Affirm 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

MEMORANDUM OPINION

Before Justices Pedersen, III, Reichek, and Carlyle
Opinion by Justice Pedersen, III

The father of S.C. and K.C. (Father) appeals the trial court's order on a motion to modify together with a series of enforcement orders granting the children's mother (Mother) attorney's fees incurred during the modification and appeals. In each proceeding, Father has challenged the trial court's order requiring him to pay Mother's attorney's fees incurred after the entry of the Second Amended Decree of Divorce (the Decree). We affirm the trial court's orders granting Mother awards for fees incurred during the modification and appeal of the suit affecting the parent–child relationship (SAPCR) proceedings.

BACKGROUND

Mother and Father were divorced in December 2015. They continued to litigate divorce issues until June 2016, when the Decree was signed. Among the Decree's provisions were a custom possession order for Father, which forbade overnight possession of the children, and an order to pay $7,250 monthly in child support. The Decree also included the following order:

> [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. [hereinafter, the Fee Provision]

Neither party appealed the Decree.

One month later, Father filed a motion to modify the Decree, seeking increased possession of the children, including overnight possession, and a reduction in his child support obligations. He subsequently amended his motion, challenging the above-quoted Fee Provision. The trial court's final order in the modification proceeding found that the circumstances of both parents and children had materially and substantially changed in some respects since the date of the Decree; it granted Father standard possession of the children. The order did not specifically address Father's child support or the Fee Provision, but it concluded by stating that all terms of the Decree not modified in the order "shall remain in full force and effect."

The trial court elaborated somewhat in subsequent Findings of Fact and Conclusions of Law. It found that the financial circumstances of the parties and

children had not materially and substantially changed in a manner sufficient to justify a change in Father's child support. And it found further that there had not been a "material and significant change in the circumstances of the parties or the children to justify a change in the attorney's fees provision found in the [Decree]." Accordingly, the court specifically ordered Father to continue to pay 100% of Mother's fees pertaining to the SAPCR as ordered in the Decree. Father appealed that order.

During the pendency of the modification proceeding, Mother submitted monthly invoices for her attorney's fees to Father. When Father did not pay some or all of the amounts billed, Mother would file an enforcement motion, the trial court would hear the motion, and the court would order Father to pay the fees. Father has also appealed those orders, and they have been consolidated in this appeal.

In addition, Mother sought and received an order allowing her to recover from Father—on an interim basis—the fees she would incur during this appeal. Orders awarding appellate fees to Mother have also been appealed and consolidated in this appeal.

THE DECREE'S FEE PROVISION

Father raises a number of challenges to the substance of the Fee Provision itself. He argues that its language does not support the trial court's orders, that public policy does not support its enforcement, and that he did not anticipate that the trial court would continue to enforce the Fee Provision throughout the modification

proceeding. We review the award of attorney's fees in a SAPCR for an abuse of discretion. *In re M.A.N.M.*, 231 S.W.3d 562, 567 (Tex. App.—Dallas 2007, no pet.) ("A trial court has broad discretion to award reasonable attorney's fees in a SAPCR.").[1] However, before we reach Father's substantive arguments regarding the validity of the Fee Provision, we must determine whether those arguments are properly before us.

Can We Address the Validity of the Fee Provision?

The Decree was, by its own terms, "a final order for purposes of appeal," but neither party appealed the Decree. Accordingly, Father's ability to challenge the validity of the Fee Provision in this appeal is severely limited. He would need to establish either (a) that the provision is void, and thus subject to collateral attack in this appeal, or (b) that circumstances of the children or parents have materially and substantially changed since rendition of the Decree, so that the trial court could reconsider the Fee Provision as a ground for modification. Father has failed in both respects.

The Fee Provision Is Not Void

As a general rule, judgments can only be challenged and corrected directly—i.e., by motion for new trial, appeal, or bill of review—within a definite time period defined by the rules of civil and appellate procedure. *PNS Stores, Inc. v. Rivera*, 379

[1] The Fee Provision, by its own terms and by virtue of its placement in the Decree, applies to the SAPCR provisions of the Decree.

S.W.3d 267, 271 (Tex. 2012) (citing TEX. R. CIV. P. 329b(a); TEX. R. APP. P. 26.1(a), (c)). A collateral attack on a judgment, on the other hand, does not attempt to secure a corrected judgment. *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005). Instead, a collateral attack attempts to avoid the effect of the former judgment. *Rivera*, 379 S.W.3d at 272. "As with other final, unappealed judgments which are regular on their face, divorce decrees and judgments are not vulnerable to collateral attack." *Hagen v. Hagen*, 282 S.W.3d 899, 902 (Tex. 2009). An order that is voidable must be corrected by direct attack; unless successfully attacked, a voidable judgment becomes final. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010).

If a judgment is void, however, it can be challenged at any time. *Rivera*, 379 S.W.3d at 272. Father's appeal is a collateral attempt to challenge the Fee Provision, and it can succeed only if the provision is void.

A judgment is void when "the court rendering judgment had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act." *Travelers Ins. Co.*, 315 S.W.3d at 863. In this case, no issue exists concerning personal jurisdiction: at the time suit was filed, both parents and the children were residents of Dallas County, Texas. Likewise, the trial court had both jurisdiction of the SAPCR portion of the proceeding below, TEX. FAM. CODE ANN. § 152.201, and the authority to make an award of attorney's fees, *id.* § 106.002(a).

We conclude the Fee Provision is not void. It is, therefore, not subject to collateral attack in this appeal.

Circumstances Relevant to the Fee Provision Did Not Materially or Substantially Change

Rather than appeal the Decree, Father filed a motion to modify it.[2] In the circumstances existing for these parties, the trial court could modify an order:

> that provides the terms and conditions of conservatorship, or that provides for the possession of or access to a child if modification would be in the best interest of the child and:
>
> (1) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since . . . the date of the rendition of the order.

FAM. § 156.101(a)(1)(A).[3] Thus, the threshold for modifying the Fee Provision—or any provision of the Decree—was proof of a material and substantial change in the parties' circumstances since the Decree was entered. The trial court specifically found that no such material and substantial change had occurred in the circumstances of the parties or the children following entry of the Decree that would justify a change in the Fee Provision. We review this finding for an abuse of discretion. *In re*

[2] For purposes of this appeal, we assume without deciding that the Fee Provision could be an order subject to modification under the Family Code. *See* FAM. § 156.001 ("A court with continuing, exclusive jurisdiction may modify an order that provides for the conservatorship, support, or possession of and access to a child.").

[3] The attorney's fees at issue have never been characterized as child support. Accordingly, we do not discuss the standard for modification of a child support order, although we note that the modification standard for child support also requires a material and substantial change in circumstances. FAM. § 156.101(a).

S.V., No. 05-16-00519-CV, 2017 WL 3725981, at *14 (Tex. App.—Dallas Aug. 30, 2017, pet. denied) (op. on reh'g). Father challenges this finding, relying on facts stemming from Mother's remarriage. He cites Mother's testimony that she does not pay the mortgage, insurance, or most utility bills at the residence where she currently lives.[4] However, the trial court found that Mother's circumstances *had* materially and substantially changed since entry of the Decree in that she is no longer receiving $20,000 monthly in spousal support. Father has not disputed that fact. Thus, there is some evidence that Mother's current finances make it less likely that she can pay attorney's fees now than at the time the Decree was entered. Indeed, Mother testified that she could not afford an attorney if Father was not ordered to pay her fees incurred on appeal. The trial court could choose to believe her testimony. *See id.* ("The trial court is able to see and hear witnesses who are testifying to fact issues, so we review findings of fact under an abuse of discretion standard if they involve an evaluation of witness credibility and demeanor."). We show almost total deference to a trial court's findings of fact, and we view the evidence in the light most favorable to the trial court's ruling. *Id.*

We conclude that the trial court did not abuse its discretion in finding that the parties had not experienced a material and substantial change in their circumstances

[4] Again, although the Fee Provision does not represent child support, we are mindful of the Family Code's prohibition against including "any portion of the net resources of a new spouse" when calculating child support in a modification proceeding. FAM. § 156.404(a).

that would support modifying the Fee Provision. Because Father failed to establish this threshold requirement, the trial court did not consider modification of the substance of the Fee Provision. Accordingly, the modification proceeding did not provide us with a reviewable ruling on the validity of the Fee Provision.

We conclude that we are unable to review the validity of the trial court's order requiring Father to pay 100% of the attorney's fees incurred by Mother relating to SAPCR issues and the safety and welfare of their children.

What Is the Reach of the Fee Provision?

Although the scope of our review is limited, we will respond to Father's challenges concerning the proceedings to which the Fee Provision applies. He argues that the order should apply, if at all, only to fees incurred by Mother prior to entry of the Decree, i.e., in the original SAPCR proceeding. We disagree.

Father argues first that the modification proceeding is a separate lawsuit from the original SAPCR so that the Decree did not apply to the modification. But while a modification proceeding may have its own rules and timelines, it is not completely separate from an original SAPCR. A modification proceeding is filed in the same trial court as an original divorce and SAPCR because that court maintains continuing exclusive jurisdiction over the case. FAM. § 156.001 ("A court with continuing, exclusive jurisdiction may modify an order that provides for the conservatorship, support, or possession of and access to a child."). Any relief granted in the proceeding would be a modification of the Decree; any modification denied would

provide for continued application of the Decree. A modification proceeding is simply one aspect of the continuing SAPCR.

We acknowledge that some of our sister courts of appeal have described attempts to modify an existing decree pursuant to Chapter 156 as a "separate suit." *See In re Honea*, 415 S.W.3d 888, 890 (Tex. App.—Eastland 2013, orig. proceeding) (addressing objection to assigned judge); *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 280 (Tex. App.—Austin 2002, no pet.) (addressing appealability of protective order); *Normand v. Fox,* 940 S.W.2d 401, 403 (Tex. App.—Waco 1997, no writ) (same); *Katerndahl v. Haberman*, No. 04-96-00444-CV, 1996 WL 411194, at *1 (Tex. App.—San Antonio July 24, 1996, orig. proceeding) (not designated for publication) (addressing procedures for overturning default judgment). None of these cases addresses a substantive provision in a SAPCR decree that is at issue in a modification proceeding. Instead, each of the cases refers to the notion of modification as a new or separate lawsuit for procedural purposes. Not surprisingly, the line of cases is rooted in the Family Code's importation of the rules of civil procedure in order to give notice to all parties in the modification procedure. *See* FAM. § 156.004 ("Rules of Civil Procedure applicable to the filing of an original lawsuit apply to a suit for modification under this chapter."). But this identification of the manner in which a modification proceeding is to begin and proceed does not affect the nature of the ongoing case that safeguards the children of divorce.

The continuing jurisdiction of one court over proceedings involving named children is unique in Texas jurisprudence. Indeed, the Family Code's specific reference to the Texas Rules of Civil Procedure's "original lawsuit" service requirements suggests that this establishes a statutory exception to the normal procedure. The motion to modify must be filed with the court of continuing exclusive jurisdiction, and it may be pursued only because the parties' conduct is—at the time of filing—governed by an existing final decree. Totally "original" lawsuits do not modify *existing* judicial decrees. We disagree that the importation of procedural rules to govern a modification proceeding puts an end to the continuing portion of the SAPCR, the case that is dedicated to the health and safety of the same children.

We also reject appellant's argument that attorney's fees may be awarded in a modification proceeding only when the suit is brought frivolously or to harass. *See Tucker v. Thomas*, 419 S.W.3d 292, 300 (Tex. 2013) (section 106.002 provides authority for fee award in enforcement modification suit); *In re B.J.W.*, No. 05-17-00253-CV, 2018 WL 3322882, at *1 (Tex. App.—Dallas July 6, 2018, no pet.) (mem. op.) ("Section 106.002 of the family code invests a trial court with general discretion to award reasonable attorney's fees in all suits affecting the parent-child relationship, including modification suits."). We conclude that the trial court was authorized to award attorney's fees in both the original SAPCR and the modification

proceeding. FAM. § 106.002.[5] Because of the limitations of our review, we assume that the requirements of the Fee Provision were an appropriate use of that authority.

Next, we address payment of Mother's fees on appeal. The Family Code authorizes the trial court to make a temporary order when "necessary to preserve and protect the safety and welfare of the child during the pendency of an appeal," including requiring the payment of reasonable and necessary attorney's fees and costs. FAM. § 109.001(a)(5). We have concluded that—in a SAPCR—deferring such a fee award until resolution of the appeal defeats the purpose of the award by denying a party the resources necessary to prosecute the appeal. *In re Jafarzadeh*, No. 05-14-01576-CV, 2015 WL 72693, at *2 (Tex. App.—Dallas Jan. 2, 2015, orig. proceeding) (mem. op.). Thus, a trial court may fashion its order under section 109.001(a)(5) to protect the best interest of the child by requiring interim payments of attorney's fees during the appeal. *Id.* at *2–3. After Father filed his notice of appeal in this case, Mother applied for and received such an order. Father filed a petition for writ of mandamus challenging the order; we denied the petition. *See In re Dondero*, No. 05-18-01183-CV, 2018 WL 6629569, at *1 (Tex. App.—Dallas

[5] We reject Father's brief argument to the effect that section 106.002 cannot provide a basis for the Fee Provision. He emphasizes that the Fee Provision contains no requirement of prevailing-party status, but section 106.002 contains no such express requirement. *See Coburn v. Moreland*, 433 S.W.3d 809, 840 (Tex. App.—Austin 2014, no pet.) ("Although success on the merits and good cause may be relevant in considering whether a trial court abused its discretion in awarding one party its attorney's fees under section 106.002, those are not compulsory requirements under the statute as presently worded."). On the other hand, we will read section 106.002's requirement of reasonableness to apply to orders made pursuant to the Fee Provision. *See* discussion below.

Dec. 19, 2018, no pet.) (mem. op.) (citing *Jafarzadeh*, 2015 WL 72693, at *2–3) (denying petition for writ of mandamus because mandamus record did not "include any evidence suggesting that the trial court's temporary order pending appeal was not in the best interest of the children or that the amount ordered by the trial court was an effort to 'set a price' on appeal to discourage resort to appeal"). Accordingly, any award of fees for Mother's attorney's work on appeal is governed by this section 109.001(a)(5) provision rather than by the Fee Provision.[6]

Are the Trial Court's Fee Orders Supported by Sufficient Evidence?

Father lodges a number of challenges to the evidentiary support for the various orders awarding Mother her fees during the modification procedure and appeal of this case. Under the Family Code's abuse-of-discretion standard, legal and factual insufficiency are not independent grounds of error but rather are relevant factors in assessing whether the trial court abused its discretion. *See In re A.B.P.*, 291 S.W.3d 91, 95 (Tex. App.—Dallas 2009, no pet.). To determine whether the trial court abused its discretion, we consider whether the trial court had sufficient evidence upon which to exercise its discretion and whether it erred in its exercise of that discretion. *Id.*

The party seeking attorney's fees has the burden of proof on the amount and reasonableness of the fees sought. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 762–

[6] The record establishes that Mother's attorneys used different billing codes for the modification proceeding and the appeal, so the fees were addressed separately when challenged and defended below.

63 (Tex. 2012). To carry that burden, the applicant must provide enough detail concerning the work performed that the trial court can meaningfully review the request. *Id.* at 764. At a minimum, there must be evidence of "the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required." *Id.* The court has broad discretion in deciding the award of attorney's fees under section 106.002(a). *M.A.N.M.*, 231 S.W.3d at 567. And the court does not abuse its discretion when some evidence supports its award. *Tull v. Tull*, 159 S.W.3d 758, 760 (Tex. App.—Dallas 2005, no pet.).

Father's brief includes a chart of all orders consolidated in this proceeding at that time, but he does not individually address any of the fee awards or their supporting evidence. Instead, he broadly characterizes the evidence submitted by Mother, arguing that her invoices are too heavily redacted, and that—as a result—it is impossible to determine whether the fees awarded were reasonable and necessary (as the Family Code requires) and whether they were incurred for work "relate[d] to issues concerning the suit affecting parent-child relationship and the safety and welfare of the children" (as the Fee Provision requires).

Father does not challenge the necessity of redacting specific information in an invoice to protect attorney–client and work–product privileges. But he contends that so much information has been redacted from Mother's bills that they are insufficient to support the fee awards. After reviewing Mother's invoices, we disagree.

The critical information required by *El Apple* is included in each billing entry: the type of service performed, who performed the service, that person's hourly rate, the date on which it was performed, and how much time the service required. *See El Apple*, 370 S.W.3d at 764. The bills in this case appear to resemble those in *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821 (Tex. App.—Dallas 2014, no pet.), in which invoices "although heavily redacted, contained line-by-line itemizations of the various charges together with brief descriptions of each charge" and provided "significant information . . . regarding the activities conducted by appellee during the underlying litigation." *Id.* at 842–43.

In addition, the absence of specific explanations for privileged activities is mitigated in two important ways in this case. First, at the hearings on Mother's motions to enforce payment of the billed fees, Mother's attorneys testified concerning the matters that had been at issue in each month's litigation. The attorneys were subject to cross-examination. And Father's attorney offered argument—and sometimes his own testimony—concerning the reasonableness, necessity, and relevance of various billed activities to the safety and welfare of the children. Second, before each hearing, Mother's attorneys provided unredacted bills to the trial court. In this manner, the redacted bills were tested by Father's attorney, and the full bills were reviewed by the trial judge. We conclude that this process provided sufficient opportunity for the trial court to evaluate the reasonableness, necessity, and relevance of the tasks undertaken. *See generally In re Estate of*

Johnston, No. 04-11-00467-CV, 2012 WL 1940656, at *5 (Tex. App.—San Antonio May 30, 2012, no pet.) (mem. op.) (court had sufficient information to determine reasonable amount of fees and expenses when bills were redacted similarly, attorney testified to reasonableness and necessity of work, and trial court reviewed unredacted bills).

In the end, Father's fundamental complaint is to the amount of fees he has been required to pay over time. "A reasonable fee is one that is not excessive or extreme, but rather moderate or fair." *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010). Father contends that the Fee Provision has incentivized Mother's attorneys "to submit thousands and thousands of dollars in attorney's fees every month," and we acknowledge that the aggregate amount of fees paid by Father since the Decree was entered in 2016 is in the hundreds of thousands of dollars. But that aggregate amount was submitted and evaluated in monthly increments, over a period of four years, in this highly contested litigation. The trial court addressed Father's concerns of unnecessary work and unreasonable amounts of fees a number of times on the record. We quote just one of the most telling examples of the court's reasoning in this case:

> You know the, truth is this case is unlike most cases I hear. It's just your client is different than 95 percent of the cases that come in here. And it is a large sum of expenses that has been spent in this case, a large and – but to the credit of both sides, the level of preparation that goes into presenting the case that comes before me and the level of the quality is just – I'm going to tell you it's outstanding. It really is. I'm very impressed by when the lawyers come in, the preparation they've

> done, the work that they've taken and undertaken to do what they do and it's obvious that that preparation takes a lot of time and most people can't afford it. And I'll tell you this, I'm very impressed with [Father's attorneys], very impressed.
>
> And I'm not surprised that [Mother's team of attorneys] has to do a lot of work to stay up and keep up and match them and it's a little uncomfortable for me to sign bills like this and orders like this. But I do see that – I do find them necessary for the safety and welfare of the children and I'm going to grant your request.

The trial court concluded that the attorneys' work, on both sides, was well done and was necessary for the safety and welfare of the children.

Under the facts of this case, we conclude that Mother's bills for legal services performed during the modification proceeding, and appeals therefrom, are supported by sufficient evidence. The trial court did not abuse its discretion in determining the fees were reasonable, necessary, and related to both this SAPCR and the children's safety and welfare.

OFFSET

Father argues alternatively that if he must pay reasonable fees pursuant to the Fee Provision, then he is entitled to an offset based on the following order in the Decree:

> It is ORDERED that [FATHER] have and recover from [MOTHER] a judgment in the amount of $1,994,600.00 for reasonable and necessary attorney fees, plus post-judgment interest at the rate of 5%, compounded annually, from December 29, 2015 until all amounts are paid in full. The judgment, for which let execution issue, is awarded against [MOTHER]. [FATHER] may enforce this judgment by any means available for the enforcement of a judgment for debt.

The trial court made this award against Mother based upon her unsuccessful litigation of the parties' Premarital Agreement.

"Mutual judgments generally are subject to offset." *Galvan v. Garcia*, No. 14-16-00162-CV, 2018 WL 3580574, at *4 (Tex. App.—Houston [14th Dist.] July 26, 2018, pet. denied) (mem. op.) (citing *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 470 (Tex. 1995)). Judgments are mutual, and subject to offset, when the debts are owed between the same parties. *Dallas/Fort Worth Airport Bank v. Dallas Bank & Trust Co.*, 667 S.W.2d 572, 575 (Tex. App.—Dallas 1984, no writ).

In this case, however, the debts are no longer "owed between the same parties." By virtue of a mandamus proceeding filed in this Court on January 16, 2020,[7] we learned that Father has sold the debt to a third party. Within the sworn record of that proceeding is a purchase agreement that identifies the above-quoted judgment as the "Monetary Award" and states that Father "hereby sells, assigns and transfers to Purchaser all of [his] right, title and interest in the Monetary Award in favor of [Father], which amount is $1,994,600.00 plus Interest" as that award is detailed on the relevant page of the Decree. The current owner of Mother's debt has attempted to collect from her, and the mandamus proceeding quoted here springs from her effort to recover from Father—pursuant to the Fee Provision—the fees that she incurred during that debt-collection proceeding.

[7] The proceeding is titled *In re James Dondero*, and bears the appellate number 05-20-00066-CV.

For purposes of his claim of offset, therefore, Father does not own a mutual debt from which to offset the attorney's fees he owes or has paid to Mother. We overrule his alternative request for offset.

CONCLUSION

We affirm the trial court's consolidated orders awarding Mother her attorney's fees incurred during the modification proceeding and during the appeal of the modification proceeding.

/Bill Pedersen, III//
BILL PEDERSEN, III
JUSTICE

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J. Reichek, dissenting.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JAMES DONDERO, Appellant	On Appeal from the 256th Judicial District Court, Dallas County, Texas
No. 05-18-00629-CV V.	Trial Court Cause No. DF-11-16417. Opinion delivered by Justice Pedersen, III. Justices Reichek and Carlyle participating.
REBECCA LANGE, f/k/a REBECCA DONDERO, Appellee	

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Rebecca Lange f/k/a Rebecca Dondero recover her costs of this appeal from appellant James Dondero.

Judgment entered this 8th day of June, 2020.