

IN THE SUPREME COURT OF TEXAS

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No. 96-1241
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ROBERT AUGUST BOCQUET, THE ESTATE OF PHILLIP EDMUND BOCQUET,
DECEASED, MALCOLM OSCAR BOCQUET, BLANCHE EUGENIA BEECHIE, WILLIE
GRANATA, R. G. WEYEL, GLENN HOWARD, OLIVER W. HOWARD, AND WIFE,
LORRAINE M. HOWARD, LOUIS J. PANTUSA, ET AL., PETITIONERS

v.

EARL HERRING AND WIFE, FLORENCE CANALES HERRING, RESPONDENTS

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ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS
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JUSTICE BAKER, joined by JUSTICE ENOCH, dissenting.

I agree with the Court that the question is what is the appellate standard of review of an attorneys' fee award in a Declaratory Judgment Act case tried by the court. However, that is about all that I can agree on with the Court in this case. As best I can glean from the Court's opinion is that in a Declaratory Judgment Act case whether to award an attorneys' fees to either side is reviewed under an abuse of discretion standard; whether the fee, if awarded, is reasonable and necessary is reviewed under a legal and factual sufficiency standard; and whether the fee is equitable and just is reviewed under an abuse of discretion standard. The Court's decision makes for a schizophrenic review of attorneys' fees in Declaratory Judgment Act cases. Accordingly, I dissent.

In 1996, the Court applied an abuse of discretion standard to the amount of an attorneys' fee award in a Declaratory Judgment Act case. *See Barshop v. Medina Underground Water Conservation Dist.*, 925 S.W.2d 618, 637-38 (Tex. 1996). Again, in *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880 (Tex. 1990)(per curiam), the Court applied an abuse of discretion standard in deciding the attorneys' fees issue. *See Ragsdale*, 801 S.W.2d at 882.

The Texas Uniform Declaratory Judgment Act expressly recognizes the trial court's discretion in making an attorneys' fee award. *See* TEX. CIV. PRAC. & REM CODE § 37.009; *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985). In a Declaratory Judgment Act case tried to the trial court both the grant or denial of attorneys' fees and the amount awarded should be a matter for the trial court's discretion, with appellate review under an abuse of discretion standard rather than an evidentiary standard. In addition to simply avoiding the anomalous situation of applying different standards when reviewing the facets of one attorneys' fees award in a Declaratory Judgment Act case tried to the court, other reasons exist that support the view that abuse of discretion is the proper standard of review.

In a bench trial, the trial judge passes on the witnesses' credibility and the weight given the witnesses' testimony. The trial judge can reject or accept any witnesses' testimony in whole or in part. *See Texas W. Oil & Gas Corp. v. El Paso Gas Trans. Co.*, 631 S.W.2d 521, 524 (Tex. App.--El Paso 1982, writ ref'd n.r.e.). The abuse of discretion standard of review recognizes that these functions rest with the trial court and not the appellate court. In awarding attorneys' fees the trial court, as a fact-finder, must take into account various factors. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 1.04, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. (STATE BAR RULES, art. X, §

9); *Arthur Andersen v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997); *Ragsdale*, 801 S.W.2d at 881. Trial judges, as well as appellate judges, can draw on their common knowledge and experience as lawyers and as judges in considering the testimony, the record, and the amount in controversy in determining attorneys' fees. *See Leggett v. Brinson*, 817 S.W.2d 154, 157 (Tex. App.--El Paso 1991, no writ).

Under an abuse of discretion standard of review, we review the entire record. *See Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986). When resolving factual issues or matters committed to the trial court's discretion, we may not substitute our judgment for that of the trial court. *See*

Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1994). The reviewing court may not reverse for an abuse of discretion merely because it disagrees with the trial court's decision, if that decision was within the trial court's discretionary authority. See *Beaumont Bank N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991). Under an abuse of discretion standard of review, if there is some evidence in the record that shows the trial court followed guiding rules and principles, then the reviewing court may not find an abuse of discretion. See *Morrow*, 714 S.W.2d at 298.

For these reasons, I believe that an abuse of discretion standard of review should apply to both the question of whether the trial court properly granted an attorneys' fees award and whether the trial court properly decided the amount of the attorneys' fees award. Because the Court decides otherwise, I respectfully dissent.

James A. Baker,
Justice

OPINION DELIVERED: April 14, 1998