Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00421-CV

IN THE INTEREST OF C.S., C.S., and C.S.

From the 288th Judicial District Court, Bexar County, Texas
Trial Court No. 2012CI00253
Honorable Laura Salinas, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Luz Elena D. Chapa, Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: November 24, 2021

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Scott S. appeals from the trial court's order in a suit to modify the parent-child relationship. On appeal, he argues the trial court erred (1) in not interviewing the children subject of this suit in chambers; (2) in ordering payments to support the children's extracurricular activities; and (3) in awarding attorney's fees. We affirm in part, and reverse and remand in part.

BACKGROUND

The children subject to this suit are fifteen-year-old Cole S. and thirteen-year-old twins, Connor S. and Cameron S. Their mother, Amy R., commenced the underlying suit by filing a petition to modify the parent-child relationship. She sought modification of the trial court's "Child Support Review Order" and alleged the circumstances of the children had materially and substantially changed since rendition of the order to be modified. She requested an increase in the

amount of child support paid by Scott S., along with a request that Scott S. be required to pay for expenses associated with the children's extracurricular activities. Scott S. then filed a counter petition. Like Amy R., he alleged that the children's circumstances had materially and substantially changed. He sought to be named the "the new primary managing conservator with the exclusive right to designate the residence of the children," requesting the trial court order Amy R. to pay him child support. Both Amy R. and Scott S. requested attorney's fees and costs.

At a hearing on temporary orders, the parties agreed that Scott S. would increase the amount of his monthly child support obligation from $1,500.00 to $2,760.00. At the bench trial, the parties stipulated that Scott S. should pay $2,760.00 per month in child support under the guidelines. After hearing all the evidence at the modification hearing, the trial court granted modification and ordered Scott S. to pay monthly child support in the amount of $2,760.00. The trial court denied Scott S.'s request to be named the person with the exclusive right to designate the primary residence of the children. Instead, Amy R. retained that right. The trial court ordered expenses for extracurricular activities of the children to be split in half by Amy R. and Scott S. The trial court also ordered retroactive child support and ordered reimbursement of 2019 Thanksgiving expenses incurred by Amy R. in the amount of $3,800.00. Finally, it ordered Scott S. to pay Amy R.'s attorney's fees in the amount of $6,000.00. Scott S. appeals.

INTERVIEWING OF CHILDREN

In his first issue, Scott S. argues that the trial court abused its discretion by failing to interview the children in chambers pursuant to section 153.009(a) of the Texas Family Code. Section 153.009(a) provides,

> In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the attorney ad litem for the child, the court shall interview in chambers a child 12 years of age or older . . . to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence.

TEX. FAM. CODE § 153.009(a). Scott S. emphasizes that he filed a pretrial motion requesting the trial court interview the children in chambers pursuant to section 153.009. During opening and closing at trial, Scott S. requested the trial court interview the children. At the end of the trial, the court told the parties it was "going to review all the pleadings before [it] decide[s] whether they're going to be interviewed." Scott S. complains on appeal that the trial court never interviewed the children and thus violated section 153.009(a)'s requirement to interview children twelve years of age and older. *See In re C.B.*, No. 13-11-00472-CV, 2012 WL 3139866, at *6-7 (Tex. App.—Corpus Christi-Edinburg Aug. 2, 2012, no pet.) (holding "shall" in section 153.009(a) was mandatory on the trial court).

Amy R. responds that Scott S. has failed to show harmful error because he did not make an offer of proof as to the children's testimony. *See In re C.B.*, 13-11-00472-CV, 2012 WL 3139866 (Tex. App.—Corpus Christi-Edinburg Aug. 2, 2012, no pet.) (applying harmful error analysis in context of section 153.009). Harmful error is error that "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case to the court of appeals." TEX. R. APP. P. 44.1(a). Moreover, the Texas Rules of Evidence provide that error may not be predicated upon a ruling that excludes evidence unless a substantial right of the party is affected and the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked. TEX. R. EVID. 103(a)(2). "To adequately and effectively preserve error, an offer of proof must show the nature of the evidence specifically enough so that the reviewing court can determine its admissibility." *In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *see also Nelson v. Duesler*, No. 09-09-00288-CV, 2010 WL 1796098, at *2 (Tex. App.—Beaumont May 6, 2010, no pet.). "A brief factual recitation of what the excluded testimony would show is sufficient to preserve error." *Nelson*, No. 09-09-00288-CV, 2010 WL 1796098, at *2 (citing *In re N.R.C.*, 94 S.W.3d at 806).

"The offer of proof may be made by counsel, who should reasonably and specifically summarize the evidence offered and state its relevance unless already apparent." *In re N.R.C.*, 94 S.W.3d at 806. "If counsel does make such an offer, he must describe the actual content of the testimony and not merely comment on the reasons for it." *Id*. Without an offer of proof, the appellate court cannot determine whether the exclusion of evidence was harmful. *See In re N.W.*, No. 02-12-00057-CV, 2013 WL 5302716, at *10 (Tex. App.—Fort Worth Sept. 19, 2013, no pet.) (holding where appellant did not make an offer of proof as to what the child would have said to the trial court in an interview, appellate court could not determine whether trial court's refusal was harmful).

Scott S. argues he made an offer of proof when his attorney said the following during opening statement: "We believe the children are going to testify to you that they want to live with their father." Assuming, without deciding, this statement by counsel during opening statement is a sufficient offer of proof, we hold Scott S. has failed to demonstrate that the trial court's error was harmful for the reasons stated below. *See* TEX. R. APP. P. 44.1(a); *see In re T.A.L.*, No. 07-17-00274-CV, 2018 WL 3862994, at *3 (Tex. App.—Amarillo Aug. 14, 2018, pet. denied).[1]

Scott S. proffers that his children would have told the trial court in the interview that "they want to live with their father." We note that "information obtained by the trial court in such an interview is strictly supplemental to the evidence taken in court, the purpose of the interview being to aid the court in making its determination." *In re A.C.*, 387 S.W.3d 673, 677 (Tex. App.—Texarkana 2012, pet. denied). "Nothing in the statute indicates that the child in such an interview is to be sworn and nothing reflects that anything resembling the Texas Rules of Evidence should

[1]We note that Scott S. relies on *In re McPeak*, 525 S.W.3d 310, 312-13 (Tex. App.—Houston [14th Dist.] 2017, no pet.), in support of his argument that the trial court abused its discretion in failing to interview the children twelve years of age or older. However, *McPeak* is distinguishable from the present case as *McPeak* was brought in the context of a petition for writ of mandamus following temporary orders. *See id*. Thus, there was no reason for the *McPeak* court to apply a harmless error analysis following a final judgment. *See* TEX. R. APP. P. 44.1(a).

apply during the interview." *Id*. "Presumably, information gleaned in such an interview can be placed in the storehouse of other information the trial court can use in exercising its discretion in matters of this type pertaining to children." *Id*. Indeed, section 153.009(c) specifically provides that "[i]nterviewing a child does not diminish the discretion of the court in determining the best interests of the child." TEX. FAM. CODE § 153.009(c). Thus, the trial court is "given wide latitude in determining the best interests of the children and will be reversed only for abuse of discretion." *In re A.C.*, 387 S.W.3d at 677 (citing *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982)).

A trial court may modify a conservatorship order if modification would be in the child's best interest and "the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed" since the previous order. TEX. FAM. CODE § 156.101(a)(1). Here, Scott S. moved for modification, requesting that he be named the party with the exclusive right to designate the primary residence of the children. As the party seeking modification of the order on these grounds, Scott S. had the burden at trial to establish these elements by a preponderance of the evidence. *See Epps v. Deboise*, 537 S.W.3d 238, 245 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

Even assuming the children would have told the trial court in an interview that they wanted to live with Scott S., there was substantial evidence presented at trial to support the trial court's decision that it was in the best interest of the children for their mother to remain the parent who had the right to designate their primary residence. In determining the best interest of the children, the trial court considered the *Holley* factors. *See Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). These non-exhaustive factors include (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child; (6) the plans

for the child by the individuals seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent, which may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Id*. Thus, the desires of the children are but one factor to be considered by the trial court.

The evidence at trial showed Amy R. had been the children's longtime primary caregiver. She was the parent who took care of them before and after school, who made all their medical appointments and talked to healthcare providers, and who talked to the children's teachers about school matters. In contrast, Scott S. admitted at trial that he had not ensured one of the children regularly took his medicine for ADHD when that child was in Scott S.'s care. Scott S. also admitted to not attending medical appointments or discussing his children with their teachers—he left those matters to Amy R. There was also evidence introduced that one of the children had suffered injuries to his nose while in Scott S.'s care and Scott S. never informed Amy R. how the injuries occurred. Further, when asked if he had ever told any of his children that he would "knock the sh-t out of [the child] the next time [Scott S.] saw [the child]," the reporter's record reflects that Scott S. grinned and then responded that he did not "recollect." Scott S. then claimed he "joke[d] a lot with [his] sons." Scott S. also admitted to disparaging Amy R. in his children's presence, telling his eldest son that he could no longer give his son a car because Amy R. had sought an increase in child support payments.

In support of his claim that the custody order should be modified, Scott S. argues that Amy R. has not provided a stable home for the children. He points to evidence that Amy R. and her husband had an argument in December 2019 where she asked Scott S. to pick up the children from her home. Amy R. testified she and her husband had an argument, and because she did not want the children to see it, she called Scott S. to pick them up. Amy R. also testified that she and her husband were separated for two months but have now engaged in marriage counseling and have

reconciled. We note that in a bench trial, the trial court, as the trier of fact, is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Hatteberg v. Hatteberg*, 933 S.W.2d 522, 530 (Tex. App.—Houston [1st Dist.] 1994, no writ). Thus, the trial court may choose to believe some witnesses over others. *Martinez v. Lopez*, No. 01-09-00951-CV, 2011 WL 2112806, at *3 (Tex. App.—Houston [1st Dist.] May 26, 2011, no pet.). In this case, the trial court could believe Amy R.'s version of events and discount Scott S.'s testimony. In light of the foregoing evidence, we cannot conclude that the exclusion of the children's testimony that they wished to live with Scott S. probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a); *see also* TEX. FAM. CODE § 153.009(c) ("Interviewing a child does not diminish the discretion of the court in determining the best interests of the child."); *In re C.B.*, No. 13-11-00472-CV, 2012 WL 3139866, at *6-7 (Tex. App.—Corpus Christi-Edinburg Aug. 2, 2012, no pet.) (holding that trial court's error in failing to interview children was harmless).

EXTRACURRICULAR ACTIVITIES

In his second issue, Scott S. argues the trial court abused its discretion in ordering him to pay half of any fees incurred by the children's extracurricular activities.[2] Specifically, Scott S. complains that the trial court "did not order a specific amount over child support, but apparently gave the discretion to [Amy R.] to make decisions regarding extracurricular activities by award[ing her] sole managing exclusive powers." Thus, according to Scott S., the trial court's order has implicitly ordered him to pay child support above the amount of the child support guidelines without any evidence of the children's "needs."

At trial, the parties stipulated that Scott S. would pay "maximum child support under the guidelines" in the amount of $2,760.00 per month. Amy R. then introduced evidence of the

[2]We note that the trial court ordered Scott S. to reimburse Amy R. $3,800.00 for costs she incurred for 2019 Thanksgiving travel expenses as a result of Scott S.'s actions. Scott S. does not challenge this award in his brief and

children's extracurricular activities, which include soccer and band. In its final order, the trial court ordered Scott S. to pay monthly child support in the stipulated amount of $2,760.00. Under a section titled "Other Parenting Plan Provisions," the trial court ordered the following:

> In addition to all other provisions for possession provided in this order, the following periods of possession are ORDERED:
>
> 1. Extracurricular Activities – Extracurricular expenses shall be split as follows: 50% by AMY [R.] and 50% by SCOTT [S.] beginning July 1, 2020.
>
>   Extracurricular reimbursements shall be paid within 15 days after other party has verified expenses through Our Family Wizard. . . .

Scott S. argues in his brief that this unspecified amount of extracurricular activity expenses he will have to reimburse Amy R. is tantamount to child support. In response, Amy R. argues that "[t]rial courts may, and routinely do, order parties to share in the cost of certain enumerated expenses . . . over and above the formal monthly child support obligation." Amy R. cites no legal authority in support of this assertion and we can find none. We agree with Scott S. that the trial court's order that he pay half of any future extracurricular expenses is tantamount to a child support order.

The Texas Family Code provides a bifurcated analysis in setting child support, depending on whether the obligor has net monthly resources above or below $9,200. TEX. FAM. CODE §§ 154.125, 154.126. Section 154.125 applies when an obligor's net monthly resources are not greater than $9,200, and section 154.126 applies when an obligor's net monthly resources exceed $9,200. *See* TEX. FAM. CODE §§ 154.125, 154.126. In this case, the parties stipulated that Scott S. should pay monthly child support under section 154.125 in the amount $2,760.00 per month. That

has waived any issue regarding this award. *See* TEX. R APP. P. 38.1(i). Scott S.'s issue on appeal relates only to the trial court ordering him to pay half of the cost of his children's extracurricular activities in an unspecified amount.

is, they stipulated that under the guidelines, his monthly net resources were $9,200.00. Because Scott S. has three children, under section 154.125's guidelines, thirty percent of his net monthly resources should be paid in child support. *See* TEX. FAM. CODE § 154.125. Thirty percent of $9,200.00 is $2,760.00, the amount stipulated by the parties.

Section 154.122 of the Texas Family Code provides that the "amount of a periodic child support payment established by the child support guidelines in effect . . . at the time of the hearing is presumed to be reasonable, and an order of support conforming to the guidelines is presumed to be in the best interest of the child." TEX. FAM. CODE § 154.122(a). Thus, we presume the $2,760.00 monthly child support ordered by the court pursuant to the guidelines, as stipulated by the parties in this case, is in the best interest of the children.

The Family Code permits a trial court to deviate from the guidelines. A "court may order periodic child support payments in an amount other than that established by the guidelines *if the evidence rebuts the presumption that application of the guidelines is in the best interest of the child and justifies a variance from the guidelines*." *Id*. § 154.123(a) (emphasis added). "In determining whether application of the guidelines would be unjust or inappropriate under the circumstances," the court "shall consider evidence of all relevant factors, including" the following:

(1) the age and *needs of the child*;
(2) the ability of the parties 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;
(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;
(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*.

Id. § 154.123(b) (emphasis added).[3]

In awarding child support, a trial court has discretion to deviate from the statutory guidelines. *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996); *MacGillivray v. MacGillivray*, No. 04-10-00109-CV, 2011 WL 2150352, at *1 (Tex. App.—San Antonio June 1, 2011, pet. denied). Scott S. argues the trial court abused its discretion because there was no evidence presented regarding the needs of the children. The "needs of the child" is not limited to the "bare necessities of life." *Rodriguez v. Rodriguez*, 860 S.W.2d 414, 417 n.3 (Tex. 1993). The trial court must determine what the needs are on a case-by-case basis by following the "paramount guiding principle: *the best interest of the child*." *Id*. (emphasis in original).

Here, Amy R. testified that her children were engaged in band and soccer. She presented evidence of expenses for band and private instrument lessons for all three children in the amount of $6,589.55. She also presented expenses for club soccer for the children in the amount of

[3]If the trial court deviates from the statutory guidelines, section 154.130 requires the trial court to make certain findings, including (1) the net resources of the obligor; (2) the net resources of the obligee, if any evidence has been offered of same; (3) the percentage applied to the obligor's net resources to obtain the child support ordered by the court; and (4) the specific reasons that the amount of child support ordered by the court varies from the amount that would result from application of the guidelines. TEX. FAM. CODE § 154.130(a)(3), (b).

$6,216.99. Thus, if the children's extracurricular expenses remain the same, Scott S. would be obligated to reimburse Amy R. $6,403.27. Other than these extracurricular expenses, there was no other evidence presented regarding the "needs" of the children. Further, we emphasize that the trial court's order relating to extracurricular expenses gives broad discretion to Amy R. to enroll the children in any extracurricular activities. The order does not limit the amount that can be spent on extracurricular activities and orders Scott S. to pay half of any fee within fifteen days. Given this lack of parameters, we hold the trial court abused its discretion. We therefore reverse the portion of the trial court's order requiring Scott S. to pay for half of the children's extracurricular expenses and remand for further proceedings consistent with this opinion. *See In re Marriage of Butts*, 444 S.W.3d 147, 157 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

ATTORNEY'S FEES

In his final issue, Scott S. argues the trial court abused its discretion in awarding $6,000.00 in attorney's fees to Amy R.'s counsel because there was no evidence admitted at trial to support the award. *See In re Q.D.T.*, No. 14-09-00696-CV, 2010 WL 4366125, at *9 (Tex. App.—Houston [14th Dist.] Nov. 4, 2010, no pet.) (holding father could raise insufficiency of the evidence argument for first time on appeal). In response, Amy R. points to testimony from her counsel, the pleadings contained in the record, and the inferences the trial court can reasonably make from the record and hearings before it.

Trial courts have broad discretion to award attorney's fees in SAPCR proceedings. *See* TEX. FAM. CODE § 106.002(a); *Lenz v. Lenz*, 79 S.W.3d 10, 21 (Tex. 2002). However, an award of attorney's fees must be supported by evidence that the fees are reasonable and necessary. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019) ("When fee-shifting is authorized, whether by statute or contract, the party seeking a fee award must prove the reasonableness and necessity of the requested attorney's fees."). Thus, we review the trial

court's award of attorney's fees for an abuse of discretion. *In re A.M.*, No. 02-18-00412-CV, 2020 WL 3987578, at *4 (Tex. App.—Fort Worth 2020, no pet.). "Questions of the amount of fees awarded and the reasonableness or necessity of attorney's fees are questions of fact that must be supported by the evidence." *Id*.

The supreme court has explained that it intends "the lodestar analysis to apply to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed." *Rohrmoos Venture*, 578 S.W.3d at 497-98. However, contemporaneous billing records are generally not required. *Id*. The evidence to support a reasonable and necessary fee need only include a description of the particular services performed, the identity of each attorney who and approximately when that attorney performed the services, the reasonable amount of time required to perform the services, and the reasonable hourly rate for each attorney performing the services. *See id*. at 497-98, 501-02, 502-03. This base lodestar figure constitutes a presumptively reasonable and necessary fee for prosecuting or defending the prevailing party's claim through the litigation process. *See id*. at 498-502. Further, in determining reasonableness of a fee award, the trial court may consider the entire record and common knowledge of the participants as lawyers and judges. *See In re A.M.*, 2020 WL 3987578, at *4; *In re S.V.*, No. 05-16-00519-CV, 2017 WL 3725981, at *5 (Tex. App.—Dallas Aug. 30, 2017, pet. denied).

The record reflects that counsel for Amy R. testified she had been practicing family law in Bexar County for over seventeen years and her hourly rate was $350 per hour. She also testified that the total fees incurred by Amy R. related to counsel's representation of Amy R. in the SAPCR proceeding up to the date of trial were $12,568.48. Counsel stated that this total reflecting her fees from the date she was hired (February 5, 2020) and did not include "today's hearing or today's expenses." The record further reflects that since the date of her hire, counsel for Amy R. prepared and filed the following pleadings: (1) Motion for Substitution of Counsel; (2) First Amended

Petition to Modify Parent-Child Relationship; (3) Second Amended Petition to Modify Parent-Child Relationship; (4) Third Amended Petition to Modify Parent-Child Relationship; and (5) Motion to Sign Order to Modify and Motion to Clarify. The record also reflects that counsel for Amy R. attended two hearings: (1) the hearing on the temporary orders, which resulted in agreed temporary orders; and (2) the final hearing on the SAPCR proceeding. Further, counsel was seeking attorney's fees as the only counsel; she was not working with other attorneys. *See Porter v. Porter*, 04-20-00229-CV, 2021 WL 2117923, at *4-*5 (Tex. App.—San Antonio May 26, 2021, no pet.) (finding distinction where sole attorney testifies about his attorney's fees and where multiple attorneys worked on the case and seek a fee award).

As noted, in determining reasonableness of a fee award, the trial court could consider the entire record and common knowledge of the participants as lawyers and judges. *In re A.M.*, 2020 WL 3987578, at *4; *In re S.V.*, 2017 WL 3725981, at *5. Thus, we can conclude the trial court determined, based on counsel's testimony and its own common knowledge and experience, that the hourly rate of $350 per hour was reasonable for someone with the experience of Amy R.'s counsel. As the trial court awarded $6,000.00 in attorney's fee, we can conclude that trial court determined 17.14 hours as reasonable and necessary. The trial court could further consider the pleadings filed in the record and the two hearings at which Amy's R. counsel appeared in calculating the attorney's fees. The trial court could also have reasonably determined counsel's preparation time for the hearing and time spent preparing her witness. Given Amy R. counsel's testimony and the record itself, we determine there is sufficient evidence to support the trial court's determination that Amy R.'s counsel performed 17.14 hours of reasonable and necessary attorney work in this case. We therefore hold the trial court did not abuse its discretion.

CONCLUSION

For the reasons stated above, we find no reversible error with respect to the trial court's failure to interview the children and no abuse of discretion with respect to the trial court's award of attorney's fees. However, because the trial court abused its discretion in ordering Scott S. to pay half of all extracurricular activities, we reverse that portion of the trial court's order and remand for further proceedings consistent with this opinion. In all other respects, the trial court's order is affirmed.

Liza A. Rodriguez, Justice