In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-18-00412-CV

IN THE INTEREST OF A.M., A CHILD

On Appeal from the 233rd District Court
Tarrant County, Texas
Trial Court No. 233-576416-15

Before Sudderth, C.J.; Womack and Wallach, JJ.
Memorandum Opinion by Chief Justice Sudderth

MEMORANDUM OPINION

Former spouses and parents to A.M. Appellant Mother and Appellee Father have disagreed since their 2016 divorce trial about whether Mother should be allowed to travel abroad with A.M. Mother has specifically sought to take A.M., who was four years old at the time of the most recent trial proceedings, to India to visit family, but Father has refused to consent out of concerns for the child's safety. As a result, since their divorce decree was signed in 2017, Mother has unsuccessfully sought the trial court's intervention to compel Father to allow Mother to take A.M. to India and, in order to do so, to assist Mother in obtaining a passport for A.M. In two issues, Mother appeals the trial court's denial of her latest attempt. Because we hold that the trial court did not err by denying her request to modify the decree and by ordering her to pay Father's attorney's fees, we affirm the trial court's order.

Background[1]

The parties' February 2017 divorce decree included a lengthy section entitled "Passport Provisions" that addressed international travel with A.M. The passport

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[1]Mother, who is representing herself pro se on appeal, referred to facts and attached exhibits to her reply brief that are not part of the trial court's record. Father moved to strike those portions of the reply brief referring to outside-the-record facts and the attached, outside-the-record exhibits. We cannot consider facts and exhibits that are outside the record before us. *See Quorum Int'l v. Tarrant Appraisal Dist.*, 114 S.W.3d 568, 572 (Tex. App.—Fort Worth 2003, pet. denied) ("We cannot look outside the record in an effort to discover relevant facts omitted by the parties; rather, we are bound to determine this case on the record as filed."). Accordingly, we grant Father's motion and will limit our review to those facts and exhibits which are part of the record before us.

provisions prohibited either party from removing A.M. from the United States absent "written agreement by and between the parties for each and every occasion that the child may travel outside of the United States," and cautioned that such agreement and permission should not be "unreasonably withheld" by either parent. Nothing in the "Passport Provisions" required either parent to obtain a passport for A.M. or to sign a passport application for A.M. prepared by the other parent, unless the parent had already agreed to the travel arrangements:

> [f]or each instance that the parties have agreed in writing for the child to travel outside of the United States, [Mother] and [Father] are each ORDERED to properly execute the written consent form to travel abroad (attached hereto) and any other form required for the travel by the United States Department of State, passport authorities . . . .

The same section also awarded Father exclusive possession of any passports issued to A.M. and required Mother to promptly return the passport in the event the parties agreed to Mother's taking A.M. out of the country at any point.

In the year that followed their divorce, Father declined to agree to Mother's requests to take A.M. to India. He also refused to sign a passport application form that would allow Mother to obtain a passport for A.M.[2] In July 2018, Mother filed a petition for enforcement of the passport provisions, arguing that Father had unreasonably withheld consent to Mother's taking A.M. to India and refused to assist her in obtaining a passport for A.M. She also sought to have Father held in

[2]According to Mother, federal passport regulations require the physical presence of both parents or the signature of one parent on a passport application form in order to obtain a passport for a minor.

contempt. On September 12, 2018, the trial court held a hearing and denied Mother's requested relief.

Undeterred, Mother filed on September 27, 2018, a petition to modify the decree's passport provisions. Mother alleged in her petition that circumstances had materially and substantially changed because Mother had "believed that she was capable of acquiring a passport for her child, but now understands that additional order language must be added to the Parties['] Final Decree of Divorce in order to . . . allow Petitioner to acquire the passport for the Parties' child." She also alleged that she had previously believed Father would work with her to acquire a passport, but that was "not the case anymore."

The trial court heard the modification request on October 16, 2018. Mother testified that she still sought permission to take her daughter to her brother's December 2018 wedding outside of the United States, either in India or Australia.[3] Father still refused to consent to the trip, ostensibly because he was afraid Mother would not return to the United States with A.M.

At the end of the trial, the trial court declined to give either party sole authority to obtain a passport. It reiterated that

> they are essentially equal possession parents. The evidence in this case persuaded me that they needed to have equal rights in this case and I

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[3]Mother's family, including her father, lived in India. But her brother purportedly agreed to move his wedding to Australia to accommodate Mother because Australia is a participant in the Hague Convention, unlike India.

> gave them equal rights based on the evidence and nothing but the evidence, and I'm not going to come in and say you're all equal except one of you is a little more equal than the other, which is exactly what she wants me to do, and I don't think that is correct based on the evidence from the trial of this case, based on the face of the judgment, and based on the law of the United States and whatever other countries that might be traveled to.

The trial court also awarded Father's counsel $2,855 in attorney's fees.

Discussion

In two issues, Mother attacks the trial court's (1) refusal to modify the decree to order Father to sign a passport application and (2) award of attorney's fees to Father.

I. Modification of decree

Mother argues that the trial court erred by denying her modification request because the decree's passport provisions are "vague, ambiguous, unenforceable by contempt, [and] an impermissible restriction of Mother's ability to travel abroad with her child" because "it is not clear . . . how a passport for the child should be obtained."

Not only does this argument seem to blatantly ignore the requirement that once the parties agree to international travel they must "execute . . . any form required for travel by the . . . passport authorities," but Mother's argument also misses the point of modification proceedings and disregards the applicable standards. As the movant, Mother was required to show by a preponderance of evidence: (1) that the sought-after modification is in A.M.'s best interest and (2) that the circumstances of A.M., her parents, or another party affected by the decree had materially and

substantially changed since the date the decree was signed. Tex. Fam. Code Ann. § 156.001; *see id.* §§ 105.005, 156.101(a). In the absence of written fact findings by the trial court,[4] we presume that the trial court found that Mother did not meet her burden on either front, *Pharo v. Chambers County*, 922 S.W.2d 945, 948 (Tex. 1996), and we review such implied findings for an abuse of discretion, *In re T.D.C.*, 91 S.W.3d 865, 872 (Tex. App.—Fort Worth 2002, pet. denied) (op. on reh'g). *See also Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985) (framing the abuse of discretion standard as a consideration of whether the court acted without reference to any guiding rules and principles). Legal and factual sufficiency, while not independent grounds of error, are relevant factors in deciding whether the trial court abused its discretion. *T.D.C.*, 91 S.W.3d at 872.

We agree with Father that Mother failed to show a material and substantial change in circumstances. The change-of-circumstances requirement is founded upon principles of res judicata: "The policy behind this requirement is to prevent constant litigation with respect to the children, which, of course, would not be in the children's best interest." *Watts v. Watts*, 563 S.W.2d 314, 316 (Tex. App.—Dallas 1978, writ ref'd n.r.e.), *disapproved of on other grounds by Jones v. Cable*, 626 S.W.2d 734, 736 (Tex. 1981).

[4]Mother did not timely request findings of fact and conclusions of law.

Other courts of appeals have recognized that a parent's desire to travel internationally after a divorce is not, in and of itself, a material and substantial change. *See In re A.B.R.,* No. 04-17-00220-CV, 2018 WL 3998684, at *6 (Tex. App.—San Antonio Aug. 22, 2018, no pet.) (mem. op.) ("[A] parent's desire to travel internationally with the children and complications therewith do not constitute materially and substantially changed circumstances."); *Smith v. Karanja*, 546 S.W.3d 734, 740–41 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *Wiese v. AlBakry*, No. 03-14-00799-CV, 2016 WL 3136874, at *5 (Tex. App.—Austin June 1, 2016, no pet.) (mem. op.) (holding that "potential benefit" to children of international travel is not sufficient to show evidence of change in circumstances). We agree.

In *Karanja*, our sister court observed that the eventuality of circumstances contemplated at the time of a divorce is not a changed circumstance, but an anticipated one, and cannot be evidence of a material or substantial change in circumstances. *Karanja*, 546 S.W.3d at 740. As in this case, the mother in *Karanja* desired to take the child to visit family abroad, but evidence in the record showed that international travel was an "issue of some contention between the parties" during the divorce proceedings. *Id.* at 740–41. The reviewing court reversed the trial court's determination that the mother's desire to renew the child's passport to permit international travel constituted a change in circumstances since the entry of the parties' decree three months prior. *Id.* at 741.

The evidence in this case similarly showed that the parties' disagreement about international travel arose before the divorce and was addressed by the divorce decree's passport provisions. Those provisions specifically anticipate passport applications—they require the parties to cooperate in applying for a passport *after* they have already agreed to allow international travel. Simply put, the trial court ordered that neither parent would take A.M. abroad without the agreement of the other parent. Furthermore, the evidence showed that Mother desired to take A.M. abroad before the divorce and Father opposed. He continued to oppose such a request postdivorce. Mother's allegations in her petition for modification that she expected Father to be more amenable to an international-travel request postdivorce do not establish a material and substantial change in circumstances. *See, e.g.*, *id.* The trial court therefore did not abuse its discretion by denying Mother's requested modification. We overrule Mother's first issue.

II. Award of attorney's fees

In her second issue, Mother attacks the trial court's award of $2,855 in attorney's fees to Father's counsel. Her argument is two-fold: first, she argues that the trial court did not make a required finding that the modification suit was filed frivolously in order to award fees as sanctions, and second, she argues that "there is no evidentiary foundation for [the] award."

Mother's argument that the trial court erred by awarding fees without finding that the suit was filed frivolously or to harass another party overlooks the trial court's

statutory authority to award attorney's fees in suits affecting the parent-child relationship. *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 . . . ."); *see also Tucker v. Thomas*, 419 S.W.3d 292, 296 (Tex. 2013) ("Section 106.002, applicable to all SAPCRs, invests a trial court with general discretion to render judgment for reasonable attorney's fees to be paid directly to a party's attorney."). We therefore reject her argument that a finding of frivolity or harassment was necessary for the trial court to award attorney's fees.

As for her argument that the award lacks evidentiary foundation, we review the trial court's award of attorney's fees for an abuse of discretion. *Bruni v. Bruni*, 924 S.W.2d 366, 368 (Tex. 1996). 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. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019). Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform services, and (5) the reasonable hourly rate for each person performing such services. *Id.* 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 in making its determination. *In re S.V.*, No. 05-16-00519-CV, 2017 WL 3725981, at *5 (Tex. App.—Dallas Aug. 30, 2017, pet. denied) (op. on reh'g).

Father's counsel, Jeff Anderson, testified that he has been licensed to practice law in Texas since 1994, has been board certified in Family Law since 1999, and that he is a fellow of the American Academy of Matrimonial Lawyers. According to Anderson, his hourly rate of $575 is fair and reasonable among family law practitioners in Tarrant County and in light of his experience. Anderson testified that he spent two hours preparing for the hearing and that travel and attendance at the hearing would account for another three hours of work on behalf of Father. In sum, Anderson testified that he would spend five hours on the modification action, for a total of $2,855[5] in attorney's fees.

Anderson's testimony provided sufficient evidence to support the reasonableness and necessity of attorney's fees incurred for the limited hearing on the modification proceeding. Mother takes issue with the lack of any documentation of Anderson's fees and tasks performed but, while beneficial and encouraged, "[c]ontemporaneous billing records are not required to prove that the requested fees are reasonable and necessary." *Rohrmoos*, 578 S.W.3d at 502. Anderson testified that he spent two hours preparing for the hearing—which we note was brief, constituting only 49 record pages—and the trial court could have reasonably inferred that he did his preparation in the days or hours leading up to the hearing. He also testified that his travel to and from and attendance at the hearing would take another three hours

[5]We note that counsel's math was slightly off and he requested $20 less than his hourly rate would have dictated.

of billable time. This evidence is sufficient without reliance on billing records. *See id.*; *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 763 (Tex. 2012) (acknowledging that an attorney can testify to details such as nature of work, services rendered, and hourly rate "in . . . the simplest cases," without referring to billing records).

Anderson also testified to his 25 years' experience in family law and his status as a board-certified practitioner, lending credibility to his testimony that $575 an hour is a reasonable rate in this area of law and of the state. Clear, direct, and uncontradicted evidence such as Anderson's supports an award of attorney's fees. *See Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990) (holding that evidence that is clear, direct, and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon is generally sufficient to sustain an attorney's fee award, especially when the opposing party has the means and opportunity of disproving the testimony or evidence and fails to do so); *see also Rohrmoos*, 578 S.W.3d at 499 (reiterating that evidence establishing the reasonable hours spent by counsel and a reasonable hourly rate is presumed to represent reasonable and necessary attorney's fees). We therefore overrule Mother's second issue.

Conclusion

Having overruled both of Mother's issues, we affirm the trial court's order.

/s/ Bonnie Sudderth
Bonnie Sudderth
Chief Justice

Delivered: June 4, 2020