

INTERESTING CASES: March 4, 2020

Sallee S. Smyth

1. *In re Mansour*, 2020 Tex. App. LEXIS 981 (Tex. App. – San Antonio February 5, 2020, orig. proceeding) (Cause No. 04-19-00899-CV)

M and F divorced in 2013 but have been litigating issues regarding the children ever since. In 2019 the trial signed an order from a suit to modify. At trial, M requested an award of attorneys fees pending appeal. The final order did not specifically address this issue but both parties conceded that the request at the time of trial had been denied. The final order provided that “all relief requested in the case but not expressly granted is denied.” F filed an appeal from the final order. M then timely filed a motion for temporary orders pending appeal under TFC 109.001 and requested that F pay her reasonable appellate fees. F filed a counter motion asking that M pay his appellate fees. F asserted that M’s motion was barred by res judicata as her prior request for such relief had been denied. Upon hearing the motions the trial court ordered F to pay \$15,000 in appellate fees to M and ordered F to pay ½ within two weeks and the other ½ a month later. F sought mandamus relief. As to res judicata, the COA determined that the record was insufficient to enable the court to determine if the appellate fee request had truly been made and denied as the underlying trial record was not provided and there was no specific written request or written denial provided by F in his mandamus record. F’s second argument addressed the court’s requirement that he pay the appellate fees up front as opposed to requiring payment to be conditioned on his pursuit of an unsuccessful appeal. F relies on the general notion that appellate fees must be awarded on a “conditional” basis to avoid the chilling effects that might result if a party was prevented from pursuing an appeal because they could not financially afford to finance their own appeal as well as the fees for the defending party. Relying on the Dallas case of *In re Jafarzadeh* (2015 TAL 7 or 2015 WL 72693) the San Antonio COA determines that the “chilling effect” argument should not apply in circumstances where appellate fees are sought pursuant to TFC 109.001 in a SAPCR case. The COA determines that sometimes, deferring the appellate fees to the end of the appeal when the outcome is known is impractical and that since both parties owe a duty of support to the children, either can be ordered to pay fees. The COA holds that the “chilling effect” argument in a SAPCR appeal can work to the disadvantage of the parent defending the appeal as necessary to preserve and protect the safety and welfare of the children. In this case the COA found that the fee award was proper when payable and allowed M to file a brief without subjecting F to financial hardship. Mandamus denied. **COMMENT:** This is only the second COA to hold that when the evidence establishes the defending party’s need for appellate fees to defend SAPCR orders determined to be in a child’s best interest, they may be ordered paid up front and not conditionally. Hopefully, in due time, twelve other COA’s will follow suit!

2. *Gerges v. Gerges*, 2020 Tex. App. LEXIS 1614 (Tex. App. – El Paso February 26, 2020) (Cause No. 08-19-00006-CV)

H and W married in 2010 and had two children, one in 2011 and the other in 2015. W filed for divorce in 2016 and H filed a counter petition. Both parties sought appointment as JMC with primary rights. The parties settled their property issues in an MSA which also provided that each would pay their own fees. All SAPCR issues were tried to the court, including W’s request for findings and injunctions regarding international abduction. H operated under an expanded SPO within temporary orders and he timely elected to continue this in the event he was not named primary. W offered evidence that H had failed to comply with school rules for turning in homework and reading assignments for the older child. W offered evidence that H’s drop offs at school for the younger child were disruptive and violated school policy when he left the older child unattended in the car and further evidence that H had recorded interactions with school personnel. Ultimately the court issued a possession order which allowed H to maintain the expanded possession on Thursday night to Friday morning but not to include overnights on Sunday to Monday. At trial, W also expressed concern over a lost passport for the older child and sought a finding of potential international abduction. The trial court found such risk and issued orders restricting travel outside the US. W also requested orders requiring complete itinerary information for all travel with the children inside the US and terms for electronic communication when the children were not in a parent’s possession. The court required 2 weeks notice of all travel information and ordered daily electronic communication. The W sought injunctions prohibiting H from videoing or recording her with the children or school personnel. W also asked that H be enjoined from leaving the children alone in his vehicle at any time. The

trial court granted both requests based on the evidence. The trial court granted the divorce on the basis of adultery by H and awarded W \$10K in fees. H appealed. Regarding the expanded SPO request, the COA found that the evidence was sufficient to limit H's access on Sunday overnights so that W could prepare the children for school the following week, noting that there was some evidence that H did not always get the older child's school work turned in as required and that there had been issues involving drop offs which had prompted the school to suggest that if they continued the children would no longer be permitted to attend school there. As to the international abduction finding, the COA determined that there was no evidence H was taking steps which suggested a plan to abduct the children. W focused on the missing passport as being "suspect" but the COA found the evidence offered reasonable explanations and that there was no evidence of any other activity which might have indicated any such plan. The evidence actually showed that H had a stable job and had just purchased a new residence. The COA sustained this objection and ruled that all terms affecting international abduction and travel be removed. As to the terms requiring travel notification and electronic communication, the court found both were supported by evidence which showed that H limited W's communication with the children while in his care and he had previously traveled for extended periods and W did not know where the children were. As to the video and vehicle injunctions, the COA found that although the TFC does not specifically provide for such injunctions, it is well established that the trial court may issue them in the best interest of a child. Here, H admitted videotaping school personnel and the school had requested it to stop or threatened dismissal of the children from the program. Also the COA notes that leaving a child under 7 unattended in a car for more than 5 minutes is a Class C misdemeanor. The COA found that both injunctions were permissible and in the children's best interest. H challenged the finding of adultery since it was never mentioned at trial, however the COA determined that evidence in the record was clear that H had fathered a child by another woman during marriage, justifying the finding. Finally, as to the fee award, H argued that W was required to segregate her fees between recoverable (as to SAPCR issues) and not recoverable (as to property division based on MSA). The COA agreed determining that the property MSA stated each would pay their own fees but did not restrict an award in the SAPCR. However, although W's attorney did not specifically segregate the fees at trial, her billing records admitted into evidence made it clear that after the property MSA, she only worked on the SAPCR issue and those fees totaled just over the \$10,000 amount awarded, finding the evidence sufficient to support those fees as reasonable and necessary. Judgment affirmed within the exception of findings and orders regarding international child abduction.