

CONCUR; DISSENT and Opinion Filed June 8, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-18-00629-CV

IN THE INTEREST OF S.C. AND K.C., CHILDREN

**On Appeal from the 256th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-11-16417**

CONCURRING AND DISSENTING OPINION
Before Justices Pedersen, III, Reichek, and Carlyle
Opinion by Justice Reichek

I concur with the majority’s holding that the trial court did not abuse its discretion by awarding Mother her attorney’s fees on appeal pursuant to section 109.001(a)(5) of the Texas Family Code. *See* TEX. FAM. CODE § 109.001(a)(5). I respectfully dissent, however, from the majority’s conclusion that the second amended divorce decree can be read to require Father to pay 100% of Mother’s attorney’s fees incurred in all future suits affecting the parent-child relationship (“SAPCRs”).

With due respect to my colleagues, a modification suit is a new and separate suit from the original SAPCR. *Rose v. Rose*, 117 S.W.3d 84, 88 (Tex. App.—Austin

2003, no pet.). Section 156.004 of the family code provides that “[t]he Texas Rules of Civil Procedure applicable to the filing of an original lawsuit apply for a ‘suit’ for modification under this chapter.” TEX. FAM. CODE ANN. § 156.004. The provision of the decree at issue states, “[Father] is further ordered to pay 100% of the attorney’s fees incurred by [Mother] as it relates to issues concerning the suit affecting parent-child relationship and the safety and welfare of the children.” This sentence, on its face, does not apply to future SAPCRs; rather, it applies, by its terms, to “the” SAPCR – the one disposed of by the decree.

Because the decree did not order an award of attorney’s fees for future SAPCRs, Father was under no obligation to appeal the decree for that reason at the time it was rendered. In other words, Father is not appealing the decree, but its application in the context of his subsequent modification suit, from which a timely appeal was perfected. I therefore disagree with the majority’s conclusion that this appeal is a collateral attack on the second amended decree.¹

Even assuming Father’s challenge is a collateral attack, the application of the attorney’s fee provision in the decree to future proceedings is void and, therefore, subject to attack at any time. *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 272 (Tex. 2012). This Court has previously addressed orders purporting to award attorney’s

¹ Although the majority concludes this appeal is an impermissible collateral attack on a judgment and this Court lacks the ability to review the decree for that reason, it then proceeds to do exactly that by addressing the reach and propriety of the attorney’s fee provision.

fees in future modification suits, and we have consistently held the trial court was without authority to render such an order. *See In re S.V.*, No. 05-16-00519-CV, 2017 WL 3725981, at *11 (Tex. App.—Dallas Aug. 30, 2017, pet. denied); *Beavers v. Beavers*, 675 S.W.2d 296, 300 (Tex. App.—Dallas 1984, no writ). A trial court cannot apply the necessary analysis required for an award of attorney’s fees to hypothetical future litigation. *See Beavers*, 675 S.W.2d at 300 (future proceedings beyond control of present judge’s authority). To the extent the trial court may have been using the fee provision in the decree as a method to address Father’s “litigation tactics,” it has other means at its disposal to achieve that result. *See In re S.V.*, 2017 WL 3725981, at *11.

For these reasons, I would hold that the provision of the decree awarding Mother 100% of her attorney’s fees applied only to “the” SAPCR disposed of by the second amended divorce decree. To the extent the trial court relied on that provision to award attorney’s fees in this later occurring SAPCR suit, it was improper to do so because any order awarding attorney’s fees in future litigation would be void. Accordingly, I would reverse the trial court’s fee award orders in this SAPCR that were based on the second amended decree and remand for the trial court to determine if the requested fees are otherwise appropriate under the family code.

I would affirm the appellate attorney's fees awarded to Mother under section 109.001(a)(5) of the Texas Family Code.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

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