Affirmed and Opinion filed July 12, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00201-CV

MARSHA M[C]INNES, Appellant

V.

RANDY FIFE, Appellee

On Appeal from the 306th District Court
Galveston County, Texas
Trial Court Cause No. 93FD1627

O P I N I O N

This is an appeal from the trial court's order in a suit affecting the parent-child relationship. On appeal, appellant, Marsha McInnes ("McInnes"), complains that the trial court erred (1) in entering a judgment awarding appellee, Randy Fife ("Fife"), attorney's fees because he failed to submit that issue to the jury and (2) because the amount of the fees awarded was unreasonable. We affirm.

I. Background

McInnes and Fife were divorced in 1995.[1] In the original divorce decree, McInnes was designated the sole managing conservator of the couple's minor child. In 1999, Fife filed a petition to modify the parent-child relationship ("the SAPCR suit"), wherein he sought to be named joint managing conservator with his former wife. Trial was to a jury, and the jury found that the order designating McInnes sole managing conservator should be modified to designate McInnes and Fife joint managing conservators. The jury also found that Fife should have the exclusive right to determine the child's primary residence, a right previously enjoyed by McInnes. Neither side requested that the jury decide which party, if either, was entitled to attorneys' fees and, if so, what amount would be reasonable. At a September hearing, the record reflects:

> THE COURT: Okay, and y'all are going to get everything to me before the eighth of October.
>
> [FIFE'S COUNSEL]: And attorney's fees are going to be submitted by submission to the Court by October eighth.
>
> THE COURT: All right. If there's nothing else, then y'all are excused.
>
> [M^{C}INNES'S COUNSEL]: Thank you.
>
> [FIFE'S COUNSEL]: Thank you. Are we excused?
>
> THE COURT: Yes.

At the October hearing, the parties were again before the court. Fife's attorney submitted her bills by affidavit. McInnes's attorney then cross-examined Fife's attorney, and before the hearing adjourned, she submitted her own fees, the ostensible purpose of which was to allow the court to compare the fees that were charged by the parties' respective attorneys. McInnes's attorney was not cross-examined. Both sides gave closing arguments.

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[1] Because appellee failed to file a brief in this case, we accept as true all factual assertions made by McInnes and supported by the record. TEX. R. APP. P. 38.1(f).

II. Did Fife Waive His Right to Recover Attorney's Fees?

In her first point of error, McInnes argues that Fife waived his right to recover attorney's fees because he did not request that the issue be submitted to the jury. Where attorney's fees are allowed, a party may request that a jury decide that issue. *See, e.g., W.K. v. M.H.K.*, 719 S.W.2d 232, 233 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.), This rule, however, does not *require* that the issue be decided by a jury. In fact, the Texas Family Code—within the context of a SAPCR suit—identifies those issues that a jury must decide, those a jury may decide, and those it may not decide. TEX. FAM. CODE ANN. § 105.002 (Vernon Supp. 2000). Attorney's fees are found in none of these provisions. Moreover, Chapter 106 expressly provides that "the court may order reasonable attorney's fees as costs . . . ." TEX. FAM. CODE ANN. § 106.002(a) (Vernon Supp. 2000). Several courts of appeals in Texas, interpreting Chapter 106, have held that a court has discretion to award attorney's fees. *See, e.g., Pletcher v. Goetz*, 9 S.W.3d 442 (Tex. App.—Fort Worth 1999, pet. denied) (finding court did not abuse its discretion where, after a hearing, it ordered wife to pay attorney's fees under section 9.205); *In re O.G.M.*, 988 S.W.2d 473 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd) (finding court did not abuse its discretion under section 106.002 in denying wife's request for attorney's fees); *Johnson v. Johnson*, 948 S.W.2d 835 (Tex. App.—San Antonio 1997, writ denied) (holding court has discretion to award attorney's fees where the issue involved is the division of community property or a suit affecting the parent-child relationship). Finally, a party may waive its right to have the jury decide whether the other side is entitled attorney's fees. *Burlington Ins. Co. v. Mexican Am. Unity Council, Inc.*, 905 S.W.2d 359, 363 (Tex. App.—San Antonio 1995, no writ).

At submission, McInnes argued that the discussion which took place at the September hearing does not reflect an *agreement* by the parties to submit attorney's fees to the court. Rather, she explained that, immediately before the discussion cited above, in

an off-the-record discussion in chambers, the trial court ordered that it would decide the issue of attorney's fees, and the remarks by counsel simply put on the record what was previously ordered in chambers. If McInnes is correct, then it was incumbent upon her to put on the record her objection to the court's order. By failing to do so, she has waived this point of error. TEX. R. APP. P. 33.1(a).

In concluding McInnes failed to preserve this argument for appeal, we are persuaded by the reasoning of the San Antonio Court of Appeals in *Burlington*. There, Mexican American Unity Council ("MAUC") argued that Burlington waived its claim for attorney's fees by not submitting the issue to the jury. 905 S.W.2d at 363. In that case, the trial court asked Burlington whether it would submit the issue of attorney's fees to the jury, to which Burlington responded, "under the declaratory judgment act[,] that's for the Court." *Id.* MAUC did not object, nor did it object when the court later stated, "I can make a finding. I need to make a finding here, I think, with respect to the attorney's fees." The judge then decided the amount of attorney's fees. On appeal, the court held that MAUC waived its complaint by failing to object to submission of the issue to the trial court. *Id.*

McInnes, like MAUC's attorney, failed to object to the statement from opposing counsel that the issue of attorney's fees was going to be submitted to the court. Indeed, this case is perhaps even more compelling than was *Burlington* because here, not only did McInnes fail to object at the September 22 hearing, but she also attended the October hearing, cross-examined Fife's attorney as to the reasonableness of his attorney's fees, and presented an expert who testified that the attorney's fees Fife sought were excessive—all without ever objecting to having the issue of attorney's fees submitted to the court in the first place. Accordingly, appellant's first point of error is overruled.

III. Reasonableness of Attorney's Fees

In her second point of error, McInnes argues that the amount of attorney's fees awarded by the court is unreasonable. Specifically, she contends that the amount is excessive in light of the fact that no experts were called at trial and no depositions were

taken. Moreover, she complains that several specific entries are unreasonable—4.5 hours to propound, and 22 hours to answer, "vanilla" sets of discovery; $645.00 to file four "very brief motions;" and billing for requests for admissions that were never propounded.

We review an award of attorney's fees to see whether the trial court abused its discretion. *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985). While legal and factual insufficiency are not *independent bases* of error, they are "relevant factors" in assessing whether the court abused its discretion. *Zieba v. Martin*, 928 S.W.2d 782, 787 (Tex. App.—Houston [14th Dist.] 1996, no writ); *Mai v. Mai*, 853 S.W.2d 615, 618 (Tex. App.—Houston [1st Dist.] 1993, no writ) (citing *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991)). An abuse of discretion does not occur where the trial court bases its decisions on conflicting evidence. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). Rather, an abuse of discretion occurs where the trial court acts without reference to any guiding rules or principles, *i.e.*, where the court acts arbitrarily or unreasonably. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). Evidence is viewed in the light most favorable to the trial court's ruling, indulging every presumption in its favor. *Phillips & Akers, P.C. v. Cornwell*, 927 S.W.2d 276, 279 (Tex. App.—Houston [1st Dist.] 1996, no writ).

Factors we consider in determining whether the amount of the fee is reasonable include (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

At the October hearing, the court heard conflicting testimony concerning the reasonableness of Fife's attorney's fees.[2] For example, while McInnes's expert testified that he believed the "charges for some of the pleadings that were filed, discovery responses and discovery preparation," were not reasonable, Fife's attorney explained why 22 hours were expended in responding to McInnes's so-called "vanilla" set of discovery. Similarly, the court heard conflicting testimony about the time Fife's attorney spent in connection with the four "very brief" motions. The court, after hearing from both sides, awarded Fife attorney's fees of $16,550.00.[3]

Based on this record, we cannot say that the trial court abused its discretion in finding the testimony of Fife's attorney more credible than the testimony of McInnes's rebuttal expert witness, particularly where, as here, there is room for reasonable disagreement. Nor are we prepared to say that it is unreasonable *per se* for an attorney to prepare, but not propound, discovery upon the opposing side. A variety of good reasons may account for why a party prepares a set of discovery requests, a pleading, a motion, or even a mandamus, but then later decides to drop the matter. Therefore, we cannot say that the court abused its discretion by awarding Fife attorney's fees in connection with his attorney's preparation of requests for admissions that were never served on McInnes. Appellant's final point of error is overruled.[4]

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[2] McInnes did not challenge the fees charged in connection with the actual time spent in trial. The record reflects that the SAPCR trial lasted three days, and that Fife had two attorneys and a legal assistant present throughout trial. Eight thousand five hundred fifty dollars of the amount awarded, or just slightly more than half, was billed during the three days of trial.

[3] The statements attached to the affidavit of Fife's attorney show total charges of $16,542.75, although the actual affidavit states the amount sought is $16,547.75. The trial court's award is $2.25 more than the evidence supports.

[4] At submission, McInnes's counsel conceded that, even if it were error for the trial court to file late findings of fact and conclusions of law, no harm occurred as a result. Accordingly, we do not address this issue.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed July 12, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).