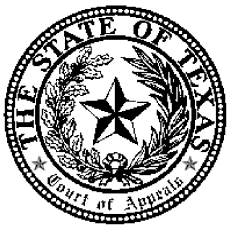
Affirmed as Modified and Opinion filed September 20, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00175-CV

LESA Y. TURNER, Appellant

V.

JIMMY C. TURNER, Appellee

On Appeal from the 245th District Court
Harris County, Texas
Trial Court Cause No. 90-50883

O P I N I O N

Appellant, Lesa Y. Turner, appeals from an order granting appellee Jimmy C. Turner's motion to modify in a suit affecting the parent-child relationship. In six points of error, appellant complains that the trial court erred (1) in not allowing appellant or her witnesses to testify; (2) in failing to consider the history of domestic violence; (3) in refusing to allow her attorney to make an offer of proof during trial; (4) in failing to exclude expert testimony regarding appellee's attorney's fees; (5) in awarding attorney's fees to appellee; and (6) in granting appellee's motion to modify. We modify the judgment to delete the award of attorney's fees to appellee and affirm.

BACKGROUND

Appellant and appellee divorced in 1991. The decree of divorce named appellant as sole managing conservator of the parties' two children. Although appellee was named possessory conservator, he was denied any rights of possession of the children at that time. The decree provided, however, that he could file a subsequent motion for visitation after he submitted to psychological evaluation.

In 1996, appellee requested standard visitation with his children, and he then submitted to a psychological examination. Appellant and the children were also ordered to undergo such evaluations, but appellant failed and/or refused to complete her evaluation. Appellee filed a total of five motions to enforce the order, alleging that he had undergone the required evaluations, but that appellant had not. Each motion was granted. In conjunction with these orders, the trial court fined appellant $50 for each day that she did not comply and awarded attorney's fees to appellee. In the fifth and final of such orders, some nineteen months later, the trial court found that appellant had "willfully disobeyed" the court's order in not completing her evaluation and ordered that her pleadings be struck.

At the ensuing trial, the court ruled that appellant could not testify or present witnesses because her pleadings had been struck. Following trial, the court entered an order modifying the decree to grant appellee standard possessory rights to the children. The court also awarded appellee $5,000.00 as costs and $30,000.00 as attorney's fees if appellant filed an unsuccessful appeal.

DISALLOWANCE OF WITNESSES

Under her first point of error, appellant contends the trial court erred in not allowing her or her witnesses to testify at trial. Appellant's general contention is that the court was not authorized to prevent her from presenting evidence notwithstanding the fact that her pleadings had been struck. Appellant presents no authority for this argument. To the contrary, we find it axiomatic that if a party's pleadings have been struck, the party no longer

has the right to present its case because it no longer has a case to present. *See In re Dynamic Health, Inc.*, 32 S.W.3d 876, 884-85 (Tex. App.—Texarkana 2000, orig. proceeding [leave filed]) (death penalty sanctions precluded presentation of witnesses on party's behalf). Disallowance of appellant's testimony and of her witnesses was not a "second" sanction, as argued by appellant, but rather was a consequence of the original sanction order striking pleadings. This death penalty sanction was imposed only after appellant ignored four prior orders of the court and previous fines of $50 a day for her failure to comply. *See In re P.M.B.*, 2 S.W.3d 618, 624 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (death penalty sanctions should not be imposed "without considering whether lesser sanctions are adequate to accomplish the needed compliance, deterrence, and punishment").

Appellant further contends her fundamental right of due process was denied at the sanctions hearing of August 6, 1999 because the trial court refused to hear any evidence regarding her inability to comply with its orders for psychological evaluation. In support of this argument, she refers us to the entirety of the reporter's record without specific reference to establish her argument. Appellant must submit a brief which contains a clear argument for her contentions and appropriate citations to the record and authorities. TEX. R. APP. P. 38.1(h). It is not this court's responsibility to sift the record to find error or evidence in support of appellant's argument. *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 280 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Tacon Mech. Contractors, Inc. v. Grant Sheet Metal, Inc.*, 889 S.W.2d 666, 671 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

Nonetheless, we have reviewed the record from the hearing. During the hearing, appellant's counsel explained that appellant could not afford to complete the psychological evaluation. Thus, the substance of her testimony was before the trial court. Due process requires that a party be given an adequate opportunity to be heard. *Allied Chem. Co. v. DeHaven*, 824 S.W.2d 257, 263 (Tex. App.—Houston [14th Dist.] 1992, no writ). Where, as here, a party is given the opportunity to argue in opposition to a sanction and have her conduct explained to the trial court, due process is satisfied. *See id.* Because appellant

received due process and because appellant did not have the right to call witnesses after her pleadings were struck, we overrule point of error one.

HISTORY OF FAMILY VIOLENCE

In her second point of error, appellant complains that the trial court erred by failing to consider the history of domestic violence as required under Section 153.004 of the Texas Family Code. Appellant's specific complaint is that the trial court refused to allow her to testify as to the history of family violence, and prevented her from fully cross-examining appellee as to family violence that occurred during the parties' marriage. Although we do not have the benefit of the original trial record from 1991, appellant concedes in her brief that the court considered the history of family violence at the original divorce trial and denied appellee visitation. At the commencement of the modification hearing on August 25, 1999, the trial court took judicial notice on the record of its prior orders and did not allow cross-examination about family violence that had occurred during the parties' marriage, which appellant concedes the court had already heard and considered in 1991. The court allowed testimony as to appellee's 1991 probated conviction for assaulting appellant and allowed extensive cross-examination about events occurring after the divorce. The record before us does not include a bill of exceptions made by appellant presenting any testimony as to post-divorce family violence excluded by the court. Under these circumstances, appellant has not presented sufficient proof that the trial court failed to consider any history of family violence. Therefore, we overrule appellant's second point of error.

OFFER OF PROOF

In her third point of error, appellant contends the trial court refused to allow her to make an offer of proof, which consisted of a prepared written version of her proposed testimony. After appellee rested, appellant's counsel was not permitted to call appellant as a witness. Moreover, appellant's counsel was not permitted to introduce the prepared statement as an "offer of proof." Such rulings, however, did not prevent appellant from

making a post-trial bill of exceptions to set forth the proposed testimony for our review on appeal. *See Melendez,* 998 S.W.2d at 274; *Estate of Veale v. Teledyne Indus.*, 899 S.W.2d 239, 242 (Tex. App.—Houston [14th Dist.] 1995, writ denied). Nothing in the record demonstrates that appellant was denied the right to make a formal bill of exceptions following trial. Although appellant has attached a copy of the prepared statement to her brief, we are unable to consider it for any purpose because it is not part of the record on appeal. *Mitchison v. Houston I.S.D.*, 803 S.W.2d 769, 771 (Tex. App.—Houston [14th Dist.] 1991, writ denied); *see* TEX. R. APP. P. 33.2.

When a trial court commits error in refusing a bill of exceptions, we will not reverse and grant a new trial unless the error amounted to such a denial of appellant's rights as was reasonably calculated to cause, and probably did cause, rendition of an improper judgment. *See Biggers v. State*, 358 S.W.2d 188, 192 (Tex. App.—Dallas), *writ ref'd n.r.e.*, 360 S.W.2d 516 (Tex. 1962). Because Appellant has not briefed the issue of harm, no error has been shown, and appellant's third point of error is overruled.

ATTORNEY'S FEES

In her fourth point of error, appellant contends the trial court erred by allowing testimony regarding attorney's fees from an undisclosed expert witness. In her fifth point of error, appellant contends the trial court erred in awarding appellee $5,000.00 in costs and $30,000.00 attorney's fees, conditioned on an unsuccessful appeal.

As to permitting appellee's counsel to testify, we note the record reflects that counsel claimed *not* to be testifying as an expert. An attorney need not be designated as an expert witness in order to testify about personal knowledge of his own work on a case. *Northwestern Nat'l County Mut. Ins. Co. v. Rodriguez,* 18 S.W.3d 718, 723 (Tex. App.—San Antonio 2000, pet. denied). The trial court did not err in allowing appellee's counsel to testify as to facts surrounding his representation of appellee, his fees, and the services he provided. *See id.* We thus overrule point of error four.

We next address point of error five, in which appellant contends there was legally and factually insufficient evidence to support the award of attorney's fees. A trial court may award reasonable attorney's fees as costs in a suit affecting the parent-child relationship. TEX. FAM. CODE ANN. § 106.002(a) (Vernon Supp. 2001). The decision to award such fees is discretionary. *Thomas v. Thomas*, 895 S.W.2d 895, 898 (Tex. App.—Waco 1995, writ denied). The trial court also has the discretion to award conditional attorney's fees for post-trial appeals. *Havis v. Havis*, 657 S.W.2d 921, 924 (Tex. App.—Corpus Christi 1983, writ dism'd). Where, as here, the pleadings generally seek attorney's fees, such pleading is sufficient to encompass post-trial attorney's fees. *In re Pecht*, 874 S.W.2d 797, 803-04 (Tex. App.—Texarkana 1994, no writ).

The trial court awarded appellee $5,000 for costs of court and $30,000 in attorney's fees should appellant unsuccessfully appeal. Although appellee's attorney testified that appellee had already incurred $5,000 in legal fees, he offered no testimony in support of attorney's fees on appeal. There is no evidence to justify the conditional award of attorney's fees on appeal. *See Pecht*, 874 S.W.2d at 803.

Appellant further contends that there is no evidence that the $5,000 awarded is a reasonable amount. "[R]easonableness of attorney's fees is a question of fact to be determined by the trier of the facts and must be supported by competent evidence." *Peeples v. Peeples*, 562 S.W.2d 503, 506 (Tex. Civ. App.—San Antonio 1978, no writ). Expert testimony is necessary to establish reasonableness of attorney's fees. *See Woollett v. Matyastik*, 23 S.W.3d 48, 52 (Tex. App.—Austin 2000, pet. denied). A trial court may not adjudicate reasonableness on judicial knowledge and without the benefit of evidence. *Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901, 907 (Tex. 1966); *Woollett*, 23 S.W.3d at 52.[1] Because there is no evidence that the $5,000 spent by appellee in attorney's fees was

[1] *But see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.003-.004 (Vernon 1997) (presuming that usual and customary attorney's fees for delineated section 38.001 claims are reasonable; permitting judicial notice of usual and customary attorney's fees without further evidence); *In re Striegler*, 915 S.W.2d 629, 644 (Tex. App.—Amarillo 1996, writ denied) (extending section 38.003 rationale to child support enforcement cases

reasonable and because there was no evidence whatsoever about fees for an appeal, we sustain point of error five.

STATUTORY MODIFICATION GROUNDS

In her final point of error, appellant alleges that the trial court erred in overruling her "motion for directed verdict" and in granting modification as there is no evidence, or only insufficient evidence, to support the modification order as to a substantial change in circumstances, an unworkable prior order, or the best interests of the children.

In reviewing a custody modification, an appellate court may not reverse a decision of the trial judge unless there has been a clear abuse of discretion. *In re M.R.*, 975 S.W.2d 51, 53 (Tex. App.—San Antonio 1998, pet. denied). The trial court has wide discretion in determining the best interests of the child. *Eason v. Eason*, 860 S.W.2d 187, 191 (Tex. App.—Houston [14th Dist.] 1993, no writ). It is appellant's burden on appeal to present supporting authority and references to the record to establish such abuse of discretion. *Id.* Appellant fails to meet this burden.

As argument for establishing error or abuse of discretion, appellant contends the trial court reached its decision without benefit of the following information: appellee's psychological evaluation and the evaluations of other parties; a social study of appellee's

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and thus permitting judicial notice of reasonableness of attorney's fees).

Appellant does not discuss *Striegler* or sections 38.003 and .004, and there is no appellee's brief filed in this case. Because we do not have the benefit of full briefing, we do not address whether a trial court can extend the rationale of sections 38.003 and .004 to permit judicial notice of reasonableness in actions other than those specifically delineated in section 38.001.

We note that appellate courts have not been uniform in their interpretation of sections 38.003 and .004 and whether a trial court may take judicial notice of reasonable attorney's fees in other types of cases. *Compare Valdez v. Valdez*, 930 S.W.2d 725, 731-33 (Tex. App.—Houston [1st Dist.] 1996, no writ) (no judicial notice of reasonableness of attorney's fees in modification of child custody); *GeoChem Tech. Corp. v. Verseckes*, 929 S.W.2d 85, 93 (Tex. App.—Eastland 1996), *rev'd on other grounds*, 962 S.W.2d 541 (Tex. 1998) (no judicial notice of reasonable attorney's fees in declaratory judgment suit) *and Matelski v. Matelski*, 840 S.W.2d 124 (Tex. App.—Fort Worth 1992, no writ) (permitting judicial notice of reasonable attorney's fees in clarification of divorce decree); *In re Estate of Kidd*, 812 S.W.2d 356, 359 (Tex. App.—Amarillo 1991, writ denied) (permitting judicial notice of reasonable attorney's fees in a will contest).

home environment; information about sleeping arrangements, accommodations for overnight visitation; and other possible residents at appellee's home. Appellant has failed to identify any portion of the record establishing that the evaluations had not been filed with the court or that a social study had been ordered but not completed, nor does it appear in the record that appellant objected to the absence of these materials. As to sleeping arrangements and other matters regarding appellee's home, the record does not show that appellant inquired into these areas during cross-examination of appellee. None of these arguments was raised in appellant's motion for directed verdict.

Nonetheless, we find the evidence was sufficient for the trial court to determine the best interests of the child and to grant the modification allowing appellee visitation with his children. Appellee testified about the good relationship between himself, his new wife, and the children. He also testified that his daughter wanted to call his wife "mom" and his son enjoyed visiting them. Appellee stated that he loved his children, wanted them to have the benefit of a two-parent relationship, and wanted to be a positive influence in their lives. Appellee's wife testified to having a good relationship with the children, to shopping and holding hands with the children, and that both she and appellant wanted regular visitation with the children. Appellant's sixth point of error is overruled.

In conclusion, we have overruled all points of error except for point of error five. Accordingly, we modify the judgment below to delete the awards of $5,000 in costs (attorney's fees) and $30,000 in conditional attorney's fees. The remainder of the judgment is affirmed.

/s/ Charles Seymore
Justice

Judgment rendered and Opinion filed September 20, 2001.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).