

Affirmed and Memorandum Opinion filed September 7, 2017.



In The

Fourteenth Court of Appeals

NO. 14-16-00491-CV

IN THE INTEREST OF D.A., A CHILD

**On Appeal from the 505th District Court
Fort Bend County, Texas
Trial Court Cause No. 14-DCV-212649**

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

Pro se appellant H.A., D.A.'s father, appeals from the award of attorney's fees rendered when the trial court modified the parent-child relationship following a bench trial. D.A.'s mother filed her appellee's brief responding to Father's fee challenge. Mother moved to dismiss Father's appeal under Rule 42.3(c) for flagrantly violating the Texas Rules of Appellate Procedure regarding briefing. Finally, Mother asked this Court to sanction Father pursuant to Rule 45 for filing a frivolous appeal.

We overrule Father's challenge to the trial court's fee award because the

record on appeal does not contain a complete reporter's record and we must, therefore, presume the omitted evidence supports the trial court's order. We deny Mother's motion to dismiss because Father substantially complied with the Rules of Appellate Procedure regarding briefing. Finally, exercising our discretion under Rule 45, we deny Mother's request for sanctions against Father.

BACKGROUND

Although sparse, the record reveals the following background facts and procedural history. Father and Mother were divorced in 2009. At the time of the divorce, they had a single child, D.A. Under the terms of the original Agreed Decree of Divorce, Father and Mother exchanged possession of D.A. at a Houston bookstore. Several years later, Mother filed a motion to modify the parent-child relationship. In her motion, Mother asked the trial court to alter the location for exchanging D.A. from the bookstore to a Houston police station.

Soon thereafter, Mother filed an amended petition to modify the parent-child relationship. Mother alleged in the amended petition that Father had a history of neglecting D.A. Based on that allegation, Mother asked the trial court to deny Father access to D.A. or, alternatively, require that his visitation with D.A. be supervised. Mother also asked the trial court to determine whether there was a risk of international abduction and, if so, take the measures it deemed necessary to protect D.A., including designating her as the parent with the exclusive right to hold and maintain D.A.'s passport. Mother also asked the trial court to increase the amount of child support Father was required to pay. Finally, Mother sought recovery of the attorney's fees she incurred as a result of filing the petition.

On October 13, 2015, Father filed a two-page document styled: "Defendant's Motion to review new evidence provided by defendant's insurance company, Motion for summary judgment, Motion to dismiss due to lack of evidence and deny

attorney bill, review six trial reset requests by plaintiff's attorney, continuous requests for continuance and second court notification of counsel's failure to comply with court order." Mother filed a response asking the trial court to quash Father's various motions and to award her sanctions for the attorney's fees she incurred having to respond to Father's motions and other court filings. The trial court granted Mother's motion, quashed Father's October 13 filing, found that Father had filed frivolous pleadings, and then sanctioned him \$1,500, payable to Mother's attorney.

The dispute went to trial before the bench on January 20, 2016, and the trial was completed the next day. Our appellate record does not contain a reporter's record of the trial. The trial court found in Mother's favor. The court subsequently signed an Order in Suit to Modify Parent-Child Relationship (1) changing the location for exchanging possession of D.A. from the bookstore to a designated Houston police station; (2) granting Mother exclusive control over D.A.'s passport; (3) eliminating Father's Thursday visitation during the school year; and (4) assessing Mother's attorney's fees, totaling \$16,826, against Father. This appeal followed.

ANALYSIS

I. Because there is no reporter's record, we must presume the evidence supports the trial court's award of attorney's fees to Mother.

Father argues that the trial court abused its discretion because insufficient evidence supports the award of attorney's fees to Mother's attorney. In family law matters, the trial court has broad discretion in awarding attorney's fees. *London v. London*, 192 S.W.3d 6, 19 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (citing Tex. Fam. Code Ann. § 106.002 (West 2014)). Under section 106.002 of the Family Code, the trial court may render judgment for reasonable attorney's fees and order them paid directly to the attorney. *Watts v. Oliver*, 396 S.W.3d 124, 133 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The award must be supported by

evidence. *London v. London*, 94 S.W.3d 139, 146 (Tex. App.—Houston [14th Dist.] 2002, no pet.). A trial court does not abuse its discretion if an award of attorney’s fees is supported by the evidence. *Id.* at 147 n.3.

Generally, absent a complete reporter’s record of the proceedings, reviewing courts must presume that the evidence before the trial court was adequate to support the trial court’s decision. *See In re D.A.P.*, 267 S.W.3d 485, 487 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (applying presumption in jurisdiction analysis); *London*, 94 S.W.3d at 143 (“Therefore, in considering [appellant’s] issues on appeal, we must presume the omitted portions of the record support the judgment of the trial court.”). Because there is no reporter’s record of the bench trial, we must presume the missing evidence supports the trial court’s decision on attorney’s fees. We overrule Father’s issue on appeal.¹

II. Father’s appellate brief substantially complies with the Rules of Appellate Procedure.

In her brief, Mother asks us to dismiss Father’s appeal because of “his complete failure to follow any appellate guidelines that would place [her] on notice as to his complaint.” Mother cites the briefing requirements of Rule 38.1 in support of her request for dismissal. *See* Tex. R. App. P. 38.1 (listing requirements to be included in appellant’s initial brief). Because Father’s brief includes an argument supported by citation to legal authority, we conclude it substantially complied with the rules. *See Smith v. DC Civil Constr., LLC*, 521 S.W.3d 75, 76 (Tex. App.—San Antonio 2017, rule 53.7(f) motion granted) (per curiam) (“Substantial compliance with Rule 38 is sufficient.”).

Even if we agreed that Father’s brief violated Rule 38.1, dismissal is not an

¹ To the extent Father’s brief could be read to challenge other rulings by the trial court, we likewise overrule those challenges based on the lack of a trial record.

available remedy; rebriefing is. *See* Tex. R. App. P. 38.9(a) (If the court determines that this rule has been flagrantly violated, it may require a brief to be amended, supplemented, or redrawn. If another brief that does not comply with this rule is filed, the court may strike the brief, prohibit the party from filing another, and proceed as if the party had failed to file a brief.”). Because Mother’s requested relief is not available under the Rules of Appellate Procedure, we deny her motion to dismiss.

III. We conclude that Father should not be sanctioned for filing a frivolous appeal.

Finally, Mother asks this Court to assess sanctions against Father for filing a frivolous appeal. Under Texas Rule of Appellate Procedure 45, a court of appeals may—on motion of any party or on its own initiative, after notice and a reasonable opportunity for response—award “just damages” as a sanction if it determines that an appeal is frivolous. Tex. R. App. P. 45; *Lane-Valente Indus. (Nat’l), Inc. v. J.P. Morgan Chase, N.A.*, 468 S.W.3d 200, 206 (Tex. App.—Houston [14th Dist.] 2015, no pet.). We may award just damages under Rule 45 if, after considering everything in our file, we make an objective determination that the appeal is frivolous. *Riggins v. Hill*, 461 S.W.3d 577, 583 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

When deciding whether an appeal is objectively frivolous, we review the record from the viewpoint of the advocate and decide whether the advocate had a reasonable basis to believe the case could be reversed on appeal. *Lane-Valente*, 468 S.W.3d at 206. Additionally, Rule 45 does not require that a court award sanctions after every frivolous appeal; rather, the imposition of sanctions is a discretionary decision exercised with prudence and caution and only after careful deliberation. *Id.*

Although Father was not successful in his appeal and his appellate briefing contained many non-relevant contentions and accusations, he did make an argument

against the trial court's award of attorney's fees that was supported by legal authority. *See* Tex. R. App. P. 38.1. Therefore, we exercise our discretion and decline to impose sanctions on Father. *See Lane-Valente*, 468 S.W.3d at 207. We deny Mother's request for sanctions.

CONCLUSION

We deny Mother's motion to dismiss, deny her request for sanctions, and we affirm the trial court's Order in Suit to Modify Parent-Child Relationship.

/s/ J. Brett Busby
Justice

Panel consists of Justices Boyce, Busby, and Wise.