AFFIRM in Part, REVERSE in Part and RENDER, and REMITTITUR SUGGESTED; Opinion Filed June 18, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01156-CV

IN THE INTEREST OF N.E.C., A CHILD

On Appeal from the 301st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-97-20578

MEMORANDUM OPINION

Before Justices Osborne, Partida-Kipness, and Pedersen, III
Opinion by Justice Partida-Kipness

Robert Canady, III (Father) appeals the trial court's judgment in a suit to modify child support for his disabled, adult child, N.E.C. The trial court awarded Deborah Denise Canady (Mother) retroactive child support, current child support for an indefinite term, and attorney's fees. In three issues, Father contends that the trial court abused its discretion by awarding retroactive and current child support, and attorney's fees. We affirm in part, reverse and render in part, and suggest remittitur.

BACKGROUND

Father and Mother divorced in 1999 when N.E.C. was almost six years old. N.E.C. turned eighteen years' old on November 17, 2011. She was disabled at that

time. The divorce decree ordered Father to pay monthly child support of $1,000, which included $350 for N.E.C.'s "special needs" until the earliest occurrence of one of five specified events, which included her eighteenth birthday, and $800 a month thereafter.

On March 1, 2012, Father filed a petition to modify the decree in which he sought to (1) require the agreement of the parties regarding decisions concerning N.E.C.'s care and treatment, and (2) decrease the amount of his child support obligations. A bench trial was held on Father's modification suit on September 16, 2014, and October 22, 2014. Mother filed her first motion to modify on the second day of the bench trial. In it, she asked that Father's child support obligations be increased to until N.E.C. reached twenty-three years' old and until N.E.C. graduated from high school if she remained fully enrolled in an accredited secondary school program leading to a high school diploma or enrolled in courses for joint high school and junior college credit pursuant to the Texas Education Code.

The trial court did not enter an order on the modification motions until February 19, 2016, when it entered an "Order on Child's Disabilities and for Support." In that order, the trial court reduced Father's child support obligation to $800 per month beginning December 1, 2011, and to $500 per month beginning April 1, 2012, continuing until N.E.C. marries, dies, or her disabilities are removed. On March 17, 2016, Father moved for a new trial, arguing there was either no evidence or insufficient evidence (1) of N.E.C.'s continuing disability or special

needs; (2) that $500 monthly support should be paid until N.E.C.'s disabilities are removed, N.E.C. dies or marries, or the court so orders; and (3) that N.E.C. is not capable of self-support. Mother filed a petition to modify on May 23, 2016, requesting that any increased child support be made retroactive to April 1, 2012, and continue for an indefinite period. The trial court granted Father's motion for new trial on May 26, 2016.

On November 14, 2016, and August 3, 2017, Father filed his third and fourth motions to modify in which he sought a determination of whether N.E.C. is an adult disabled child under section 154.302 of the family code, and an order granting him primary rights, duties, and powers as to conservatorship and possession of N.E.C. or, alternatively, guardianship and possession of N.E.C., terminating his child support obligations or, alternatively, reducing his support obligations, and requiring Mother to pay child support.

On May 8, 2018, the trial court issued a "Memorandum Ruling on Modification" ordering Father to pay prospective child support of $500 per month for an indefinite period of time, retroactive child support of $500 per month to April 1, 2012, and Mother's attorney's fees of $20,000. The trial court finalized that memorandum ruling in the July 6, 2018 "Order Modifying Prior Orders." The July 6, 2018 Order is the subject of this appeal.

STANDARD OF REVIEW

"A trial court has discretion to set child support within the parameters provided by the Texas Family Code." *Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011) (citing *Rodriguez v. Rodriguez*, 860 S.W.2d 414, 415 (Tex. 1993)); *see also* TEX. FAM. CODE §§ 154.121–.123. "'A court's order of child support will not be disturbed on appeal unless the complaining party can show a clear abuse of discretion.'" *Iliff*, 339 S.W.3d at 78 (quoting *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam), and citing *Rodriguez*, 860 S.W.2d at 415). "A trial court abuses its discretion when it acts arbitrarily or unreasonably, without reference to guiding rules or principles." *Id*. (citing *Worford*, 801 S.W.2d at 109, and *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)). "A trial court also abuses its discretion by failing to analyze or apply the law correctly." *Id*. (citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)).

Likewise, in a suit affecting the parent-child relationship, "the court may render judgment for reasonable attorney's fees. . . ." TEX. FAM. CODE § 106.002(a). A trial court has wide discretion in awarding attorney's fees for non-enforcement modification suits, including modification of conservatorship and child support. *See* TEX. FAM. CODE §§ 106.002, 156.101, 156.401; *Tucker v. Thomas*, 419 S.W.3d 292, 296, 300 (Tex. 2013). A trial court does not abuse its discretion when there is some evidence to support the award of attorney's fees. *In re Moore*, 511 S.W.3d 278, 288 (Tex. App.—Dallas 2016, no pet.).

ANALYSIS

On appeal, Father complains of the trial court's awards of retroactive child support, continued prospective child support for his disabled adult child, and the amount of attorney's fees. We address each in turn.

A. Retroactive Child Support

In his first issue, Father contends the trial court abused its discretion by awarding Mother retroactive child support because there is no provision in the family code that permits retroactive support for N.E.C. We agree.

Chapter 154 of the family code provides two circumstances in which retroactive child support may be ordered. *See* TEX. FAM. CODE §§ 154.009(a), (d). First, a court "may order a parent to pay retroactive child support if the parent: (1) has not previously been ordered to pay support for the child; and (2) was not a party to a suit in which support was ordered." TEX. FAM. CODE § 154.009(a). Second, a court "may order a parent subject to a previous child support order to pay retroactive child support if: (1) the previous child support order terminated as a result of the marriage or remarriage of the child's parents; (2) the child's parents separated after the marriage or remarriage; and (3) a new child support order is sought after the date of the separation." TEX. FAM. CODE § 154.009(d). On the record before us, neither of these subsections apply because Father's child support obligations began with the 1999 decree and were never terminated.

Mother argues the retroactive support order is proper under Chapter 154, subchapter F of the Texas Family Code, which addresses child support for minor or adult disabled children. Mother maintains that section 154.302(a) does not prohibit a court from ordering retroactive child support because it permits a court to order one or both parents "to provide for the support of a child for an indefinite period," does not limit a court to order only prospective child support, and does not specifically prohibit the court from ordering retroactive child support. *See* TEX. FAM. CODE § 154.302(a). Absent a prohibition on retroactive support, Mother contends the trial court was permitted to exercise the discretion provided by section 156.401(b) of the family code to order retroactive child support.

Assuming without deciding that section 154.302(a) does not prohibit retroactive child support orders, the order was still improper here. Section 154.304 provides that "the substantive and procedural rights and remedies in a suit affecting the parent-child relationship relating to the establishment, modification, or enforcement of a child support order apply to a suit filed and an order rendered under this subchapter." TEX. FAM. CODE § 154.304. Accordingly, "the substantive and procedural rights and remedies" stated in section 154.009 apply here and, as we stated above, barred the retroactive child support order because a previous, unterminated child support order was already in place. *See* TEX. FAM. CODE § 154.009(a), (d) (permitting retroactive support only when no prior order was in place or any prior order had terminated); *see also In Interest of J.G.Z.*, 963 S.W.2d 144,

149 (Tex. App.—Texarkana 1998, no pet.) (citing section 154.009 and concluding section 156.401(b) does not provide for the award of retroactive support in cases where there has been a prior support order). We sustain Father's first issue.

B. Prospective Child Support

In his second issue, Father contends that the trial court abused its discretion by awarding prospective support for N.E.C. According to Father, the trial court failed to consider the factors required by section 154.306 of the family code when making this order.

Section 154.306 specifies the factors a court must consider when determining the amount of support to be paid after a child's eighteenth birthday. Specifically, a court must consider:

> (1) any existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to that disability;
>
> (2) whether the parent pays for or will pay for the care or supervision of the adult child or provides or will provide substantial care or personal supervision of the adult child;
>
> (3) the financial resources available to both parents for the support, care, and supervision of the adult child; and
>
> (4) any other financial resources or other resources or programs available for the support, care, and supervision of the adult child.

TEX. FAM. CODE § 154.306. Neither the trial court's modification order nor its findings of fact mention these four factors. Thus, Father argues the trial court failed to consider the factors when determining the support order. Father contends that

Mother's evidence regarding N.E.C.'s existing needs, care and supervision, and other financial support was "limited, conclusory, and speculative." He also notes that Mother did not offer expert testimony regarding N.E.C.'s physical or educational deficiencies. Father takes particular issue with Mother's testimony that N.E.C.'s financial needs included a personal shopper and hair salon visits, and that N.E.C.'s necessities included a Michelle Obama leather backpack, New Balance shoes, and a $100 per month payment for a burial plot.

Father cites only Mother's testimony in support of his contention that the trial court failed to consider all of the factors required by section 154.306. The record reflects, however, that the trial court received evidence on all four factors.

1. Existing or future needs of N.E.C.

The "needs" of the child is a term that has not been defined by the family code or by case law. *See Rodriguez v. Rodriguez*, 860 S.W.2d 414, 418 n.3 (Tex. 1993). Consequently, what constitutes "needs" of the child has been left for the courts to determine in their discretion on a case-by-case basis. *Scott v. Younts*, 926 S.W.2d 415, 420 (Tex. App.—Corpus Christi–Edinburg 1996, writ denied). The supreme court has, however, explained the term "needs" includes more than bare necessities, but is not to be determined based on the lifestyle of the family. *Rodriguez*, 860 S.W.2d at 418 n.3.

Multiple witnesses testified regarding N.E.C.'s disability, the existing and future needs directly related to her disability, and the substantial care and personal

supervision directly required by or related to that disability. Anthony Quartz, case manager with Bettyes Healthcare Network, which manages the group home in which N.E.C. lives, testified that N.E.C. has severe autism, intermittent explosive disorder, and seizures, and that she requires substantial care and personal supervision. Likewise, Tonya Reeves, Bettyes Healthcare Network owner and program director, testified that she had known N.E.C. for four years, and that N.E.C. functions on the level of a four or five-year-old. Reeves testified that N.E.C. has a tendency to destroy property, such as her television, clothes, bedding, and other items. N.E.C. also soils, bites, and spits on her bedding, which requires frequent replacement. Father testified that N.E.C. is in a group home because she needs substantial care and personal supervision. Father confirmed that "[a]lmost anything can trigger [N.E.C.]." Dr. Nicole Brown, a pediatrician and N.E.C.'s aunt, testified that N.E.C. requires 24-hour supervision, suffers regular "emotional outbreaks," is not potty trained, and is significantly speech delayed. Dr. Brown testified that N.E.C. requires anesthesia when receiving dental treatment due to her autism and behavioral issues. Mother testified that N.E.C.'s dental insurance did not cover the anesthesiologist for one procedure, but that Medicaid "should." However, Mother had paid for the uncovered anesthesiologist.

In addition to uncovered medical fees, the evidence showed that Mother purchased personal items for N.E.C. that were either not covered by her monthly social security benefits or exceeded those benefits. For example, Mother bought

new bedroom furniture that exceeded the amount N.E.C. had in her account. Mother also buys N.E.C.'s clothes, shoes, hair products, bedding, furniture, and school supplies. Mother testified that N.E.C.'s shoes cost about $125 because N.E.C.'s wide size is not carried in many stores. Mother told the court that she would bring a friend to help her when shopping with N.E.C. because N.E.C. requires constant supervision. N.E.C. had run away while shopping at least once. Mother testified that she provides toiletries beyond those provided by the group home, and provides girdles for N.E.C. to smooth out her adult diapers and prevent them from moving around. The girdles have to be changed out monthly due to soiling. In addition, Mother takes N.E.C. to restaurants and Six Flags because N.E.C. "loves interacting with people out in the public," and buys her daughter gifts because N.E.C. enjoys getting new things. For example, Mother bought N.E.C. a new backpack, which N.E.C. showed off to her teachers and caregivers.

Furthermore, the evidence showed that Mother paid for and provided other uncovered services for N.E.C., such as hair braiding, and provides N.E.C.'s personal items, such as toothpaste, deodorant, lotion, clothing, socks, shoes, underwear, personal-care items, money for field trips, television, and hair styling. Mother has supplied food for the group home in which N.E.C. resides, and paid for parties, such as birthday, graduation, and prom. Mother visits N.E.C. once a week and periodically puts funds in N.E.C.'s account. Mother pays $100 per month for a burial plot at Laurel Land, and paid for N.E.C. to attend a summer camp. In all,

Mother estimated that she pays $1,100 per month for N.E.C. *See In re W.M.R.*, No. 02-11-00283-CV, 2012 WL 5356275, at *13–14 (Tex. App.—Fort Worth Nov. 1, 2012, no pet.) (mem. op.) (holding mother's testimony regarding adult child's existing and future needs was sufficient to support the first factor); *see also In re Gonzalez*, 993 S.W.2d 149, 159–60 (Tex. App.—San Antonio 1999, no pet.) (noting that expert testimony is not required to determine if a child's need exists).

2. Care or supervision of N.E.C.

For the second factor, the evidence established that neither Father nor Mother provide or will provide substantial care or personal supervision of N.E.C., and they do not pay for nor will they pay for N.E.C.'s basic care or supervision. The testimony showed that Mother pays for additional care beyond that provided by Metrocare Services and Bettyes Healthcare Network.

3. Parents' financial resources

The amount of child support that each parent pays does not solely depend on his or her earnings but the ability to pay from all resources available. TEX. FAM. CODE § 154.062. Both Father and Mother testified and offered evidence regarding their respective income and assets.

4. Other financial resources or programs

As for the fourth factor, the evidence showed that N.E.C.'s room and board are covered by her Social Security Disability Insurance payments, and that she has $105 left over each month after paying her room and board. Metrocare provides

food, basic clothing, and toiletries to N.E.C., and there are sufficient financial resources to meet all of N.E.C.'s needs required by the State apart from any resources provided by Father or Mother.

Father testified that he had never been asked to contribute to any of the expenses for services or resources provided by any of the caregivers or Mother. Consistent with his petition to modify, Father testified that he was seeking removal of the support order because N.E.C.'s needs were met by other sources. He also testified that in his opinion any support beyond that provided by the group home and caregivers was not necessary to meet N.E.C.'s needs.

Based on the record before us, we conclude the trial court received evidence on all four factors required when determining the amount of support to be paid for an adult child, such as N.E.C. *See* TEX. FAM. CODE § 154.306. Because the record contains information concerning all of the Section 154.306 criteria, the trial court did not abuse its discretion in assessing current child support against Father. *See, e.g.*, *In re M.W.T.*, 12 S.W.3d 598, 607 (Tex. App.—San Antonio 2000, pet. denied), disapproved of on other grounds by *Office of Atty. Gen. of Tex. v. Scholer*, 403 S.W.3d 859 (Tex. 2013); *In Interest of C.J.N.-S.*, No. 13-14-00729-CV, 2018 WL 1870430, at *5 (Tex. App.—Corpus Christi–Edinburg Apr. 19, 2018, no pet.) (mem. op.); *In re W.M.R.*, 2012 WL 5356275, at *13–14. Consequently, we overrule Father's second issue.

C. Attorney's Fees

In his third issue, Father contends the trial court abused its discretion by awarding Mother $20,000 in attorney's fees because Mother produced evidence of only $8,500 in attorney's fees. Mother acknowledges that she did not produce evidence of attorney's fees greater than $8,500 but argues the trial court has discretion to award more. Father seeks remittitur of the attorney's fees award.

An award of attorney's fees must be supported by evidence that the fees are reasonable and necessary. *See Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991); *see also Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019) ("When fee-shifting is authorized, whether by statute or contract, the party seeking a fee award must prove the reasonableness and necessity of the requested attorney's fees."). Although contemporaneous billing records are not required, legally sufficient evidence to establish a reasonable and necessary fee must include a description of the services performed, the identity of each attorney who performed the service, approximately when service was performed, the reasonable amount of time required to perform the service, and the reasonable hourly rate for each attorney performing the service. *Rohrmoos Venture*, 578 S.W.3d at 502. The fact finder may adjust this base lodestar using relevant factors. *Id*. at 494. These include the novelty and difficulty of the questions involved, the skill required to properly perform the service, the likelihood acceptance of the employment will preclude other employment, the results obtained,

time limitations imposed by the client or circumstances, the nature and length of the professional relationship with the client, whether the fee is fixed or contingent. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). "If a fee claimant seeks an enhancement, it must produce specific evidence showing that a higher amount is necessary to achieve a reasonable fee award." *Rohrmoos Venture*, 578 S.W.3d at 501.

Both Father and Mother direct the Court to Mother's counsel's testimony as the sole evidence of Mother's attorney's fees. Counsel summarized her experience and stated her and her staff's hourly rates. Counsel then stated, "I think that everything that I have done for [Mother] has been reasonable and necessary, and my fees of about $8,500 are reasonable and necessary." Counsel did not offer into evidence any billing records but claims on appeal that she supplied Father with summary records and promised the underlying records. Although contemporaneous billing records are not required to prove that fees are reasonable and necessary, such records are "*strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested." *Id*. at 502 (emphasis in original). Neither party directs the Court to these documents in the record on appeal. Additionally, Mother does not argue, and the record does not reflect, that she pursued a fee enhancement.

Under this record, there is no evidence that Mother's reasonable and necessary attorney's fees exceeded $8,500. Because the award of $20,000 is not supported by

sufficient evidence, the trial court abused its discretion by awarding attorney's fees in that amount. *See Reeves v. Ultra Realty Co.*, No. 05-99-01144-CV, 2000 WL 1015970, at *11 (Tex. App.—Dallas July 25, 2000, no pet.). We, therefore, resolve Father's third issue in his favor. We further conclude, however, that there is sufficient evidence to support an award of attorney's fees of $8,500. This amount was testified to by Mother's counsel at trial. Accordingly, we hold that the trial court's attorney's fee award was excessive by $11,500 and suggest a remittitur in that amount. *See* TEX. R. APP. P. 46.3 (court of appeals may suggest remittitur); *see also Range v. Calvary Christian Fellowship*, 530 S.W.3d 818, 843 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (suggesting remittitur of $67,285.03 from $232,000 award of attorney's fees where there was no evidence that reasonable and necessary attorney's fees exceeded $164,714.97); *Corral-Lerma v. Border Demolition & Envtl. Inc.*, 467 S.W.3d 109, 128 (Tex. App.—El Paso 2015, pet. denied) (suggesting remittitur of attorney's fees because judgment on attorney's fees rested on insufficient evidence).

CONCLUSION

Having sustained Father's first issue but overruled his second issue, we reverse the portion of the trial court's order awarding retroactive child support, render judgment that retroactive child support is denied, and affirm the trial court's award of prospective child support. As for the award of attorney's fees presented in Father's third issue, we conclude the trial court's attorney's fee award of $20,000 is

excessive in the amount of $11,500 and suggest a remittitur of that amount. If within fifteen days of the date of this opinion, Mother files a remittitur in this Court with respect to attorney's fees in the amount of $11,500, we will reform the trial court's judgment accordingly and, as reformed, affirm the judgment. If Mother does not file a remittitur that conforms with this opinion, the trial court's judgment will be reversed with respect to attorney's fees and the cause remanded for a new hearing on the issue of attorney's fees.

/s/ Robbie Partida-Kipness
ROBBIE PARTIDA-KIPNESS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF N.E.C., A CHILD	On Appeal from the 301st Judicial District Court, Dallas County, Texas Trial Court Cause No. DF-97-20578.
No. 05-18-01156-CV	Opinion delivered by Justice Partida-Kipness. Justices Osborne and Pedersen, III participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part, **REVERSED** in part, and we suggest **REMITTITUR** in part.

We **REVERSE** that portion of the trial court's judgment awarding retroactive child support and **RENDER** judgment that retroactive child support is denied.

We **AFFIRM** that portion of the trial court's judgment awarding prospective child support.

We suggest **REMITTITUR** as to that portion of the trial court's judgment awarding attorney's fees. If within fifteen days of the date of this opinion, Petitioner Deborah Denise Canady files a remittitur in this Court with respect to attorney's fees in the amount of $11,500, we will **MODIFY** the trial court's judgment accordingly and **AFFIRM THE JUDGEMENT AS MODIFIED**. If Petitioner does not file a remittitur that conforms with this opinion, the trial court's judgment will be **REVERSED** with respect to attorney's fees and the cause **REMANDED** for a new hearing on the issue of attorney's fees.

Judgment entered this 18th day of June, 2020.