In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00240-CV

IN THE INTEREST OF R.F.

On Appeal from the 1st District Court
Jasper County, Texas
Trial Cause No. 28319

MEMORANDUM OPINION

M.F. and J.F. had one child, R.F.[1] M.F. appeals the trial court's Order on First Amended Motion to Disqualify Attorney and Order in Suit to Modify Parent-Child Relationship. On appeal, M.F. argues (1) the trial court abused its discretion in denying her First Amended Motion for New Trial; (2) the trial court abused its discretion in ordering M.F. to pay R.F.'s attorney $16,729.00 in attorney's fees;[2] (3)

[1] M.F. is R.F.'s mother and J.F. is R.F.'s father. To preserve the parties' privacy, we refer to the parties and to the child by initials. *See* Tex. Fam. Code Ann. § 109.002(d) (West Supp. 2017); Tex. R. App. P. 9.8.

[2] M.F. hired Stephanie Proffitt, an attorney, to represent the interests of R.F. in the litigation.

the trial court erred in issuing a withholding order for payment of attorney's fees; (4) the trial court abused its discretion in denying M.F.'s Motion to Disqualify Attorney; and (5) the trial court abused its discretion in finding that J.F. did not unlawfully intercept M.F.'s electronic communications. We affirm in part and reverse and remand in part.

Background Facts

J.F., R.F.'s father, filed a First Amended Petition to Modify Parent-Child Relationship and pleaded that R.F.'s circumstances had materially and substantially changed since the date of rendition of the prior order. J.F.'s petition requested that, among other things, the trial court terminate the parental rights of R.F.'s mother, M.F., and name J.F. as R.F.'s sole managing conservator. M.F. filed a Counter-Petition to Modify Parent-Child Relationship. On July 6, 2015, M.F. also filed an amended motion to disqualify J.F.'s attorney, and alleged that J.F.'s attorney "used and disclosed illegally intercepted electronic communications in violation of Federal and State laws[.]" The trial court considered the motion and signed an order denying the motion on August 26, 2015.

At a pretrial hearing on March 11, 2016, the trial court adjourned to allow the parties to continue their mediation from the previous day. The trial court was then notified that an agreement had been reached, the agreed terms were read into the

record, and the trial court orally ruled on the remaining disputed terms. The court approved the agreement:

> [THE COURT:] So, I'm telling you this: I'm approving of your agreement. I've resolved in my mind the two outstanding issues that were left. I'm going to grant [M.F.] the overnight on Tuesday on the fourth weekend -- of the fourth week. I'm not going to do a specific allegation as to [M.F.'s sister]. . . .
>
> Does everyone understand my order?
>
> [J.F.'s counsel]: Yes, your Honor.
>
> [R.F.'s attorney]: Yes, your Honor.
>
> THE COURT: Who's going to draft it?
>
> [R.F.'s attorney]: I am.
>
> THE COURT: How long do you think it will take you to draft and disseminate?
>
> [R.F.'s attorney]: Well, two weeks is Good Friday. So, maybe the following week. I think it's the 1st of April.
>
> THE COURT: There's no way we could do it by the 21st?
>
> [R.F.'s attorney]: Yes.
>
> THE COURT: Well, okay. Today is the 11th. The 25th will be two weeks. I will be back -- so, let's do it April 4th. I am back in the country then.
>
> . . . .
>
> And what we'll do is disseminate it. If everybody doesn't sign off on it, then we all have to come back down here on the 4th. . . .
>
> . . . .

> At this time I approve the orders. I've made my rulings as to the two disputed issues. I find that these orders are in the best interest of the child, and I will set this for entry of judgment on April the 4th.

M.F.'s counsel then asked to be able to question her client on the record:

> [M.F.'s counsel]: You and I had an opportunity to talk about this agreement that the Court has adopted and put into an order; is that correct?
>
> [M.F.]: Yes.
>
> [M.F.'s counsel]: Has anyone attempted to influence you or force you into signing this agreement?
>
> [M.F.]: No.
>
> [M.F.'s counsel]: And you do believe that after consulting with me and having counsel go through each step, that this is in the best interest of the child?
>
> [M.F.]: Yes.
>
> [M.F.'s counsel]: And you're asking the Court to make this an order?
>
> [M.F.]: Yes.

On April 4, 2016, the trial court held a hearing on the motion to enter judgment and signed an Order in Suit to Modify Parent-Child Relationship after clarifying details as to some of the terms. The trial court stated on the record the following:

> . . . . At this time I find with the changes that I've made and initialed that the order is pursuant to the agreement that was reached the last time we were here, and I am signing that decree.
>
> Let the Record reflect that I am signing the order in Suit to Modify the Parent-Child Relationship, and I find that it memorializes the agreement that was made.

. . . .
March the 11th.

The order noted that the trial court heard the case on March 11, 2016, that the parties reached an agreement on that date, and set forth the agreed terms. Neither M.F. nor her counsel signed the order.

On May 3, 2016, M.F. filed a Motion for New Trial and a First Amended Motion for New Trial. In her First Amended Motion for New Trial, M.F. asserted that the order entered by the court did not conform with the agreement reached on March 11, 2016, and that the order contains the following errors: (1) no agreement was reached nor put into the record as stated in the order and only evidence of an agreement was presented to the trial court on March 11, 2016; (2) there was no agreement as to the amount of fees M.F. was to pay Proffitt, and Proffitt did not prove up necessary or reasonable attorney's fees nor was an amount agreed to and/or stipulated to; (3) the wage withholding order for Proffitt's fees was improper because the amount of income ordered to be withheld exceeds 50% of M.S.'s income; (4) the order incorrectly states that that it was signed by M.F. but neither she nor her attorney signed the order; (5) on the date of entry of the order, M.F. informed the associate attorney representing M.F., who was unfamiliar with the case, that M.F. did not agree with the form of the order but M.F. was not allowed to testify despite her request to do so; and (6) the order deviates from the agreement read into the

record by not providing that the family code provisions apply to the pick-up and drop-off of the child and does not include additional injunctions. M.F. also argued that she entered into the agreement as a result of "fraud, duress, coercion or other dishonest means[]" because "illegally obtained evidence was used in this case that was leveraged and mischaracterized in order to force [M.F.] into an agreement she would not have otherwise agreed to." M.F. argued that her attorney recommended that she hire Proffitt and that M.F. was led to believe that Proffitt's role was to be an advocate for M.F.'s side of the case.

On May 4, 2016, the trial court signed its written findings of fact and conclusions of law. The trial court found or concluded, among other things, the following:

> [] [J.F.], Petitioner and Counter-Respondent, and [M.F.], Respondent and Counter-Petitioner[,] appeared before the Court on March 11, 2016 and announced to the Court that an agreement had been reached.
>
> [] On March 11, 2016, the Court considered the First Amended Petition to Modify Parent-Child Relationship filed by [J.F.] on December 30, 2015 and the Court further considered the Counter-Petition to Modify Parent-Child Relationship filed by [M.F.] on December 23, 2015.
>
> [] The parties announced to the Court on March 11, 2016 that an agreement had been reached concerning the issues before the Court concerning the pending Motions referred to above and that all of the other pending Motions, Petitions, Applications and Ancillary issues in this cause regarding the child would be non-suited by each respective party and dismissed.
>
> . . . .

> [] On March 11, 2016 an agreement concerning the issues before the Court was announced into the Record.
>
> [] The Court on April 4, 2016 entered an Order in Suit to Modify Parent-Child Relationship and Final Judg[]ment based upon the Agreement of the parties and upon the Court's Ruling on 2 ancillary matters regarding Thursday night visitation and the Aunt, [S.F.]
>
> [] The proposed Order based upon the agreement was prepared by Stephanie Proffitt, Attorney representing the minor child, [R.F.] Such Order was approved [by] [J.F.] and his attorney.
>
> . . . .
>
> [] The Court FINDS that based upon the agreement of the parties that the modification of the prior Order of this Court is in the best interest of the child and there has been a material and substantial change in circumstances since the issuance of the Order sought to be modified.
>
> . . . .
>
> [] That Judg[]ment is granted in favor of Stephanie J. Proffitt, attorney for the child, in the sum of $16,729.00 for attorney's fees, expenses and costs incurred, which Judg[]ment will be assessed against [M.F.] and bear interest at the rate of 5% per annum compounded annually from the date of Judgment forward. Such Judgment shall be construed as child support and enforceable subject to a wage withholding order if not fully paid by June 1, 2016 at the rate of $1,000.00 per month, plus interest, until paid in full.
>
> [] That the Order entered on April 4, 2016 complies with the agreement of the parties and based upon such agreement and all pending motions is in the best interest of the child.

The trial court held a hearing on the motion for new trial on May 24, 2016. M.F. testified that after she entered into the agreement in court, and at the hearing to enter the modification order, she learned that evidence that had been talked about during the pendency of the case, namely that she had coached R.F., did not exist. According to M.F., she then told her attorney that she repudiated the agreement and wanted a jury trial. M.F. denied coaching R.F. to make outcries of sexual abuse and

denied sending text messages indicating that she had somehow coached or coerced R.F. to answer questions in a certain way. Proffitt, R.F.'s attorney, argued that although the evidence of coaching was not presented to the trial court, she knows the evidence exists and she never said the evidence did not exist. The trial court stated on the record that she "didn't take [the evidence of coaching] into account because there was no evidence presented to [her]," and the parties had reached an agreement. The trial court denied the motion for new trial. On June 17, 2016, M.F. filed a Motion for Reconsideration of Motion for New Trial, and the trial court denied the motion on June 22, 2016. M.F. timely filed her notice of appeal.[3]

[3] On appeal, J.F. contends that M.F.'s notice of appeal was not adequate to convey jurisdiction to this Court for either appeal of the final judgment entered on April 4, 2016, or the order denying M.F.'s motion to disqualify J.F.'s attorney. J.F. cites to *Rainbow Group, Ltd. v. Wagoner*, 219 S.W.3d 485, 491 (Tex. App.—Austin 2007, no pet.), in arguing that this Court lacks jurisdiction over the appeal of the final judgment because M.F.'s notice of appeal states she is appealing the order "rendered" on April 4, 2016, but the judgment in this case was rendered March 11, 2016, and then entered April 4, 2016. As J.F. concedes in his brief, appellate courts generally do not impose technical requirements that overly restrict the appellate process, and appellate courts generally do not require a party to list the date of every interlocutory order in the notice of appeal. *See Gunnerman v. Basic Capital Mgmt.*, 106 S.W.3d 821, 825-26 (Tex. App.—Dallas 2003, pet. denied). *Wagoner* involved two separately appealable orders and the Court of Appeals concluded that an amended notice of appeal cannot be used to add an entirely different interlocutory order from which the appeal is taken because this is not the type of amendment Rule 25.1 intended to allow. *Wagoner*, 219 S.W.3d at 491-93. *Wagoner* is distinguishable from the present case where M.F. stated the correct date of the modification order signed by the trial court but mistakenly used the term "rendered" instead of "entered." Here, it is clear from the record that the final judgment from which M.F.

Denial of Motion for New Trial and Motion for Reconsideration

In her first issue, M.F. argues the trial court abused its discretion in denying M.F.'s motion for new trial because (1) the agreement upon which the judgment was based was obtained by fraud, coercion, or duress; (2) M.F. revoked her consent to the agreement prior to the rendition of judgment; and (3) the trial court failed to consider new evidence brought forth in her Motion for Reconsideration of Motion for New Trial.

A new trial may be granted and judgment set aside for good cause, on motion or on the court's own motion. Tex. R. Civ. P. 320. We review a trial court's disposition of a motion for new trial for an abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009). A trial court has broad discretion in ruling on a motion for new trial. *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 210 (Tex. 2009); *Cliff v. Huggins*, 724 S.W.2d 778,778-79 (Tex. 1987). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner or

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appeals was rendered on March 11, 2016, and then entered on April 4, 2016. The interlocutory order denying her motion to disqualify merged into the court's final judgment and we conclude that the issues raised by Appellant are properly before us now on appeal. *See, e.g*., *Roccaforte v. Jefferson Cty*., 341 S.W.3d 919, 924 & n.10 (Tex. 2011) (citing *Webb v. Jorns*, 488 S.W.2d 407, 408-09 (Tex. 1972) (interlocutory judgment merged into final judgment, which was then appealable)).

without reference to any guiding rules and legal principles. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000).

M.F. argues the trial court rendered judgment on April 4, 2016, and she claims in her motion for new trial that she informed her attorney that she revoked her consent prior to rendition of judgment and refused to sign the order. On the other hand, J.F. argues the trial court rendered judgment on March 11, 2016, because that was the date when the terms of the agreement and rulings on the remaining disputed items were read by the trial court into the record.

A Rule 11 agreement is an agreement between the parties or attorneys touching any pending suit that, to be enforceable must be either (1) in writing, signed and filed as part of the record, or (2) made in open court and entered of record. Tex. R. Civ. P. 11. The purpose of Rule 11 is to avoid misunderstandings and controversies that often result from oral agreements. *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995). A rendition of judgment is the pronouncement of the trial court of its decision upon the matters submitted to it for adjudication. *Becker v. Becker*, 997 S.W.2d 394, 395 (Tex. App.—Beaumont 1999, no pet.); *Arriaga v. Cavazos*, 880 S.W.2d 830, 833 (Tex. App.—San Antonio 1994, no writ). The decision can be oral or written. *Becker*, 997 S.W.2d at 395; *Arriaga*, 880 S.W.2d at 833. Judgment is rendered when the decision is officially announced either orally in

open court or by a memorandum filed with the clerk. *Becker*, 997 S.W.2d at 395; *Arriaga*, 880 S.W.2d at 833. In order to be an official judgment, the trial court's oral pronouncement must indicate an intent to render a full, final, and complete judgment at that point in time. *In re Marriage of Joyner*, 196 S.W.3d 883, 886 (Tex. App.—Texarkana 2006, pet. denied).

The record for the March 11, 2016 hearing indicated that the trial judge had the present intent to render judgment on March 11, 2016, and this is further supported by the trial court's findings of fact and conclusions of law. The trial court's oral pronouncement that she approved the agreement, that she ruled on the remaining two disputed issues, and that she wanted to set entry of judgment for April 4, 2016, indicates an intent to render a full, final, and complete judgment at that time. *See id.* M.F.'s alleged comments to her counsel on April 4, 2016, that she could not agree to the Rule 11 terms were insufficient to revoke her consent to the agreement because they were not made known to the trial court. *See Miller v. Miller*, 721 S.W.2d 842, 844 (Tex. 1986). A party's revocation of consent in the context of a Rule 11 agreement that is made in open court should be made known to the trial court before the trial court renders judgment. *See Milner v. Milner*, 361 S.W.3d 615, 618 n.2 (Tex. 2012) (citing *Padilla*, 907 S.W.2d at 461); *Quintero v. Jim Walter Homes, Inc.*, 654 S.W.2d 442, 444 (Tex. 1983) (citing *Burnaman v. Heaton*, 240 S.W.2d 288, 290

(Tex. 1951). M.F. has failed to show that she revoked her consent to settle prior to the trial court rendering judgment on March 11, 2016. In fact, at the March 11, 2016 hearing, after the trial court read the terms of the Rule 11 agreement and the trial court's rulings on the remaining terms into the record, M.F. testified that no one had influenced or forced her to enter into the agreement, the agreement was in R.F.'s best interest, and M.F. wanted the court to enter the agreement as an order. This testimony evidences M.F.'s consent to the judgment at the time of rendition. *See Kennedy v. Hyde*, 682 S.W.2d 525, 528 (Tex. 1984).

Next, we address M.F.'s argument on appeal that the trial court abused its discretion in denying her motion for new trial because the agreement upon which the judgment was based was obtained by fraud, duress, or coercion. "Fraud may be committed through active misrepresentation or passive silence and is an act, omission, or concealment in breach of a legal duty, trust, or confidence justly imposed, when the breach causes injury to another or the taking of an undue and unconscientious advantage." *In the Interest of D.E.H.*, 301 S.W.3d 825, 829 (Tex. App.—Fort Worth 2009, pet. denied). A person shows duress when, because of some kind of threat, a person is incapable of exercising her free agency and unable to withhold consent. *Id.* Coercion occurs if a person is compelled to perform an act by force or threat. *Id.* at 828.

At the hearing on the motion for new trial, M.F. testified that after she consented to the Rule 11 agreement her mind did not change but that "the Court had been told for a year that there was evidence of [M.F.] coaching [her] daughter" and she learned at the March 11, 2016 hearing—after the agreement was read into the record and after she testified as to her consent—that the evidence did not exist. The child's attorney, Proffitt, argued at the hearing that the evidence of coaching did exist but that it had not been presented to the trial court because an agreement was reached. The trial court judge acknowledged that she knew there was an allegation of coaching, but the trial court judge then stated on the record, "I didn't take it into account because there was no evidence presented to me." According to M.F., she told her attorney she would not sign the order and she wanted to proceed to trial. On this record, we cannot say that the trial court abused its discretion in concluding M.F. had failed to show that she consented to the agreement as a result of fraud, coercion, or duress.

M.F. also argues on appeal that the trial court abused its discretion in refusing to consider the "new evidence" M.F. presented in her Motion for Reconsideration of Motion for New Trial. In her motion for reconsideration, M.F. asserted that at the hearing on her motion for new trial, the trial court did not consider evidence relating to alleged statements M.F.'s attorney told her that "led to her reluctant acquiescence

of the agreement[.]" M.F. argues she did not testify to the statements because she incorrectly believed the statements were privileged and would waive attorney-client privilege as to all communications with her lawyer. The first time M.F. raised this "newly discovered evidence" argument was in her motion for reconsideration and not in her motion for new trial.

Even assuming without deciding that M.F. adequately preserved error and timely raised this issue, M.F. failed to meet her burden. A party seeking a new trial on grounds of newly-discovered evidence must demonstrate to the trial court that (1) the evidence has come to its knowledge since the trial, (2) its failure to discover the evidence sooner was not due to lack of diligence, (3) the evidence is not cumulative, and (4) the evidence is so material it would probably produce a different result if a new trial were granted. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010). M.F.'s motion for new trial, motion for reconsideration, and appellate brief do not address these elements. *See id.* The record demonstrates that the trial court approved the Rule 11 agreement after M.F. testified that: no one influenced her to enter into the agreement, that the agreement was in R.F.'s best interests, and that she wanted the agreement to become an order. Furthermore, M.F. argued in her motion for reconsideration that *her* attorney made statements to her that led her to enter into the Rule 11 agreement. *See Hollaway v. Hollaway*, 792 S.W.2d 168, 171 (Tex.

App.—Houston [1st Dist.] 1990, writ denied) (upholding property settlement agreement over appellant's allegations that she was coerced into signing agreement by her own attorney); *see also Scheffer v. Chron*, 560 S.W.2d 419, 420 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.) (claim of inadequate representation does not alone constitute grounds for reversal). The trial court did not abuse its discretion in denying M.F.'s motion for new trial and motion for reconsideration. We overrule issue one.

Attorney's Fees

In her second appellate issue, M.F. argues that the trial court abused its discretion in ordering M.F. to pay counsel M.F. hired to represent R.F. $16,729.00 in attorney's fees "when there was legally and factually insufficient evidence that such an amount was a reasonable and necessary fee." In issue three, M.F. contends the trial court erred in issuing a withholding order for attorney's fees in a suit to modify the parent-child relationship because attorney's fees may not be withheld from income as additional child support in a modification suit.

In a suit affecting the parent-child relationship, the Family Code provides that a trial court "may render judgment for reasonable attorney's fees and expenses" and that such fees "may be enforced . . . by any means available for the enforcement of a judgment for debt." Tex. Fam. Code Ann. § 106.002 (West 2014); *Tucker v.*

Thomas, 419 S.W.3d 292, 296-97 (Tex. 2013); *In re Moers*, 104 S.W.3d 609, 611 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Not all attorney's fees, however, are treated as costs enforceable as debt. *In re Moers*, 104 S.W.3d at 611. The Texas Supreme Court in *Tucker* determined that if the case does not involve enforcement proceedings under Chapter 157, the trial court lacks discretion to characterize a party's attorney's fees as necessaries and as a part of a party's child support obligation:

> The Legislature has provided trial courts with broad discretion to resolve family law matters. In enforcement proceedings, the Legislature expressly provided for mandatory awards of attorney's fees and specific means for enforcing those awards. *See* Tex. Fam. Code § 157.167(a). Except when a trial court finds that a party filed a non-enforcement modification suit frivolously or with the purpose of harassing the opposing party, no provision in Chapter 156 authorizes an award of attorney's fees in modification suits. *See id.* § 156.005. Thus, trial courts must look to section 106.002—Title 5's general attorney's fee provision—for authority to award attorney's fees in most non-enforcement modification suits. Noticeably absent from section 106.002 is authority for a trial court to characterize an attorney's fee award as necessaries or as additional child support. In light of this absence of express authorization, we conclude that the Legislature did not intend to provide trial courts with discretion to assess attorney's fees awarded to a party in Chapter 156 modification suits as additional child support. Moreover, neither our precedent nor the plain language of section 151.001(c) supports the court of appeals' conclusion that attorney's fees in non-enforcement modification suits may be characterized as necessaries, enforceable by contempt.

Tucker, 419 S.W.3d at 300. Section 106.002 does not allow for attorney's fees to be deemed as additional child support or for payment of such attorney's fees to be enforced through garnishment of wages. *See id.* at 298.

Because the underlying proceeding was not an enforcement proceeding pursuant to Chapter 157, the trial court abused its discretion in entering a judgment awarding Proffitt's attorney's fees as "additional child support[]" and ordering them withheld from M.F.'s earnings. *See id.* at 298; *In re Moers*, 104 S.W.3d at 611. Furthermore, although the Rule 11 agreement read into the record provided that M.F. pay Proffitt reasonable and necessary attorney's fees, the amount of attorney's fees was not specified until Proffitt added the amount to the order she submitted to the parties and the court for entry of the order. Proffitt argued at the hearing on the motion for new trial that the $16,729.00 in attorney's fees was the amount of the balance due on invoices she presented to M.F. during mediation and prior to the rendition of the Rule 11 agreement, and that M.F. had agreed to pay the balance due. No testimony or other evidence regarding the reasonableness or necessity of Proffitt's $16,729.00 in attorney's fees or that M.F. had agreed to pay that amount was presented to the trial court. Therefore, we also conclude that insufficient evidence supports the trial court's finding that $16,729.00 for Proffitt's attorney's fees was a reasonable and necessary fee. We sustain issues two and three.

Allegations against J.F. and J.F.'s Counsel

In issue four, M.F. argues that the trial court abused its discretion in denying M.F.'s motion to disqualify J.F.'s counsel "when he failed to notify [M.F.] and her attorney that he was in possession of her confidential attorney-client communications[.]"[4] In issue five, M.F. contends the trial court abused its discretion "in determining that [J.F.] did not unlawfully intercept [M.F.]'s electronic communications."

We review the trial court's denial of a motion to disqualify for an abuse of discretion. *See Metro. Life Ins. Co. v. Syntek Fin. Corp.*, 881 S.W.2d 319, 321 (Tex. 1994) (per curiam). It is well-established that disqualification of a party's attorney is "severe remedy." *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002) (per curiam) (quoting *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990)). Because disqualification of counsel "can result in immediate and palpable harm, disrupt trial court proceedings, and deprive a party of the right to have counsel of choice[,]" a trial court considering a motion to disqualify "must strictly adhere to an exacting standard to discourage a party from using the motion as a dilatory trial tactic." *Id.* Mere allegations of unethical conduct or evidence showing a remote

[4] M.F.'s Motion to Disqualify includes other allegations that her counsel argued at the hearing on the motion, but on appeal she does not challenge the trial court's ruling on the motion as to those allegations.

possibility of a violation of the disciplinary rules will not satisfy this standard. *In re Sw. Bell Yellow Pages, Inc.*, 141 S.W.3d 229, 231 (Tex. App.—San Antonio 2004, no pet.).

In M.F.'s amended motion to disqualify J.F.'s counsel, she alleged that J.F.'s attorney "has used and disclosed illegally intercepted electronic communications in violation of Federal and State laws[,]" and the court heard the motion on July 9, 2015. According to M.F., J.F.'s counsel produced documents to M.F. during discovery that were retrieved off an iPad that R.F. brought to J.F.'s house. M.F. argued these communications were subject to the attorney-client privilege and were "illegally obtained intercepted electronic communications[.]" J.F.'s counsel argued at the hearing that when M.F. packed a bag of items for R.F. to take with her to J.F.'s house, M.F. included an iPad that was a Christmas gift to R.F., thereby waiving confidentiality, and that J.F., as the custodial parent of R.F. who possessed the iPad, had the right to have the iPad inspected to make sure nothing on the iPad was "monitoring where the iPad was or the child."

At the hearing, the following exchange occurred:

> [M.F.'s counsel]: . . . Your Honor, . . . that's in violation of the federal and state wire tap[p]ing invasion of privacy rule with regard to electronic devi[c]es. . . . [I]f that is in fact how this all went down, [J.F.] did not have the authorization to go into specifically the iPad. As law enforcement, does not, [J.F.] does not. For now [the private

investigator] should not have downloaded all the information on this iPad including attorney-client privilege --

THE COURT: Are you telling me that a parent doesn't have the right to go into a child's iPad?

[M.F.'s counsel]: That's correct. It wasn't the child's iPad. It was my client's iPad.

THE COURT: [J.F.'s counsel] just said that it was a gift to the child for Christmas from [J.F.].

[M.F.'s counsel]: No. It was my client.

THE COURT: That's a matter of fact.

[M.F.'s counsel]: Perhaps that the iPad was password protected, my client's iPad. It's her iTunes account.

THE COURT: I'm going to need to hear evidence then of whether it was password protected or if it was a gift. If it's the child's, I think he would have a right to look at it. But you can -- you can convince me otherwise if you can find case law. I think, please, don't tell me I don't have a right to look at my 17-year-old's computer.

[M.F.'s counsel]: I'm not going there, Your Honor. I'm just saying under these circumstances and other circumstances I do have case law. I have to dig it out.

THE COURT: I'm going to need to hear evidence. . . .

The trial court signed the order denying the motion on August 26, 2015.

The trial court specifically stated it would need to hear evidence whether the iPad was password protected or if it was a gift before the court could determine whether J.F. had a right to access the contents of the iPad. On this record, M.F. did

not present any such testimonial or documentary evidence. In her brief in support of her amended motion, filed after the hearing but prior to the trial court's ruling on the motion, M.F. cites to case law she asserts supports her motion, but none of the cases she cites squarely address the relevant issues the trial court identified: waiver of confidentiality and rights of a custodial parent to inspect a child's electronic device. Accordingly, we conclude that the trial court did not abuse its discretion in denying M.F.'s motion to disqualify J.F.'s counsel. We overrule issue four.

In presenting M.F.'s argument on appeal that the trial court abused its discretion "in determining that [J.F.] did not unlawfully intercept [M.F.]'s electronic communications[,]" M.F. asserts that she preserved this issue on appeal when her attorney asked the trial court "'to determine whether or not they were illegally obtained by [Appellee].'" The citation to the record where M.F.'s counsel allegedly preserved error does not reflect such a request. Furthermore, M.F.'s written Amended Motion to Disqualify and Motion for Change of Venue on file at the time of the hearing do not specifically allege that J.F. illegally intercepted M.F.'s communications. Although M.F. argued in her brief in support of her amended motion that J.F. illegally intercepted M.F.'s electronic communications, the motion itself sought to disqualify J.F.'s attorney and made no allegations against J.F. M.F. has failed to demonstrate on appeal that she preserved error with respect to her

allegations against J.F., and she has failed to show that the trial court made a ruling regarding her purported allegations specifically against J.F. The trial court's ruling on the motion to disqualify opposing counsel dealt solely with J.F.'s counsel and did not address M.F.'s allegation that J.F. individually violated the law by intercepting M.F.'s text or email communications. *See* Tex. R. App. P. 33.1. We overrule issue five.

Conclusion

We reverse that part of the trial court's Order in Suit to Modify Parent-Child Relationship ordering M.F. to pay Proffitt $16,729.00 for reasonable attorney's fees incurred for R.F.'s benefit as additional child support and ordering a withholding from M.F.'s earnings for payment thereof, and we remand the case to the trial court for proceedings consistent with this opinion. We affirm the trial court's Order in Suit to Modify Parent-Child Relationship in all other respects and affirm the trial court's denial of M.F.'s motion to disqualify J.F.'s counsel.[5]

[5] We note that at the hearing on M.F.'s motion for new trial, the parties agreed that a nunc pro tunc order would be necessary to amend some clerical mistakes where the April 4, 2016 Order in Suit to Modify Parent-Child Relationship did not accurately reflect the agreement of the parties read into the record at the March 11, 2016 hearing. The appellate record does not include a nunc pro tunc order.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

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LEANNE JOHNSON
Justice

Submitted on February 27, 2018
Opinion Delivered May 3, 2018

Before McKeithen, C.J., Kreger and Johnson, JJ.