Affirmed and Memorandum Opinion filed May 1, 2018.

In The

Fourteenth Court of Appeals

NO. 14-17-00082-CV

IN THE INTEREST OF J.C.K., A CHILD

On Appeal from the 309th District Court
Harris County, Texas
Trial Court Cause No. 2009-41400

M E M O R A N D U M O P I N I O N

In this appeal from a final modification order in a suit affecting the parent-child relationship, appellant Edward Charles Knoblauch challenges only the portion of the order requiring him to pay $252,996.55 of appellee Stacey Stelmach's attorney's fees and expenses. Central to Knoblauch's arguments is the fact that a packet of documents sent from Stelmach's attorney to Knoblauch's attorney was not admitted into evidence in its entirety. This packet consisted of a letter, an affidavit, and a proposed order. The trial court admitted the letter and affidavit but not the proposed order. Knoblauch contends that the packet in its entirety constituted an extortion attempt and

demonstrates that Stelmach only sought the modification to obtain more money from him. On that basis, he contends the trial court erred in ordering him to pay Stelmach's attorney's fees.

In five issues in his Amended Brief, Knoblauch specifically asserts that the trial court erred in (1) refusing to sign his formal bill of exception, (2) refusing to admit the packet in its entirety, and (3) ordering Knoblauch to pay the attorney's fees without considering the packet in its entirety; that (4) the packet did not constitute a settlement offer under Texas Rule of Evidence 408; and (5) even assuming it was a settlement offer, the packet still was admissible.[1] In three additional issues in his Supplemental Brief, filed with our permission after the trial court entered findings of fact and conclusions of law, Knoblauch additionally asserts that the trial court erred in finding that (6) he failed to timely comply with the requirements to obtain a formal bill of exception and (7) he failed to lay a proper predicate or offer the packet in its entirety as an exhibit and that (8) the evidence is legally and factually insufficient to support the trial court's finding that the amount of Stelmach's attorney's fees was reasonable.[2] Because Knoblauch failed to preserve error related to his first seven issues and the evidence is sufficient to support the trial court's finding on the reasonableness of Stelmach's attorney's fees, we affirm.

---

[1] Various nomenclature was used by the parties to describe Knoblauch's pleading. Herein, we will use only the term "formal bill of exception." *See* Tex. R. App. P. 33.2.

[2] Although Knoblauch did not list his eighth issue in his Issues Presented, he did list it within the body of his Supplemental Brief. *See generally* Tex. R. App. P. 38.1(f) ("The brief must state concisely all issues or points presented for review."). The Texas Supreme Court has advised that "[a]ppellate briefs are to be construed reasonably, yet liberally, so that the right to appellate review is not lost by waiver. Simply stated, appellate courts should reach the merits of an appeal whenever reasonably possible." *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (holding parties preserved error by challenging the merits of a particular order in the body of their appellate brief, even though they did not specifically challenge the order in their issues presented); *see also Knopf v. Gray*, No. 17-0262, 2018 WL 1440160, at *2 n.5 (Tex. Mar. 23, 2018) (following Perry). Accordingly, we will address Knoblauch's eighth issue.

Background

The trial court entered a final decree of divorce ending the parties' relationship on April 30, 2010. In the decree, Knoblauch and Stelmach were named joint managing conservators of their one child together, J.C.K.[3] In December 2010, Stelmach's attorney sent a letter to Knoblauch's attorney along with a proposed modification order and an affidavit by Stelmach. In the affidavit, Stelmach alleged that Knoblauch had assaulted her as well as several other women and had drug and alcohol problems. At the time, Knoblauch was on deferred adjudication for a previous assault on Stelmach that had occurred prior to the divorce. In the letter, Stelmach's counsel stated that the affidavit would be attached to a petition to modify if it became necessary to file such a petition and requested that Knoblauch's counsel advise if an agreement could be entered based on the attached documents. According to Knoblauch, the proposed order attached to the letter would have effectively ended any right he had to see his son—as visitation would have been at Stelmach's sole discretion—and would have required him to pay Stelmach exorbitant additional sums in child support.

Stelmach thereafter filed her Petition to Modify, but without attaching the affidavit or proposed order. In her petition, Stelmach sought to be named sole managing conservator, limitations on Knoblauch's rights of possession and access to the child, an increase in child support, and payment of Stelmach's attorney's fees and expenses. Knoblauch filed a counter-petition, also seeking certain modifications including a reduction in the amount of child support. A significant portion of the trial was spent addressing the alleged violence and drug and alcohol use. As will be discussed in more detail below, during trial, Knoblauch indicated a desire to have the packet of documents sent by Stelmach's attorney admitted into evidence in its entirety, but he ultimately

[3] Knoblauch contends that he and Stelmach were never married but that he agreed to the divorce for J.C.K.'s sake.

offered only the attorney's letter and Stelmach's affidavit as separate exhibits, and they were admitted as such. After trial, Knoblauch attempted to enter into the record a formal bill of exception containing the document packet, but the trial court sustained Stelmach's objections and refused to accept or sign the bill.

In its modification order, the trial court named Stelmach as sole managing conservator and ordered that Knoblauch's visitation be reduced, supervised, and contingent on Knoblauch's meeting certain requirements, such as attending drug and alcohol abuse therapy and avoiding domestic violence and conviction of a criminal offense. The court further ordered Knoblauch to pay Stelmach's attorney $252,996.55 in attorney's fees and expenses for prosecution and defense of the present lawsuit.

In its findings of fact and conclusions of law, the trial court stated that credible evidence was presented regarding Knoblauch's drug abuse and violence against women and that it was in J.C.K.'s best interest to modify the order. The court further stated that Knoblauch should pay a portion of Stelmach's attorney's fees and expenses and that her total fees and expenses "at the time of trial" was $414,809.80. The court found that the hourly rate and total fees and expenses incurred by Stelmach were reasonable and necessary and usual and customary. Regarding the packet of documents sent by Stelmach's attorney, the court found that Knoblauch "did not lay the proper predicate or mark and offer [the packet] into evidence." Additionally, the court concluded that Knoblauch failed to "timely comply with all requirements to obtain a completed formal bill of exception."

Preservation of Error

As stated, Knoblauch's first seven issues all assert in some fashion that the trial court erred in not admitting into evidence or considering the packet of documents sent by Stelmach's attorney to Knoblauch's attorney. Issues 1, 6, and 7 pertain to the preservation of error on the admissibility of the packet; issues 2, 4, and 5 pertain to the

admissibility of the packet; and issue 3 postulates the trial court erred in ordering Knoblauch to pay Stelmach's attorney's fees without considering the packet in its entirety. Because Knoblauch failed to preserve the issue of the admissibility of the packet, we overrule each of these first seven issues.

To preserve error concerning the exclusion of evidence, the complaining party must actually offer the evidence and secure a ruling from the court. *E.g., In re of Kahn*, 533 S.W.3d 387, 394 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding); *see also Comiskey v. FH Partners, LLC*, 373 S.W.3d 620, 629–30 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) ("To preserve error in the exclusion of evidence, a party must (1) attempt during the evidentiary portion of the trial to introduce the evidence; (2) if an objection is lodged, specify the purpose for which the evidence is offered and give the trial court reasons why the evidence is admissible; (3) obtain a ruling from the court; and (4) if the court rules the evidence inadmissible, make a record of the evidence the party desires admitted."). Examination of the record reveals that at no point before or during trial did Knoblauch actually offer the packet in its entirety, or the proposed order by itself, into evidence or obtain a ruling from the court.

Prior to seeking admission of any of the documents in the packet, Knoblauch gave the trial court a bench brief in which he argued that the packet and the documents were admissible.[4] The bench brief contained a discussion of relevant law and facts but did not actually request a ruling on admissibility. During discussion relating to the bench brief, Knoblauch's attorney argued that the packet was admissible, while Stelmach's attorney argued the packet constituted a settlement offer that was inadmissible under Texas Rule of Civil Procedure 408.[5] During this discussion, the trial

[4] Knoblauch's initial bench brief discussed specific details of the packet documents, but after Stelmach objected to having these details in the bench brief, Knoblauch filed an amended bench brief omitting the details. The trial court did not rule on Stelmach's objections.

[5] Rule 408 reads as follows:

judge initially stated:

> Whatever you're offering sounds like a settlement offer letter. I'm going to wait and see how you set that up as a predicate and so forth and ask the questions, and I'll make a ruling either then or at break once you've [sic] had an opportunity to look at the brief; but, I'd have to agree . . . , to give it to me right now, without trying to lay the groundwork for it, if you will, I think, is premature.

After more argument by the attorneys, the judge further stated: "Well, my initial ruling, at least, at this point, unless you want to raise something more, Counsel, is it is, by all appearances, an offer of settlement." The judge later said: "So, at least, right now, it's the Court's understanding that this is an exchange between attorneys trying to settle the matter; whether it was before or after litigation started it, it's still an offer of settlement." After Knoblauch's attorney pointed out that even settlement offers are admissible under certain circumstances, the judge concluded the exchange by saying "I don't know whether or not that's true or not [speaking of certain circumstances in which settlement offers may be admissible] because I haven't heard any testimony to that effect . . . . So, I'm going to let you-all think on that."

Knoblauch interprets this discussion as the trial court ruling that the packet as a

---

Rule 408. Compromise Offers and Negotiations

(a) Prohibited Uses. Evidence of the following is not admissible either to prove or disprove the validity or amount of a disputed claim:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made during compromise negotiations about the claim.

(b) Permissible Uses. The court may admit this evidence for another purpose, such as proving a party's or witness's bias, prejudice, or interest, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Tex. R. Evid. 408.

whole was inadmissible as a settlement offer. Knoblauch suggests that the judge heard and understood the parties' arguments regarding the documents and indicated that the packet would not be admitted in its entirety, citing Tex. R. App. P. 33.1(a) (permitting court ruling to be express or implied to preserve error). Stelmach argues that the trial judge did no more than offer a preliminary indication of her ruling subject to subsequent testimony and how Knoblauch laid the predicate for admission.

What is important to note, however, is that Knoblauch did not actually offer anything into evidence at this point, not the packet in its entirety or any of the individual documents. He also did not establish any predicate for their admission. The exchange regarding the bench brief occurred at the beginning of the third day of trial testimony, but it was not until days later that Knoblauch offered any of the packet documents into evidence. At that time, Knoblauch offered the letter and then the attached affidavit as separate exhibits, and the trial court admitted both.[6] As the trial court found in its findings of fact, however, at no point did Knoblauch offer into evidence the packet in its entirety or the proposed order itself or obtain a ruling excluding these items from evidence.

Accordingly, Knoblauch did not preserve error regarding admission of these documents during trial. *See Kahn*, 533 S.W.3d at 394; *Comiskey*, 373 S.W.3d at 629–30; *see also In re A.G.B.*, No. 09-16-00176-CV, 2017 WL 6390687, at *2 (Tex. App.—Beaumont Dec. 14, 2017, no pet.) (mem. op.) (overruling issue complaining of exclusion of evidence in modification case because, although trial court sustained general objection to matters occurring before prior order, appellant failed to offer specific items in question into evidence); *Mandeville v. Mandeville*, No. 01-15-00119-

[6] When Knoblauch's attorney offered the letter, he pointed out that it was just the letter and did not contain any terms of the proposed order. Stelmach's attorney then said "the letter alone, I have no objection to."

CV, 2015 WL 7455436, at *4 (Tex. App.—Houston [1st Dist.] Nov. 24, 2015, no pet.) (mem. op.) ("Because the agreement was not offered into evidence, the record contains no final evidentiary ruling excluding the agreement."); *B.O. v. Tex. Dep't of Family & Protective Servs.*, No. 03-12-00676-CV, 2013 WL 1567452, at *3 (Tex. App.—Austin Apr. 12, 2013, no pet.) (mem. op.) ("While Grandmother contends that early rulings by the trial court had a 'chilling effect' on the presentation of evidence regarding the children's heritage, she does not identify any instance in which the trial court refused to admit such evidence when she offered it.").

Knoblauch's first and sixth issues relate to his formal bill of exception, which he apparently filed to ensure that the packet made it into the record for appeal. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006) ("The purpose of a bill of exception is to allow a party to make a record for appellate review of matters that do not otherwise appear in the record, such as evidence that was excluded."). *See generally* Tex. R. App. P. 33.2 (providing procedures governing formal bills of exception). Knoblauch does not contend that he preserved error regarding exclusion of the packet from evidence by filing the bill; indeed, the bill of exception did not request that the trial court make or reconsider any ruling other than accepting the packet for purposes of the appellate record. Regardless, even if Knoblauch had made such a request, the trial court sustained Stelmach's objections to Knoblauch's bill, including that the bill was untimely, factual statements therein were not verified, and the evidence in question was never properly offered into evidence. Knoblauch does not specifically challenge each of these sustained objections in his appellate briefing. *See Garza v. Cantu*, 431 S.W.3d 96, 101 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) ("Generally, when an appellant fails to attack all independent grounds that support an adverse ruling, we must affirm."); *In re Elamex, S.A. de C.V.*, 367 S.W.3d 879, 888 (Tex. App.—El Paso 2012, orig. proceeding) ("If the appellant fails to challenge all possible grounds,

we must accept the validity of the unchallenged independent grounds and affirm the adverse ruling."). Accordingly, Knoblauch's bill of exception did not preserve any issue not preserved during trial. We overrule Knoblauch's first seven issues.

Reasonableness of Attorney's Fees

In his eighth issue, Knoblauch challenges the legal and factual sufficiency of the evidence to support the trial court's finding that Stelmach's attorney's fees were reasonable. The trial court found that Stelmach had incurred $414,809.80 in reasonable attorney's fees and expenses and ordered Knoblauch to pay $252,996.55 to Stelmach's attorney.

Trial courts have broad discretion to award reasonable attorney's fees and expenses in suits affecting the parent-child relationship. *See* Tex. Fam. Code § 106.002(a); *Bruni v. Bruni*, 924 S.W.2d 366, 368 (Tex. 1996); *In re J.M.W.*, 470 S.W.3d 544, 549 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Whether attorney's fees are reasonable is a question of fact that must be supported by evidence. *See, e.g. Velasquez v. Velasquez*, 292 S.W.3d 80, 86 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Under the abuse-of-discretion standard, legal and factual sufficiency are not independent grounds of error, but are merely factors to be considered in determining whether the trial court abused its discretion. *See London v. London*, 94 S.W.3d 139, 143–44 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). A trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support its decision. *E.g., In re J.S.*, No. 14-17-00024-CV, 2018 WL 830891, at *1 (Tex. App.—Houston [14th Dist.] Feb. 13, 2018, no pet.) (mem. op.); *In re J.R.P.*, 526 S.W.3d 770, 780 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

To support an award of attorney's fees, evidence generally should be presented on the hours spent on the case, the nature of preparation, complexity of the case, experience of the attorney, and the prevailing hourly rates in the community. *West v.*

West, No. 01-14-00350-CV, 2016 WL 1719328, at *7 (Tex. App.—Houston [1st Dist.] Apr. 28, 2016, no pet.) (mem. op.); *Hardin v. Hardin*, 161 S.W.3d 14, 24 (Tex. App.—Houston [14th Dist.] 2004, no pet.). But evidence on each factor is not necessary to determine a reasonable award. *In re S.V.*, No. 05-16-00519-CV, 2017 WL 3725981, at *5 (Tex. App.—Dallas Aug. 30, 2017, pet. denied). The trial court also may consider the entire record and the common knowledge of the participants as lawyers and judges in making its determination. *Id*.; *see also Cypress Creek EMS v. Dolcefino*, No. 01-16-00929-CV, 2018 WL 1597463, at *12 (Tex. App.—Houston [1st Dist.] Apr. 3, 2018, no pet. h.).

Stelmach's attorney testified at trial in support of the reasonableness and amount of the fees and expenses. Prior to his testimony, the parties stipulated to the attorney's qualifications and that his $400 hourly rate was reasonable.[7] The attorney testified that Stelmach had incurred $414,809.80 in attorney's fees and expenses in the modification case. He discussed the amounts she had paid up to that point and what amount was then outstanding. He opined that "those fees, given the length of this case, given the complexities and extensive documents in this case, [are] fair and reasonable—fair and reasonable fee and expenses to be incurred in a case such as this." He then noted that he had been doing such work in the county for about 22 years and based on his experience the fees were fair and reasonable.

An exhibit admitted into evidence provided a breakdown of the fees and expenses incurred in the modification case. Invoices from Stelmach's attorney also were admitted into evidence. Although these invoices show only a fraction of the overall fees and expenses, they were used as samples of the type of work and billing that occurred. An additional exhibit shows the amounts that the attorney billed

[7] The attorney stated that during the pendency of the modification case, his rate had increased to $550 per hour but that he had never charged more than $400 per hour for work on the case.

Stelmach for other work and indicated that these amounts were not included in the fees requested. On cross-examination, Knoblauch's attorney sought to establish that Stelmach and her attorney caused a number of delays in the proceedings, but Stelmach's attorney insisted it was Knoblauch's activities and the facts of the case that caused the high fees.

Although the evidence supporting the reasonableness of the fees is quite succinct, it is sufficient to support the trial court's finding of reasonableness, particularly in light of the fact that the trial judge would have been familiar with the history and complexity of the case. *See Garcia v. Gomez*, 319 S.W.3d 638, 641 (Tex. 2010) (concluding that, although attorney's testimony lacked specifics, it constituted some evidence fees were reasonable where attorney testified as to his experience, the amount of fees, and the reasonableness of the fees)[8]; *In re T.L.T.*, No. 05-16-01367-CV, 2018 WL 1407098, at *4 (Tex. App.—Dallas Mar. 21, 2018, no pet. h.) (mem. op.) ("An attorney's testimony on the total amount of fees, his experience, and the reasonableness of the fees charged is sufficient to support an award."); *Kramer v. Kastleman*, No. 03-13-00133-CV, 2017 WL 5119211, at *16–17 (Tex. App.—Austin Nov. 3, 2017, no pet. h.) (mem. op.) (holding trial court did not abuse its discretion in awarding fees where attorney testified as to his experience, the complexity of the case, and that the requested fees were reasonable); *Messier v. Messier*, 458 S.W.3d 155, 170 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (rejecting complaint that evidence regarding appellate fees was conclusory and thus insufficient where counsel testified

[8] In *Garcia*, the Texas Supreme Court explained that an attorney's testimony about the reasonableness of the attorney's fees is not like other expert witness testimony as it melds the attorney's experience and expertise with personal knowledge about the work done and its value to the client. 319 S.W.3d at 641. The court further noted that such testimony is not objectionable as merely conclusory because the opposing party's attorney would also have knowledge of the time and effort involved and could effectively question the testifying attorney regarding the reasonableness of the fees. *Id*.

the awarded amounts were reasonable for attorneys with similar experience, counsel's qualifications and rate were stipulated to, billing statements for trial work were admitted, and the trial judge herself would have been familiar with the complexity of the case, size of the record, and potential issues on appeal); *see also Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017) (upholding court of appeals' determination that attorney's testimony on fees, though "lacking in specifics," was sufficient under *Garcia*); *In re A.A.L.*, No. 12-11-00161-CV, 2012 WL 1883763, at *3 (Tex. App.—Tyler May 23, 2012, no pet.) (mem. op.) (reversing award of attorney's fees where attorney testified as to dollar amount but did not state the amount was reasonable or provide any other details). Accordingly, the trial court did not abuse its discretion in ordering Knoblauch to pay the fees, and we overrule Knoblauch's eighth issue.

We affirm the trial court's judgment.

/s/ Martha Hill Jamison
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Jamison.