MODIFY and AFFIRM; and Opinion Filed May 9, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00602-CV

IN THE INTEREST OF C.A.C., A CHILD

On Appeal from the 199th Judicial District Court
Collin County, Texas
Trial Court Cause No. 199-55049-2016

MEMORANDUM OPINION

Before Justices Lang-Miers, Myers, and Boatright
Opinion by Justice Boatright

Lorena Tincher (Mother) appeals an order awarding attorney's fees to the appellee, Richard Council (Father), in a proceeding to enforce and modify a final order previously rendered in a suit affecting the parent-child relationship. We modify the district court's fee order to delete the reference to child support, and we affirm the order as modified.

BACKGROUND

The child in this case, C.A.C., was born in 2013. The district court in January 2014 signed an Order in Suit Affecting the Parent-Child Relationship (the SAPCR Order). This order appointed Mother and Father as joint managing conservators of C.A.C. and prescribed terms governing possession and access, child support, and medical support, among other topics. In 2016, Father filed (i) a motion for enforcement of possession or access, and (ii) a petition to modify parent-child relationship. Mother also filed a petition for modification. Following a hearing on the foregoing

motions on March 13, 2017, the district court signed an order approximately one month later—on April 11—that disposed of the matters raised in the motions.

Eight days later, Father's attorney, Shayla Smith, filed a motion to set aside the April 11 order, urging that the parties had agreed at the March 13 hearing that Smith would draft the proposed order memorializing the court's rulings. Smith claimed that, to this end, she sent a proposed order to Mother's attorney with instructions that he make any objections to the court in writing. According to Smith, Mother's attorney instead filed a separate proposed order without giving Smith a file-stamped copy and without affording Smith sufficient time to review the order. Smith claimed that the court signed Mother's proposed order on April 11, and this order contained several errors.

The district court held a hearing on the motion to set aside on May 23, 2017. At the hearing, Smith made an oral motion on Father's behalf requesting an award of attorney's fees. The court vacated the April 11 order, granted Father's fee request, and tasked the parties with preparing a new proposed order that set forth the court's rulings from the March 13 hearing. The parties submitted a proposed order, which the court signed, also on May 23. On the following day, the court signed an order that granted the motion for attorney's fees and awarded Father $1,000. The fee order recites that it "is . . . part of a suit affecting the parent-child relationship and should constitute and be interpreted as a form of child support." This appeal followed.

ANALYSIS

Mother raises two issues related to the May 24 fee order, to which Father has filed no brief in response.

Evidentiary Sufficiency

Mother first contends that the evidence is insufficient to support an award of attorney's fees. Insufficiency of the evidence is not an independent ground for asserting error in family law

cases, but it is a relevant factor in assessing whether the trial court abused its discretion in awarding attorney's fees. *In re E.B.*, No. 05-14-00295-CV, 2015 WL 5692570, at *1 (Tex. App.—Dallas Sept. 29, 2015, no pet.) (mem. op.). We must engage in a two-pronged approach to determine whether the district court (i) had sufficient information on which to exercise its discretion; and (ii) erred in its application of that discretion. *Id.*

Mother complains that Father did not submit any documentation or time records to support the attorney's fee award. Documentary evidence is not required under the traditional method of awarding attorney's fees. *Metroplex Mailing Servs., LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 900 (Tex. App.—Dallas 2013, no pet.). In contrast, the lodestar method—pursuant to which the court multiplies the reasonable hours billed by the reasonable hourly rate for such work, with adjustments as necessary—requires proof documenting the performance of specific tasks, the time required for those tasks, the person who performed the work, and his or her specific rate. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760, 765 (Tex. 2012). While a lodestar fee can be established through attorney testimony, "'in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information.'" *City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013) (per curiam) (quoting *El Apple*, 370 S.W.3d at 763). The lodestar method is required in certain cases, *see El Apple*, 370 S.W.3d at 760 (noting that Texas courts have used lodestar in awarding fees under section 21.259(a) of the Texas Commission on Human Rights Act), and a party may also choose this method of proof, *see Long v. Griffin*, 442 S.W.3d 253, 253 (Tex. 2014) (per curiam) (referring to party "choosing" the lodestar method).

Since this case involved the parent-child relationship under the Family Code, Father was entitled to seek reasonable attorney's fees and expenses. TEX. FAM. CODE ANN. § 106.002(a) (West 2014). Texas courts have allowed parties to prove their attorney's fees under section 106.002 using the traditional method. *In re E.B.*, 2015 WL 5692570, at *2. In *E.B.*, we affirmed the trial court's

fee award under the traditional method, noting that the appellee's counsel had provided evidence in the form of testimony regarding several of the factors applicable under this method. *Id.* at *2–3. The factors are: (i) the time, labor and skill required to properly perform the legal service; (ii) the novelty and difficulty of the questions involved; (iii) the customary fees charged in the local legal community for similar legal services; (iv) the amount involved and the results obtained; (v) the nature and length of the professional relationship with the client; and (vi) the experience, reputation and ability of the lawyer performing the services. *Id.* at *2. The trial court is not required to receive evidence on each of these factors, and it may also look at the entire record, the evidence presented on reasonableness, and the amount in controversy, among other considerations. *In re A.B.P.*, 291 S.W.3d 91, 98 (Tex. App.—Dallas 2009, no pet.).

Father's motion for fees was based on a statement by his attorney, Smith, at the May 23 hearing:

> I feel that I have spent about five hours—and it was kind of an emergency—drafting a motion to set aside, trying to get a hearing date set . . . and all the other work that I've done and that I've spent about five hours. My hourly rate is $200 an hour, and so I'm asking at this time for a thousand dollars of attorney['s] fees.

This statement was not under oath, but Mother's counsel did not object, thereby waiving the objection. *Olsen v. Comm'n for Lawyer Discipline,* 347 S.W.3d 876, 890 (Tex. App.—Dallas 2011, pet. denied). Accordingly, we consider Smith's statement as testimony. Testimony from a party's attorney about a party's attorney's fees is taken as true as a matter of law if it is not contradicted by any other witness and is clear, positive, direct, and free from contradiction. *E.B.*, 2015 WL 5692570, at *2. Though brief, Smith's testimony is clear, positive, direct, and is free from contradiction. Nor did Mother's attorney cross-examine Smith or offer any witness to contradict Smith's statement. We therefore take Smith's statement as true and conclude that the trial court did not abuse its discretion in awarding his attorney's fees. We overrule Mother's first issue.

Child Support

Mother next contends that the court erred in awarding fees as a form of child support. The award of attorney's fees in the nature of child support is a legal conclusion that we review de novo. *In re A.M.W.*, 313 S.W.3d 887, 893 (Tex. App.—Dallas 2010, no pet.). Fees may be awarded as child support if the court finds that (i) the respondent failed to make child support payments, or (ii) the respondent failed to comply with the terms of an order providing for possession or access and enforcement of the order was necessary to ensure the child's physical or emotional health or welfare. TEX. FAM. CODE ANN. § 157.167(a)–(b) (West 2014). Otherwise, the fees awarded in a suit affecting the parent-child relationship may be collected by any means available for the enforcement of judgment on a debt. *Id*. § 106.002(b) (West 2014).

Father's motion for enforcement of possession or access was one of the motions disposed of by the district court's May 23 order. This motion complained that Mother on four occasions had failed to make C.A.C. available as required by the SAPCR Order. Father requested, among other relief, that Mother be held in contempt for each of the four violations and that the court grant Father additional periods of access to C.A.C. The May 23 order determined that (i) Mother had on three occasions denied Father his court-ordered period of access and possession, (ii) Mother changed her residence without notifying Father, in violation of the SAPCR Order, and (iii) the parties had agreed to a make-up period for Father's access to, and possession of, C.A.C. The court made no finding that enforcement of the SAPCR Order's possession and access terms was necessary to ensure C.A.C.'s physical or emotional health or welfare, as was required for the fee award to be enforceable as child support. Even had the court made such a finding, the fees at issue were incurred in preparing Father's motion to set aside and "other work." Father made no attempt to demonstrate what part of the fees related to his motion for enforcement as opposed to his petition to modify. Attorney's fees are enforceable only as debt when a party does not segregate fees

incurred in an enforcement proceeding from those incurred in a modification proceeding. *In re Braden*, 483 S.W.3d 659, 664–66 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding). Nor can attorney's fees awarded on a motion to modify be characterized as child support. *In re A.M.W.*, 313 S.W.3d at 893. For each of these reasons, there is no basis in fact or in law to characterize the fee award in this case as a form of child support. We sustain Mother's second issue.

CONCLUSION

We modify the May 24 order to delete the following clause in the final sentence of the order: "and should constitute and be interpreted as a form of child support." We affirm the order as modified.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF C.A.C., A CHILD	On Appeal from the 199th Judicial District Court, Collin County, Texas
No. 05-17-00602-CV	Trial Court Cause No. 199-55049-2016. Opinion delivered by Justice Boatright. Justices Lang-Miers and Myers participating.

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

> We delete the following clause in the final sentence of the order: "and should constitute and be interpreted as a form of child support."

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 9th day of May, 2018.