Affirmed and Memorandum Opinion filed March 27, 2018.

In The

Fourteenth Court of Appeals

NO. 14-17-00010-CV

IN THE INTEREST OF M.K.M.L., A CHILD

On Appeal from the 309th District Court
Harris County, Texas
Trial Court Cause No. 2011-33344

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

This is an appeal from an award of amicus attorney fees incorporated into a modification order in a suit affecting the parent-child relationship. Appellant David Lehmann, Jr., the father of the minor child who is the subject of the suit, contends that the trial court erred by awarding the appointed amicus attorney's fees in the amount of $22,910.00, and by ordering an unequal apportionment of fees. We affirm.

Factual and Procedural Background

David Lehmann, Jr. (David Jr.) and Mandy Marie Lehmann were divorced in July 2012. In January 2013, David Jr. filed this suit seeking to modify the divorce decree's terms pertaining to conservatorship, possession and access, and support of their child, M.K.M.L. David's father, David Lehmann, Sr. (David Sr.), intervened in the lawsuit. Mandy filed an answer and counterpetition for modification.

In March 2013, the trial court appointed George Clevenger as an amicus attorney to assist the court in protecting the child's best interests pursuant to Texas Family Code section 107.021. Clevenger filed a notice of appearance as amicus attorney and requested that the parties be ordered to pay his attorney's fees. Later, Clevenger filed a motion requesting that the David Jr. and Mandy be required to deposit sufficient funds to secure payment of his fees and expenses incurred in representing M.K.M.L.'s interests, and he set the motion for a hearing. Clevenger did not specify the amount requested or include any documentation of his attorney's fees.

On February 28, 2014, the trial court signed a judgment for amicus attorney's fees reflecting that on December 20, 2013, a hearing was held on Clevenger's request for amicus attorney's fees. The judgment recited that David Jr., David Sr., Mandy, and Clevenger appeared in person and announced ready. The trial court, "after reading and considering the pleadings, and reviewing the evidence and argument of Counsel," awarded Clevenger amicus attorney's fees in the amount of $22,910.00. The court further found that "the purpose of the amicus attorney's fees incurred was to establish or modify conservatorship, possession and access, and support of the minor child" and that the fees incurred were "both reasonable and necessary for these purposes." The trial court allocated payment of the amicus attorney's fees as follows: $10,000.00 to David Jr., $1,000.00 to Mandy, and $11,910.00 to David Sr. The court

also discharged Clevenger from any further duties as amicus attorney. Although the record is not clear, it appears that Clevenger also served for a brief period as guardian and attorney ad litem.

In July 2016, David Jr. filed "Petitioner's Response to Motion to Award Ad Litem Fees." In that filing, David Jr. asserts that he opposes a motion for guardian ad litem fees that Clevenger had filed and set for hearing on September 28, 2016. Our record does not contain this motion by Clevenger or any ruling by the trial court on the motion. In his filing, however, David Jr. challenged Clevenger's apparent request for an award of $22,910.00 in attorney's fees for his services, the same amount that the trial court ultimately awarded to Clevenger as amicus attorney's fees in its February 28, 2014 order.

On October 12, 2016, a hearing was held on a different motion filed by David Sr. to reconsider Clevenger's amicus attorney's fee award. At the hearing, David Sr. complained about the allocation of the fees and the lack of evidence supporting the amount of the fees. David Sr.'s attorney also argued that there had been no notice of any hearing on December 20, 2013, and no invoices were ever presented for review. David Sr.'s attorney also questioned whether a hearing was even held on that date. David Jr. similarly argued that Clevenger was not entitled to any fees because he had not filed a proper fee application or voucher, and no one had been able to review his invoices.[1] Mandy took the position that it would be unfair to reallocate the fees two years after the issue had been litigated and Clevenger had been discharged. For his part, Clevenger stated that at the time of the hearing, he presented to the court an itemized statement of the services he performed, and he testified to his hourly rate

[1] We presume that David Jr.'s objection during the hearing that Clevenger should not be paid "anything" due to a failure to support the fee request with evidence is sufficient to preserve the issue for appeal. *See* Tex. R. App. P. 33.1(a)(1)(A).

and the payments that already had been made by David Jr. and David Sr.

At this time, the trial judge who had signed the 2014 judgment awarding Clevenger's attorney's fees was no longer on the bench. The current judge reviewed the court records and stated that it appeared to her that Clevenger was correct that there was a hearing on December 20, 2013. The judge also noted that she had no transcript from that hearing, and had to accept that what was reflected in the judgment was what had occurred. Although the judge was unwilling to reconsider the amount of the fees, she expressed a willingness entertain the issue of reallocation, but no party presented any evidence on that issue. Ultimately, the judge decided not to revise the judgment for amicus attorney's fees.

On November 30, 2016, the trial court signed a modification order incorporating by reference the judgment for Clevenger's amicus attorney's fees, making that judgment final and appealable. David Jr. filed a notice of appeal limited to the judgment for amicus attorney's fees, and he requested a partial reporter's record pursuant to Texas Rule of Appellate Procedure 34.6(c). He also filed a statement of issues to be presented on appeal as: (1) "The trial court erred in awarding the amicus attorney fees in the amount of $22,910.00"; and (2) "The trial court erred in allocating the amicus attorney fees by ordering Petitioner to be [sic] pay $10,000.00 of the total fee awarded while requiring respondent, Mandy Marie Culver Feltner to only pay $1,000[.00] of the total fee awarded."

ANALYSIS

In two issues, David Jr. contends that the trial court erred by (1) awarding Clevenger $22,910.00 in amicus attorney's fees, and (2) ordering an unequal apportionment of the fees. In his first issue, David Jr. argues that the trial court abused its discretion in awarding the fees because the record contains insufficient evidence to support the award of fees. In his second issue, David Jr. argues that the

trial court provided no explanation for its allocation of the fee award and failed to base its decision to allocate the fee award unequally on any competent evidence in the record.

In support of his first issue, David Jr. asserts that the trial court awarded Clevenger amicus attorney's fees of $22,910.00 "without the benefit of evidence." But, our appellate record does not contain the reporter's record of the December 20, 2013 hearing on Clevenger's request for attorney's fees.

Absent a specific indication or assertion to the contrary, we generally presume that pretrial hearings are nonevidentiary. *See Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 150 (Tex. 2015); *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 783 (Tex. 2005). However, if the proceeding's nature, the trial court's order, the party's briefs, or other indications show that an evidentiary hearing took place in open court, then a complaining party must present a record of that hearing to establish harmful error. *Vernco*, 460 S.W.3d at 150. Without a complete reporter's record of an evidentiary hearing, it is presumed that the omitted evidence supports the trial court's judgment. *See, e.g.*, *Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991) (per curiam); *King's River Trail Ass'n, Inc. v. Pinehurst Trail Holdings, L.L.C.*, 447 S.W.3d 439, 449–51 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *Mason v. Our Lady Star of the Sea Catholic Church*, 154 S.W.3d 816, 819 (Tex. App.—Houston [14th Dist.] 2005, no pet.). As an initial matter, then, we must determine whether the record indicates that the hearing was evidentiary or nonevidentiary. *See Vernco*, 460 S.W.3d at 150–51; *Michiana*, 168 S.W.3d at 783.

The record reflects that the purpose of the December 20, 2013 hearing was to enable the trial court to determine Clevenger's request for amicus attorney's fees

under the Texas Family Code. *See* Tex. Fam. Code § 107.023.[2] The reasonableness of an attorney's fee is an issue of fact that must be supported by evidence. *Russell v. Russell*, 478 S.W.3d 36, 48 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Vazquez v. Vazquez*, 292 S.W.3d 80, 86 (Tex. App.—Houston [14th Dist.] 2007, no pet.). The trial court's February 2014 judgment for amicus attorney fees reflects that all parties appeared on December 20, 2013, and the court, "after reading and considering the pleadings, and reviewing the evidence and argument of Counsel," granted Clevenger's request for attorney's fees and allocated the fees among the parties. To support the assertion that no evidentiary hearing was held, David Jr. cites only to a representation to that effect made by David Sr.'s counsel during the October 12, 2016 hearing.[3] In contrast, Clevenger—who attended the December 20, 2013 hearing—stated that he submitted evidence of his fees and testified concerning his hourly rate.[4] Further, the clerk's record does not contain any evidence filed by

[2] The Family Code provides that in a suit other than a suit by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as a conservator of the child, an amicus attorney is entitled to reasonable fees and expenses. *See* Tex. Fam. Code § 107.023(a). In awarding fees, the trial court shall determine the fees and expenses of the amicus attorney by reference to the reasonable and customary fees for similar services in the court; order a reasonable cost deposit to be made at the time of appointment; and, before the final hearing, order an additional amount paid into a trust account for the amicus attorney's use. *See id.* § 107.023(b). The court may also determine that the fees awarded to an amicus attorney are necessaries for the benefit of the child. *Id.* § 107.023.

[3] David Jr. also asserts that the trial court heard the issue of Clevenger's amicus attorney's fees on de novo appeal of an associate judge's report and recommendation without the benefit of a transcript from that hearing and without evidence. Again, however, David Jr. relies on the argument of David Sr.'s counsel at the October 12, 2016 hearing as support for this statement. The appellate record does not reflect any associate judge's recommendation and we have no transcript from any hearing before an associate judge.

[4] Although David Jr. also argues that he had no opportunity to attend the hearing, the trial court's judgment reflects that David Jr. "appeared and announced ready" at the hearing. Unless the record demonstrates otherwise, we must presume the trial court's judgment is valid and correct. *See Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 251 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). The record does not contain any evidence that David Jr. did not attend the hearing.

Clevenger that would support either an award of $22,910.00 in fees or the trial court's unequal allocation among the parties. Taken together, these considerations are sufficient show that the December 20, 2013 hearing was evidentiary. *See Vernco*, 460 S.W.3d at 150–51.

As noted above, David Jr. requested a partial reporter's record and provided a statement of issues. *See* Tex. R. App. P. 34.6(c). In a partial-record appeal, we are required to "presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues." Tex. R. App. P. 34.6(b), (c)(4). Even in a partial-record appeal, however, the burden remains on the complaining party to present a sufficient record to the appellate court to show error requiring reversal. *See Garcia v. Sasson*, 516 S.W.3d 585, 590 (Tex. App.—Houston [1st Dist.] 2017, no pet.). ("[N]othing in in Rule 34.6(c) relieves an appellant of her ultimate burden to bring forth a record showing reversible error."); *see also Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990) (per curiam); *Melendez v. Exxon Corp*., 998 S.W.2d 266, 278 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

David Jr. designated as the partial reporter's record the record of the hearing on the motion to reconsider the judgment for amicus attorney fees, as well as the reporter's record of the hearing on amicus attorney fees "which began on December 13, 2013 and which was completed on December 20, 2013," including all witness testimony and exhibits. The court reporter has informed this court that no record was taken in this case between November 28, 2013 and December 31, 2013. David Jr does not assert that a record was taken of the hearing on amicus attorney's fees, nor does he contend that any reporter's record was lost or destroyed. *See* Tex. R. App. P. 34.6(f). Therefore, although David Jr. designated the reporter's record of the hearing on December 20, 2013, the court reporter cannot create a reporter's record

from this hearing because no record was taken. Rule 34.6(c) does not provide a way to address on appeal parts of proceedings during which no record was taken. *See W&F Transp., Inc. v. Wilhelm*, 208 S.W.3d 32, 41 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

Whether David Jr. requested a reporter's record from the December 20, 2013 hearing as part of a partial reporter's record or as part of a request for a reporter's record from all hearings in this case, no record was taken of this evidentiary hearing, and we must presume that the evidence at the hearing is relevant and supports the trial court's judgment awarding amicus attorney's fees. *See, e.g.*, *Schafer*, 813 S.W.2d at 155; *King's River Trail Ass'n*, 447 S.W.3d at 451; *Mason*, 154 S.W.3d at 819. Applying the presumption to each of the issues raised on appeal, David Jr. cannot prevail on either issue. We therefore overrule David Jr.'s issues.

CONCLUSION

We overrule David Jr.'s issues and affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Chief Justice Frost and Justices Busby and Wise.