial attorney, John Schorsch, satisfied the requirement of expert testimony to support the fee award. And Father acknowledges that Schorsch testified that the fees requested were reasonable and necessary based upon his qualifications and experience. (Schorsch testified he had practiced law in Dallas County, primarily in the field of family law, for thirty years.) Indeed, Father acknowledges that Schorsch testified the fees charged by him and his associate, Stefani Eisenstat, were consistent with or lower than prevailing fees for work of the nature performed in this case.[8] During Schorsch's testimony, the trial court admitted both a summary of the fees sought by Mother and the actual invoices supporting the summary. The exhibits identified the hourly rate charged by each individual working on the case. They also identified each task performed, the individual who performed the task, and the total charge for that service.

Father contends Schorsch's testimony was insufficient because it did not specifically address a number of the *Arthur Andersen* factors, including how the fees were calculated, preclusion of other business opportunities, the amount involved and the results obtained, the time limitations imposed, and the nature and length of the attorney-client relationship. However, not all of the *Arthur Andersen* factors must be considered in every case; instead, the factors are general guidelines for the court's consideration. *Diamond*, 239 S.W.3d at 431. Moreover, we disagree with Father's assertion that Mother's evidence failed to indicate how the fees were calculated: each individual charge on the invoices was identified by the provider, the amount of time spent, and the total charge, which is easily obtained by multiplying that provider's listed

[8] The reporter's record makes clear that the full name of "Ms. Eisenstat," who is referred to in Schorsch's testimony concerning reasonable rates charged, is Stefani Eisenstat. She is referred to by her initials, SE, on billing invoices and SSE on the summary.

rate by the amount of time spent. We conclude Mother's evidence was sufficient to support the award as to the fees she incurred based on the work of her attorneys.

Father also contends the evidence is insufficient to support an award of fees for work performed by a legal assistant in this case. Schorsch's summary indicates that Mother incurred paralegal fees in the amount of $300. To obtain payment for a legal assistant's time, a party must provide evidence of: the qualifications of the legal assistant to perform substantive legal work; substantive legal work performed by the legal assistant under the direction and supervision of an attorney; the nature of the legal work performed; the legal assistant's hourly rate; and the number of hours expended by the legal assistant. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763 (Tex. 2012). In the absence of such proof, legal assistant fees have been denied. *Id.* Here, Mother's evidence included the specific tasks performed by Schorsch's assistant, and one can compute the assistant's hourly rate of $200 from the detailed itemization of the number of hours worked on each task and the charge for that task. But even if the trial court had been able to determine from the invoices that the tasks performed by the assistant included substantive legal work, there is no evidence of the assistant's qualification to perform substantive legal work or that he or she performed such work under the direction and supervision of an attorney. Although Schorsch testified that the summary exhibit truly and accurately represented the time spent by his paralegal, he did not testify to these important factors indicating the work done was appropriately recovered as attorney's fees. *See id.* Accordingly, we modify the Order to reduce Mother attorney's fee award by $300, the total amount of paralegal fees sought in this case.

Except for this modification, we decide Father's sixth issue against him.

Conclusion

We modify the trial court's award of attorney's fees and render judgment that Mother recover $30,339.13 for reasonable attorney's fees, expenses, and costs. In all other respects, we affirm the trial court's Order.

/Martin Richter/
MARTIN RICHTER
JUSTICE, ASSIGNED

151534F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST V.J.A.O., A CHILD

No. 05-15-01534-CV

On Appeal from the 303rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DF-13-20429.
Opinion delivered by Justice Richter.
Justices Myers and Evans participating.

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

> Virginie Naigeon is awarded $30,339.13 for reasonable attorney's fees, expenses, and costs, with interest as provided by statute compounded annually from the date judgment was signed until paid.

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

It is further **ORDERED** that appellee Virginie Naigeon recover her costs of this appeal from appellant Adrian Ong.

Judgment entered this 9th day of March, 2017.