NUMBER 13-14-00401-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN THE INTEREST OF D.D.J. & K.L.J., CHILDREN

On appeal from the 389th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Chief Justice Valdez

This is an appeal from the trial court's judgment modifying and enforcing its previous order in a suit affecting the parent-child relationship (SAPCR) between appellant Marcos Juarez, appellee Diana Molina, and their two children, D.D.J. and K.L.J. By four issues, Juarez contends that the trial court erred in: (1) refusing to require Molina to disclose her contact information to him; (2) modifying child support; (3) ordering him to pay the children's outstanding medical bills; and (4) awarding Molina attorney's fees. We affirm, in part, and reverse and remand in part.

I. Background

In 2006, Juarez and Molina divorced. In the original SAPCR proceeding, the trial court made a finding of family violence, issued a protective order for Molina's safety, ordered Juarez to pay child support, appointed Molina the sole managing conservator of the children, and granted Juarez visitation rights.

In 2008, while family violence charges were pending against Juarez in a criminal court, the trial court ordered that Molina's contact information not be disclosed to Juarez (the nondisclosure provision). *See* TEX. FAM. CODE ANN. § 105.006(c) (West, Westlaw through 2015 R.S.) (exempting a party to a SAPCR suit from having to disclose his or her contact information to the other party if disclosure is "likely to cause the child or a conservator harassment, abuse, serious harm, or injury"). The trial court also increased Juarez's child support obligation from $650 to $748 per month.

In 2009, a jury acquitted Juarez on the family violence charges.

In 2013, Juarez filed two motions: (1) a motion to enforce his visitation rights under the SAPCR order; and (2) a motion to modify the SAPCR order to (a) reduce child support, (b) appoint him joint managing conservator of the children, (c) adjust his visitation schedule, and (d) remove the nondisclosure provision. After receiving service of Juarez's motions, Molina filed two counter-motions: (1) a motion to enforce unpaid child support under the SAPCR order; and (2) a motion to modify the SAPCR order to (a) increase child support, (b) extend child support for D.D.J. indefinitely because of a disability, (c) adjust Juarez's visitation schedule, and (d) require Juarez to complete medical training on how to properly administer injections for D.D.J.'s allergies during visitation.

After discovery, the trial court heard the parties' respective motions in one consolidated proceeding. After hearing evidence from both sides, the trial court entered

a new SAPCR order, which, in relevant part: (1) retained Molina as sole managing conservator of the children; (2) retained the nondisclosure provision; (3) reduced Juarez's child support obligation from $748 to $670 per month; (4) required Juarez to pay the children's outstanding medical bills in the amount of $3,172.06; and (5) required Juarez to pay Molina's attorney's fees in the amount of $8,520. This appeal followed.

II. Modification

By his first and fourth issues, Juarez contends that the trial court erred in denying his request to modify the SAPCR order with respect to the nondisclosure provision and child support. We address each issue below.

1. Contact Information

By his first issue, Juarez contends that the trial court erred in retaining the provision exempting Molina from having to disclose her contact information to him under section 105.006 of the Texas Family Code. *See id.* § 105.006.

Family code section 105.006 provides that parties to a SAPCR order are required to exchange and update their contact information unless, as happened in this case, the trial court finds that disclosure of such information by one party to the other party is "likely to cause the child or a conservator harassment, abuse, serious harm, or injury." *Id*. § 105.006(a), (c). Because Juarez sought to remove the nondisclosure provision, it was his burden to prove that: (1) the circumstances had "materially and substantially" changed since the original SAPCR order; and (2) disclosure of Molina's contact information would be in the best interest of the children. *See id*. § 156.101(a) (West, Westlaw through 2015 R.S.). We review the trial court's decision to retain the nondisclosure provision for an abuse of discretion, reversing only if the trial court acted in

an unreasonable and arbitrary manner or acted without reference to guiding rules or principles. *See Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991).

According to Juarez, the circumstances have changed materially and substantially since the 2006 SAPCR because a jury acquitted him of the family violence charges in 2009—charges which he argues prompted the nondisclosure provision. However, the trial court could have reasonably concluded that evidence of the acquittal was not a determination of actual innocence with respect to the incident made the basis of the charges. *See French v. French*, 385 S.W.3d 61, 71 n.3 (Tex. App.—Waco 2012, pet. denied); *see also In re L.A.F.*, No. 05-12-00141-CV, 2015 WL 4099760, at *6 (Tex. App.—Dallas July 7, 2015, pet. denied) (mem. op.) (observing that "an acquittal is not equivalent to or a determination of actual innocence"). In addition, Juarez provided no evidence that Molina ever retracted her accusation of family violence. *See French*, 385 S.W.3d at 71 n.3; *see also In re L.A.F.*, 2015 WL 4099760, at *6 (upholding family violence protective order despite appellant's subsequent acquittal on the criminal case, in part, because the family member protected by the order maintained that family violence occurred). We cannot conclude that the trial court acted without reference to guiding rules or principles in retaining the nondisclosure provision despite Juarez's acquittal. *See Beaumont Bank, N.A.*, 806 S.W.2d at 226.

Moreover, regardless of whether the acquittal constitutes a material and substantial change in circumstances, Juarez provided no evidence or argument that disclosure of Molina's contact information would be in the best interest of the children—the second element to support modification. *See* TEX. FAM. CODE ANN. § 156.101(a). Based on our review of the record, the trial court could have reasonably found that disclosure of Molina's contact information was likely to cause harassment because Juarez

did not deny that he referred to Molina in a derogatory manner and that he did so in front of the children. See *id*. § 105.006(c) (permitting nondisclosure if it is likely to lead to harassment, among other things). Therefore, we cannot say that the trial court abused its discretion in failing to remove the nondisclosure provision.[1] We overrule Juarez's first issue.

2. Child Support

By his fourth issue, Juarez contends that the trial court deviated from the child support guidelines when it modified his child support obligation downward from $748.00 to $670.00 per month. According to Juarez, the child support ordered by the trial court still represents more than 22.6 percent of his "net resources." However, Juarez provides no citation to the appellate record concerning his income or net resources and no explanation or argument as to how child support ordered by the trial court constitutes 22.6 percent of his net resources. We overrule Juarez's fourth issue for inadequate briefing.[2] *See* TEX. R. APP. P. 38.1.

[1] Citing Texas Family Code section 153.004, Juarez asserts that he was entitled to know Molina's contact information because there was no order of protection for Molina's safety in the two years immediately preceding to filing of his 2013 motions to modify and enforce. *See* TEX. FAM. CODE ANN. § 153.004(a)–(e) (West, Westlaw through 2015 R.S.). Juarez's reliance on family code section 153.004 is misplaced. Section 153.004 requires a trial court to "consider" the existence of a protective order in determining whether to "appoint a party as a sole or joint managing conservator" or to allow "unsupervised visitation." Nothing in that section requires a trial court to consider the existence of a protective order in ordering disclosure of a party's contact information pursuant to section 105.006. *See id*. Furthermore, for the reasons set out above, the trial court could have reasonably determined that nondisclosure of Molina's contact information was necessary even if there had not been a protective order in place in the preceding two years.

[2] Juarez complains that the trial court erred in failing to file findings concerning child support. However, Juarez waived this complaint because he never requested such findings from the trial court. *See* TEX. FAM. CODE ANN. § 154.130(a) (West, Westlaw through 2015 R.S.); *see also In re Valadez*, 980 S.W.2d 910, 914 (Tex. App.—Corpus Christi 1998, no pet.); TEX. R. APP. P. 33.1. Juarez further complains that the trial court failed to include a step-down provision setting his child support obligation at a certain amount in the event that his obligation as to one child terminates. However, the step-down provision that Juarez claims is missing actually appears on page twenty-two of the SAPCR order.

III. Medical Expenses

By his second issue, Juarez contends that the trial court erred in ordering him to pay for medical expenses incurred by Molina on behalf of D.D.J. and K.L.J. Specifically, Juarez complains that the trial court erred in ordering him to pay $3,072.06 for D.D.J.'s outstanding medical bills and $100 for K.L.J.'s prescription eyeglasses (medical expenses), totaling $3,172.06.

First, Juarez argues that Molina's motion to enforce only sought to recoup unpaid child support, not unpaid medical expenses. However, the issue was tried by consent when Juarez did not object at trial to Molina's request that unpaid medical expenses be enforced. *See Roark v. Stallworth Oil & Gas, Inc*., 813 S.W.2d 492, 495 (Tex. 1991) (observing that "the party who allows an issue to be tried by consent and who fails to raise the lack of a pleading before submission of the case cannot later raise the pleading deficiency for the first time on appeal"); *see also Torres v. Corpus Christi Hous. Auth*., No. 13-04-00591-CV, 2006 WL 2168086, at *2 (Tex. App.—Corpus Christi Aug. 3, 2006, no pet.) (mem. op.) (holding that appellant, by failing to object, allowed issue to be tried by consent).

Second, Juarez argues that Molina failed to present evidence substantiating the children's medical expenses. However, the record shows that medical bills supporting the amounts ordered by the trial court were admitted into evidence, without objection, as Molina's exhibits eight and nine.

Third, Juarez contends that he is not obligated to pay for the children's medical expenses under 41.0105 of the Texas Civil Practice and Remedies Code because the expenses were not "actually paid" by Molina before she sought reimbursement from him. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West, Westlaw through 2015 R.S.).

However, section 41.0105 states that a damage claimant may recover medical expenses "actually paid *or incurred*" by the claimant. *Id*. (emphasis added). Thus, to the extent that section 41.0105 applies, actual payment of medical expenses is not a prerequisite to recovery. *See id*.

Fourth, Juarez argues that he is not obligated to pay for the children's medical expenses because Molina failed to provide receipts of the medical bills within thirty days of receiving them. However, Juarez provides no citation to the appellant record to support this assertion. We find that this complaint is inadequately briefed. *See* TEX. R. APP. P. 38.1.

Fifth, Juarez contends that he is not obligated to pay for the children's medical expenses because "over 20% of his income" is allegedly being spent on "health, dental, and vision premiums"—an amount which he claims is unreasonable under family code section 154.181(e). *See* TEX. FAM. CODE ANN. § 154.181(e) (West, Westlaw through 2015 R.S.) (providing that the cost of health insurance is deemed "reasonable" if it does not exceed nine percent of the obligor's annual resources). However, Juarez provides no citation to the appellate record concerning his annual resources and provides no explanation as to how he spends one-fifth (or 20%) of his annual income on health insurance. We find that this complaint is inadequately briefed. *See* TEX. R. APP. P. 38.1.

Sixth, Juarez argues that he should not have to pay $100 for K.L.J.'s eyeglasses because, according to him, they were unreasonably "expensive" and not entirely covered by his insurance. However, the record reflects that K.L.J.'s eyeglasses cost $200 and that Molina assumed responsibility to pay for one-half (or $100) of that cost. The trial court did not err in ordering Juarez to pay the other half (or $100) for his daughter to have eyeglasses.

Finally, Juarez asserts that, at least with respect to D.D.J.'s medical expenses, the trial court failed to consider that the government could have paid for those expenses because D.D.J. receives social security assistance. However, Juarez provides no evidence indicating that the trial court failed to consider government assistance in ordering that he pay D.D.J.'s medical expenses. We overrule Juarez's second issue.

IV. Attorney's Fees

By his third issue, Juarez contends that the trial court erred in awarding attorney's fees to Molina in the amount of $8,520.

A. Standard of Review and Applicable Law

We review the trial court's award of attorney's fees for an abuse of discretion. *See Grynberg v. M–I L.L.C.*, 398 S.W.3d 864, 880 (Tex. App.—Corpus Christi 2012, pet. denied). Attorney's fees are recoverable in a suit only if permitted by statute or by contract. *See 1/2 Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378, 382 (Tex. 2011). The party seeking to recover attorney's fees carries the burden of proof with respect to such fees. *See Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991).

Fee claimants are required to "segregate [attorney's] fees between claims for which [fees] are recoverable and claims for which they are not." *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006). An award of attorney's fees erroneously based upon evidence of unsegregated fees requires a remand. *See id*. at 314–15. A recognized exception to this rule requiring segregation occurs when discrete legal services rendered on both recoverable and unrecoverable claims are so "intertwined" that recoverable attorney's fees cannot be segregated from those which are not. *See id*. at 313–14. When the "intertwined" exception applies, a fee claimant is

relieved of her burden to segregate attorney's fees and is instead entitled to fees incurred with respect to both recoverable and unrecoverable claims. *See id*.

Under the family code, the respondent in a suit to *enforce* an existing SAPCR order is obligated to pay the movant's attorney's fees if the trial court finds that the respondent has "failed to make child support payments" or has "failed to comply with the terms of an order providing for possession of or access to a child." *See* TEX. FAM. CODE ANN. § 157.176(a), (b) (West, Westlaw through 2015 R.S.). By contrast, the respondent in a suit to *modify* an existing SAPCR order is not required to pay the movant's attorney's fees. *See generally* TEX. FAM. CODE ANN. § 156; *Tucker v. Thomas*, 419 S.W.3d 292, 300 (Tex. 2013) (concluding that the Legislature did not intend to provide trial courts with discretion to award attorney's fees to a movant who seeks only to modify—not enforce—an existing SAPCR order).

B. Analysis

The record in this case shows that Molina filed a motion to enforce child support and that Juarez, the respondent to that action, owed child support. Therefore, Juarez was obligated to pay Molina's attorney's fees with respect her motion to enforce. *See* TEX. FAM. CODE ANN. § 157.176(a) (providing that the respondent to an enforcement action must pay the movant's attorney's fees); *see also Tucker*, 419 S.W.3d at 298.

However, the record reflects that Juarez and Molina each filed a motion to enforce and a motion to modify on a myriad of other issues and that the trial court ruled on all four motions after one consolidated hearing. To support her request for attorney's fees, Molina's counsel testified, in relevant part, that:

> [Molina retained me] to draft a response to [Juarez's] Motion for Modification. Subsequently, [Molina retained me] to draft a Motion for Enforcement of Child Support and a Motion to Modify the Child Support and

> to designate the child, [D.D.J.] as a disabled child. I've responded to discovery requests, propounded discovery requests on [Juarez] and drafted numerous correspondence and subpoenas and motions in this matter. We've attended mediation.

After hearing this testimony, the trial court ordered that Juarez pay all of Molina's attorney's fees, which included legal fees incurred by Molina to modify and enforce the SAPCR order and to respond to Juarez's motions to modify and enforce the SAPCR order. This understanding is evidenced by the language contained in trial court's order awarding attorney's fees, which refers to Molina's attorney's fees globally as those "incurred [by Molina] as a result of legal representation in this case." However, as noted above, the family code does not authorize recovery of attorney's fees for legal services unrelated to Molina's enforcement action, *see Tucker*, 419 S.W.3d at 300, unless the "intertwined" exception to the rule requiring segregation of attorney's fees applies. *See Chapa*, 212 S.W.3d at 313–14 (reiterating that "if any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make [] fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated"); *cf. Michelena v. Michelena*, No. 13-13-00036-CV, 2015 WL 525182, at *10 (Tex. App.—Corpus Christi Jan. 8, 2015, no pet.) (mem. op.) (holding that the movant properly segregated recoverable attorney's fees by providing evidence of fees incurred specifically in relation to her enforcement action).

Therefore, we sustain Juarez's third issue to the extent that he argues that the trial court erred in awarding attorney's fees based upon evidence of unsegregated fees. *See Chapa*, 212 S.W.3d at 311. Accordingly, we remand the case for a new trial on attorney's fees. *See id.* at 314–15.

V. Conclusion

We affirm, in part, the trial court's order and reverse and remand, in part, for a new trial on attorney's fees.[3]

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Delivered and filed the
22nd day of November, 2016.

[3] We note that, on remand, Justice Guzman's concurring opinion in *Tucker v. Thomas* regarding "blended [SAPCR] proceedings" may provide guidance to the trial court and the parties on the issue of attorney's fees. 419 S.W.3d 292, 305 (Tex. 2013) (observing that "trial courts are often presented with cases in which parties seek both modification and enforcement of support orders. Considering the inextricability of modification and enforcement issues in many SAPCR proceedings, it follows that trial courts placed in such circumstances would maintain similar discretion to award attorney's fees as child support") (Guzman, J., concurring).