

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00757-CV

In re Tamika Payne

ORIGINAL PROCEEDING FROM BELL COUNTY

MEMORANDUM OPINION

Relator Tamika Payne has filed a petition for writ of mandamus seeking relief from a temporary order requiring her to pay interim attorney's fees to the attorney for real party in interest Richard Payne. For the following reasons, we will conditionally grant relief.

BACKGROUND

Richard Payne and Tamika Payne, the parents of two minor children, separated in 2006 and were divorced in 2007.¹ In the original order in the suit affecting the parent-child relationship (SAPCR), Tamika was appointed the joint-managing conservator with the exclusive right to determine the primary residence of the children. The order was subsequently modified on December 14, 2010, to provide, in accordance with the parties' agreement, that the children would reside with Richard in Pennsylvania while Tamika worked overseas.

In 2016, Tamika returned to the United States when her overseas contract ended. On April 5, 2017, Richard filed a petition to modify the SAPCR order, seeking to be designated the

¹ Because the parties share the same last name, we will refer to the parties by their first names to avoid confusion.

joint-managing conservator with the exclusive right to determine the primary residence of the children. The trial court signed temporary orders appointing Richard as the temporary managing conservator with the exclusive right to determine the primary residence of the children and limiting Tamika to supervised visits. Richard subsequently filed a motion to modify the temporary orders, requesting interim attorney's fees. *See* Tex. Fam. Code § 105.001(a)(5).

At the hearing on Richard's request for attorney's fees, Richard's attorney asserted that Tamika had caused Richard to incur excessive fees in the course of the litigation, in part by requesting a jury trial. The attorney estimated that \$32,000 in additional attorney's fees and expenses would be incurred should the case continue through a jury trial, as anticipated. According to the attorney, without the award of attorney's fees, Richard could not afford the additional fees and "[would not be] able to go forward." Other than testimony from Richard's attorney regarding the reasonableness of the amount of the requested fees, neither party introduced testimony or any other evidence at the hearing.

The trial court later signed an order requiring Tamika to pay interim attorney's fees to Richard's counsel in the amount of \$25,000.

MANDAMUS

This Court may grant mandamus relief only to correct a "clear abuse of discretion" by the trial court when there is no adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). A clear abuse of discretion occurs when the trial court reaches a decision "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Id.* at 839. A trial court has no "discretion" in determining what the law is or applying the law to the facts of the case. *Id.* at 840.

Thus, a clear failure by the trial court to analyze or apply the law correctly constitutes an abuse of discretion. *Id.* In addition, both legal and factual sufficiency challenges to the evidence are relevant factors in assessing whether the trial court abused its discretion. *In re Rogers*, 370 S.W.3d 443, 445 (Tex. App.—Austin 2012, orig. proceeding); see *In re Wiese*, No. 03-15-00062-CV, 2015 WL 4907030, at *2 (Tex. App.—Austin Aug. 12, 2015, orig. proceeding) (mem. op.). In reviewing the evidence in the context of an abuse-of-discretion standard, we engage in a two-pronged inquiry: (1) whether the trial court had sufficient information on which to exercise its discretion; and if so, (2) whether the trial court erred in the application of discretion; that is, whether based on the evidence, the trial court made a decision that was neither arbitrary nor unreasonable. *In re Rogers*, 370 S.W.3d at 445.

When a trial court abuses its discretion in the issuance of temporary orders in a suit affecting the parent-child relationship, mandamus relief is proper because there are no adequate appellate remedies. See Tex. Fam. Code § 105.001(e) (“Temporary orders rendered under this section are not subject to interlocutory appeal.”); *In re Sartain*, No. 01-07-00920-CV, 2008 WL 920664, at *2 (Tex. App.—Houston [1st Dist.] Apr. 3, 2008, no pet.) (mem. op.) (“Mandamus is a proper remedy to attack the issuance of a temporary order in a suit affecting the parent-child relationship, because such orders are not subject to interlocutory appeal.”).

DISCUSSION

Section 105.001(a)(5) of the Texas Family Code provides that in a suit affecting the parent-child relationship, the trial court may make a temporary order “for the safety and welfare of the child, including an order . . . for payment of reasonable attorney’s fees and expenses.” Tex. Fam.

Code § 105.001(a)(5). A party seeking a temporary order for interim attorney’s fees under section 105.001(a)(5) has the burden of showing that payment of the requested attorney’s fees is necessary for the safety and welfare of the children. *See In re Rogers*, 370 S.W.3d at 446; *In re Sartain*, 2008 WL 920664, at *2 n.2 (noting that party requesting interim attorney’s fees had burden of proof). Section 105.001(a)(5) does not authorize a trial court to make a temporary order for the payment of attorney’s fees “for a purpose other than the safety and welfare of the child.” *See Saxton v. Daggett*, 864 S.W.2d 729, 736 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding). Consequently, a trial court may not order payment of attorney’s fees for the purpose of “level[ing] the playing field” in the SAPCR litigation. *See In re Wiese*, 2015 WL 4907030, at *3 (rejecting argument that award of interim attorney’s fees under analogous family code provision was necessary to appeal because underlying issue on appeal only related to children’s best interest and not to children’s safety and welfare (citing *Saxton*, 864 S.W.2d at 736)).

Here, at the hearing on his request for attorney’s fees, Richard did not present any evidence in support of his contention that payment of attorney’s fees was necessary for the safety and welfare of the children. *See* Tex. Fam. Code § 105.001(a)(5). Instead, Richard’s attorney argued that although “the safety and welfare of the children were not at issue” when Richard filed his April 2017 petition to modify, since that time “[Tamika] [has] created circumstances that have given rise to where we are now” and has endangered the children. Similarly, in his response to Tamika’s petition for writ of mandamus, Richard asserts that in the course of the SAPCR proceedings, “[Tamika has] engaged in multiple acts that endangered the safety and welfare of the [children], and all evidence of such behavior was presented to the court during multiple hearings prior to the award

of attorney's fees in July 2017." For example, Richard asserts that Tamika endangered the children when she "abducted the [children] from Pennsylvania," "refus[ed] to send the [children] to Richard for his summer possession," and "refus[ed] to send the [children] back to Pennsylvania . . . to start school." According to Richard, "[b]y the time the [trial court] awarded interim attorney's fees in this case, Tamika had not only violated the court's orders multiple times, and spent time in the Bell County Jail for her violations, but then after being released from jail she further endangered the children by orchestrating and funding their running away to a major city all alone, further endangering their safety and welfare."

Based on the limited record before us, we cannot conclude that there is any evidence from which the trial court could have found that Tamika committed the acts that Richard now claims impact the safety and welfare of the children and are the basis of his request for attorney's fees. At the hearing on his request for attorney's fees, Richard did not ask the court to take judicial notice of any earlier hearings in the case, nor did he seek to introduce, or even specifically reference, any testimony or other evidence of particular facts. *See In re T.M.F.*, No. 09-10-00019-CV, 2010 WL 974577, at *1 (Tex. App.—Beaumont Mar. 18, 2010, orig. proceeding) (per curiam) (mem. op.) (noting that party seeking interim attorney's fees under section 105.001(a) did not offer any evidence regarding "the safety and welfare of the children" and that although he asked court to take judicial notice of earlier hearings, he did not supply trial court with particular facts to be noticed and court did not state that judicial notice was being taken of any particular facts); *see also Cleveland v. Taylor*, 397 S.W.3d 683, 693 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (noting that arguments or comments made by attorneys do not constitute evidence).

Moreover, even if the record showed that Tamika committed the complained-of acts, the trial court still could not have reasonably concluded the payment of the attorney's fees was authorized by section 105.001(a) of the Family Code. At the time of the hearing, the trial court had already issued temporary orders limiting Tamika's access to the children to supervised visitation in Pennsylvania. *See In re T.M.F.*, 2010 WL 974577, at *2 (noting that "any immediate threat to the health and safety of the children had been met by the temporary orders"). Further, Richard did not present any evidence of his financial situation to the trial court. He did not provide any testimony regarding his ability to pay the anticipated attorney's fees and made no attempt to "segregate those legal services that will be related to the safety and welfare of the children." *See id.* (noting that movant failed to present evidence of financial ability to pay attorney's fees). Thus, even if the complained-of acts impact the safety and welfare of the children and these acts would be issues in the trial on Richard's petition to modify, Richard failed to show that payment of the requested attorney's fees was *necessary* for the safety and welfare of the children. *See id.* (explaining that "[a]lthough trial of the petition to modify the SAPCR may involve issues relating to the safety and welfare of the children," movant failed to show that payment of interim attorney's fees was "necessary for the safety and welfare of the children"); *see also In re Rogers*, 370 S.W.3d at 447-48 (concluding that even if court could infer inability to proceed on merits in SAPCR for financial reasons, "a situation which could be reasonably said to have an effect on the safety and welfare of the children," evidence suggesting that movant had actual ability to pay attorney's fees precluded such inference in that case).

CONCLUSION

Based on the record before us, we conclude that there is no evidence that would support the conclusion that an award of interim attorney's fees was needed for the safety and welfare of the children. *See* Tex. Fam. Code §105.001(a)(5). As a result, the trial court abused its discretion in ordering Tamika to pay \$25,000 in interim attorney's fees. *See In re Sartain*, 2008 WL 920664, at *2 (holding that trial court abused its discretion by ordering payment of interim attorney's fees where no evidence was presented at hearing and, consequently, trial court heard no evidence that requested attorney's fees were needed for "the safety and welfare of the child"). In addition, Tamika has no adequate remedy by appeal. *See In re Rogers*, 370 S.W.3d at 445. We therefore conditionally grant the petition for writ of mandamus and direct the trial court to vacate that portion of its December 18, 2017 order compelling Tamika to pay interim attorney's fees. The writ will issue only if the trial court fails to comply.

Scott K. Field, Justice

Before Chief Justice Rose, Justices Goodwin and Field

Filed: April 5, 2018