



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00362-CV

IN RE Carmen CARTER-FAUGHTENBERY

Original Mandamus Proceeding¹

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Beth Watkins, Justice

Delivered and Filed: September 9, 2020

PETITION FOR WRIT OF MANDAMUS CONDITIONALLY GRANTED

Relator (“Carmen”) asserts the trial court abused its discretion by ordering her to pay unconditional appellate attorney’s fees into the registry of the court pending her appeal of an order entered in the underlying suit affecting the parent-child relationship. We conditionally grant the petition for writ of mandamus.

BACKGROUND

The real party in interest (“Kourtney”) is the mother of the minor child, T.D.L., and Carmen is the child’s paternal grandmother. Following the death of the child’s father, Carmen sought conservatorship of the child. The trial court dismissed Carmen’s suit for lack of standing and she has filed an appeal with this court. After Carmen filed her notice of appeal, Kourtney filed a

¹ This proceeding arises out of Cause No. CVW2000108, styled *In the Interest of T.D.L., a Child*, pending in the 218th Judicial District Court, Wilson County, Texas, the Honorable Donna S. Rayes presiding.

motion for temporary orders pending appeal seeking attorney's fees. Following a June 10, 2020 hearing, the trial court signed, on June 25, 2020, temporary orders ordering Carmen to pay unconditional attorney's fees into the court's registry. Carmen filed her petition for writ of mandamus complaining of the order. Kourtney filed a response to which Carmen replied.

STANDARD OF REVIEW

Mandamus is an extraordinary remedy that will issue only to correct a clear abuse of discretion when there is no other adequate remedy at law. *In re Sw. Bell Tel. Co., L.P.*, 235 S.W.3d 619, 623 (Tex. 2007) (orig. proceeding). To satisfy the clear abuse of discretion standard, the relator must show "that the trial court could reasonably have reached only one decision." *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1996) (orig. proceeding) (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)).

"A trial court has no 'discretion' in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ." *Walker*, 827 S.W.2d at 840. To satisfy the clear abuse of discretion standard, the relator must show "that the trial court could reasonably have reached only one decision." *Akin*, 927 S.W.2d 627, 630 (Tex. 1996) (orig. proceeding) (quoting *Walker*, 827 S.W.2d at 840).

"A party may seek review of the trial court's temporary order under [section 109.001] by (1) petition for writ of mandamus; or (2) proper assignment in the party's brief." TEX. FAM. CODE § 109.001(b-5). These temporary orders "are not subject to interlocutory appeal." *Id.* § 109.001(c). "When, as here, a trial court's temporary orders under section 109.001 require the immediate payment of attorney's fees, review of the award during a pending appeal does not provide an adequate remedy at law." *In re Mansfield*, 04-19-00249-CV, 2019 WL 2439104, at *2 (Tex. App.—San Antonio June 12, 2019, orig. proceeding) (mem. op.). Therefore, because

Carmen lacks an adequate remedy at law, we only consider whether she established the trial court abused its discretion.

CHILD'S SAFETY AND WELFARE

In her petition, Carmen asserts the trial court abused its discretion because there is no evidence that appellate fees are necessary to preserve and protect T.D.L.'s safety and welfare. The Texas Family Code provides that in a suit affecting the parent-child relationship

on the motion of any party or on the court's own motion and after notice and hearing, the court may make any order *necessary to preserve and protect the safety and welfare of the child during the pendency of an appeal* as the court may deem necessary and equitable. In addition to other matters, an order may . . . require payment of reasonable and necessary attorney's fees and expenses . . .

TEX. FAM. CODE § 109.001(a)(5) (emphasis added).

Evidence is sufficient to justify appellate attorney's fees to preserve and protect the safety and welfare of the child under section 109.001 when the recipient of appellate attorney's fees "has primary responsibility of the children and for the care and upkeep of and the debt on the children's principal home." *See In re Garza*, 153 S.W.3d 97, 101 (Tex. App.—San Antonio 2004, orig. proceeding).

In her response to the petition for writ of mandamus, Kourtney contends she provides for the everyday stability of her son and the costly attorney's fees have a direct impact on the child's daily life because Kourtney "must reevaluate her usual expenditures for food, clothing, activities, and other items that pertain to the child's care." She also contends her son's status quo is affected because every cent she earns goes to attorney's fees rather than establishing a residence for her and the child. Our review of the record reveals, however, that the evidence at the hearing does not support Kourtney's contentions.

At the hearing, when asked how paying her own attorney's fees would affect the quality of T.D.L.'s life, Kourtney replied that it would affect his life because the money "*could have gone*

to, you know, things that he needs and, you know, wanted, you know.” [Emphasis added.] Kourtney moved to Stephenville, Texas, to live with her parents shortly after the death of T.D.L.’s father. She testified she still lives with her parents, but she could have made a down payment on a small house for her and T.D.L. She said her parents buy groceries and “whatnot,” she does not pay them rent, her parents paid her attorney’s retainer, and she has made one \$200 payment to her attorney. She said that since moving in with her parents, nothing in her son’s life has changed related to being fed, clothed, and housed. She started working for an insurance claims company shortly before the hearing, but has not received her first pay check yet. The last time she worked for the company was after Hurricane Harvey. No other testimony or evidence was offered.

At most, Kourtney’s testimony is speculative about what she would do if she did not need to pay appellate attorney’s fees. The only evidence she offered was that her parents provided all the financial support for T.D.L. and all of his needs were being met. Therefore, on this record, we conclude there is no evidence that the temporary order was necessary to preserve and protect T.D.L.’s safety and welfare during the pendency of an appeal.

CONCLUSION

We conclude the trial court abused its discretion by ordering Carmen to pay appellate attorney’s fees into the court’s registry.² Therefore, we conditionally grant the petition for writ of mandamus and direct the trial court to vacate its June 25, 2020 “Order on Motion for Temporary Orders Pending Appeal” no later than fifteen days from the date of this opinion.

Sandee Bryan Marion, Chief Justice

² Because this issue is dispositive, we do not address Carmen’s remaining issues. *See* TEX. R. APP. P. 47.1.