IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 23, 2015 Session

ELIZABETH EBERBACH v. CHRISTOPHER EBERBACH

Appeal from the Chancery Court for Williamson County
No. 37317 James G. Martin, III, Chancellor

No. M2014-01811-COA-R3-CV – Filed October 23, 2015

This post-divorce case involves issues concerning reimbursement for the parties' children's uncovered medical expenses and an award of attorney's fees in favor of Mother. Father/Appellant contends that he is not responsible for the uncovered medical expenses on grounds that Mother/Appellee failed to timely send him copies of the bills as required under the permanent parenting plan. Father also contests the award of attorney's fees and costs. Discerning no error, we affirm and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed and Remanded

KENNY ARMSTRONG, J., delivered the opinion of the Court, in which RICHARD H. DINKINS, J., and BRANDON O. GIBSON, J., joined.

Connie Reguli, Brentwood, Tennessee, for the appellant, Christopher W. Eberbach.

Rose T. Palermo, Nashville, Tennessee, for the appellee, Elizabeth Eberbach.

OPINION

I. Background

This is the second post-divorce appeal involving these parties. Appellant Christopher Eberbach ("Father") and Appellee Elizabeth Eberbach ("Mother") were divorced on May 13,

2011. In ***Eberbach v. Eberbach***, No. M2013-02852-COA-R3-CV, 2014 WL 7366904 (Tenn. Ct. App. Dec. 23, 2014) ("***Eberbach I***"), we addressed issues involving child support and residential parenting time for the parties' three minor children. While the ***Eberbach I*** appeal was pending, on March 26, 2014, Mother gave notice to Father that she intended to relocate to Columbus, Ohio, on August 1, 2014. Although Father moved to Florida in 2013, on April 28, 2014, he filed a motion in opposition to Mother's relocation and to alter the children's parenting plan. In the motion, Father averred that Mother's planned relocation did not have a reasonable purpose as required by Tennessee Code Annotated Section 36-6-108(d)(1)(A). As set out in his motion, Father was concerned that Mother's relocation to Ohio, without entry of a new parenting schedule, would pose a specific threat of harm to the children because the children's anxiety was allegedly exacerbated when they were separated from Father for extended periods of time. Father further stated that "[s]ince the 2011 divorce, [F]ather has continuously availed himself of all visitation allowed by the parenting plan through the end of 2013." However, Father admitted that he "was unable to book a flight [to pick the children up in Nashville for Christmas vacation visitation] during heavy holiday travel." He further stated that his "ongoing and aggravated medical spinal injury[, which he allegedly sustained in a criminal assault,] prevented him from picking up the [children] for Spring Break." Father averred that Mother was less than cooperative in allowing either Father's administrative assistant (whom Mother averred was also Father's girlfriend), or his pastor to pick the children up for visitation with Father.

On May 12, 2014, Mother filed a response to Father's motion in opposition of her relocation and a counter-motion to relocate with the children and to modify the parenting plan. Therein, Mother disputed Father's allegations that he could not exercise visitation either because of holiday air traffic, or ongoing injury. Rather, she averred that "[n]othing has kept Father from exercising his visitation . . . other than his choice not to do so . . . ." Mother further stated that "Father, who has a long history of difficulty following the Court's orders, once again defied the Court's order and sent his live-in girlfriend/administrative assistant and a former pastor to Mother's residence to pick up the children . . . ." Mother also stated that she had doubts "that Father has any injury that prevents him from traveling . . . ."

On May 22, 2014, Mother filed a motion to temporarily relocate with the children to Ohio pending a final hearing. Father opposed the motion. On June 3, 2014, the trial court heard Mother's motion to relocate pending final disposition. By order of June 13, 2014, the trial court granted Mother's motion, allowing her to move to Ohio pending final hearing. The order further indicated that "[t]he parties will continue to operate under the permanent parenting plan executed on November 19, 2010, and incorporated in the court's Final Decree of Divorce on May 13, 2011." The November 19, 2010 parenting plan provides that the children's "uncovered reasonable and necessary medical expenses . . . will be paid by pro rata share in accordance with [the parties'] income[s]." This parenting plan lists Father's monthly

gross income as $27,766.00; Mother's monthly gross income is listed as $0.

On June 18, 2014, after he had been ordered by the trial court to answer written discovery and to appear for a deposition, Father moved the court "for dismissal of all pending matters. . . including, without limitation, his motion in opposition to relocation of mother and to alter visitation or parenting time." On June 19, 2014, Mother filed a motion to dismiss Father's motion in opposition to her relocation for failure to prosecute. Mother also asked for sanctions because this was the second post-divorce proceeding initiated by Father in which he failed to appear or to comply with discovery orders and then dismissed his action. Mother's motion asked the court to award her attorney's fees and costs. On June 20, 2014, Father filed a notice of dismissal, stating "that pursuant to TRCP 41, [Father] voluntarily dismisses, without prejudice, and discontinues all pending matters since the Father's April 28, 2014, Motion in Opposition to Relocation of Mother." On June 23, 2014, Mother filed a response to Father's notice of voluntary dismissal, wherein she again asked the court to award her "a judgment against Father in the amount of her attorneys' fees and other costs incurred during this cause . . . ."

On June 25, 2014, Father filed a response in opposition to Mother's June 19, 2014 motion to dismiss and for sanctions. On July 1, 2014, the trial court held a hearing on Mother's motion to dismiss and for sanctions. Father's counsel was present and advised the court that Father wished to enter an order of voluntary dismissal. Although the trial court acknowledged dismissal of Father's claims at the July 1, 2014 hearing, it did not enter an order dismissing those claims until December 2, 2014. In its July 1, 2014 order, the trial court set Mother's counter-petition, including her request for attorney's fees and sanctions, for hearing on July 15, 2014.

Meanwhile, on July 7, 2014, Mother filed a motion for judgment against Father for reimbursement of uncovered medical expenses. Therein, Mother cited Section II, paragraph D of the November 19, 2010 parenting plan, which was entered in the divorce and under which the parties were still operating pursuant to the trial court's June 13, 2014 order, *supra*. This portion of the parenting plan indicates that the children's unpaid medical expenses will be paid, pro rata, by the parties based on their respective incomes. At the time the parenting plan was entered, Mother's monthly income was $0. In her motion for judgment against Father for reimbursement of the children's uncovered medical expenses, Mother stated that:

> 4. Father maintains health insurance coverage for the children and he receives all "Explanation of Benefits" ("EOB") from the insurance company. Father is fully aware of the balance, which is owed on all medical and dental as it is reflected on the EOB.
>
> 5. Mother has paid all of the unpaid medical and dental expenses.

> These expenses are listed on the spreadsheet attached as Exhibit 1. The total amount of these expenses since the entry of the Final Decree of Divorce, are $25,669.31.
>
> 6. Mother has attempted to collect these from Father, but he has refused to reimburse her. Counsel for Mother has contacted Father's prior counsel about these unpaid medical reimbursements, but as of the date of the filing of this motion, Father has still refused to reimburse Mother.

Based upon the foregoing averments, Mother asked the court to award her a judgment against Father in the amount of $25,669.31 plus her attorney's fees and costs. On July 14, 2014, Father filed a response in opposition to Mother's motion for judgment for the children's uncovered medical expenses. Therein, Father argued, *inter alia*, that Mother had failed to provide documentation sufficient to show that the claimed medical expenses were "reasonable and necessary" and had failed to include adequate proof "in the form of credit card receipts" or other documentation to show that the medical expenses were actually paid. Father further noted the parenting plan language stating that "[a]fter insurance has paid its portion, the parent receiving the bill will send it to the other parent within ten days. The other parent will pay his or her share within 30 days of receipt of the bill." In his response, Father argued that Mother's motion "fails to allege or show that proper notice was given to Father within twenty-four (24) hours of any of these medical incidents, or that insurance has paid its portion . . . or whether bills for such expenses were properly sent to Father . . . ."

The trial court heard all remaining motions on July 15, 2014. By order of August 20, 2014, the trial court: (1) allowed Mother to relocate to Ohio; (2) modified the permanent parenting plan; (3) awarded Mother her attorney's fees and costs in the amount of $19,870.00; and (4) awarded Mother a judgment against Father in the amount of $26,096.50 for reimbursement of the children's uncovered medical expenses. The trial court's August 20, 2014 order incorporates, by reference, its findings from the bench. In relevant part, those findings are that

> the Court really has no competent proof before it concerning income. Ms. Eberbach's income from the sale of assets is not income. It's just not. I mean, to go out and sell your securities, that's not income. All you've done is spend your assets. So, I don't really have any competent proof before me concerning Ms. Eberbach's income or Mr. Eberbach's income.
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> For that reason, and because there's no request to modify the income figures, the Court will continue to base the child support on $27,766 a month for Mr. Eberbach and zero for Ms. Eberbach.

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> The Court finds that [requiring Father to pay the children's uncovered medical expenses] is not punitive to Mr. Eberbach. These are bills that he should be paying—he should be paying under the terms of the permanent parenting plan order, that the document that is a summary of the boys' medical bills is supported by the bills themselves.
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> So under Rule 1006, I think is the rule of evidence, the Court finds it's competent and that there has been appropriate proof before the Court to establish that a judgment should be awarded in favor of Ms. Eberbach and against Mr. Eberbach in the amount of $26,096.50 for bills incurred on behalf of the children, not paid by insurance, through June the 25th, 2014.
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> ***
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> [T]he Court is satisfied that the attorney's fees being requested on behalf of Ms. Eberbach are very reasonable in light of the extensive litigation that has been conducted in this case since Ms. Eberbach gave notice to Mr. Eberbach that she was relocating.
>
> The Court will award attorney's fees and expenses incurred by Ms. Eberbach based on both the MDA, which incorporates the permanent parenting plan order, as well as the provisions of Title 36, for the total amount requested by her . . . .

II. Issues

Father appeals. He raises two issues for review as stated in his brief:

1. The trial court erred in awarding Mother a judgment for medical expenses when she did not comply with the contractual terms set forth in the parenting plan.

2. The trial court erred in awarding Mother attorney's fees.

In the posture of Appellee, Mother asks this Court to award her attorney's fees and costs for this appeal either on grounds that the appeal is frivolous, or pursuant to the terms of the parties' marital dissolution agreement ("MDA").

III. Standard of Review

The applicable standard of review in this appeal is identical to that set out in ***Eberbach I***:

> We review the trial court's findings of fact de novo on the record, with a presumption of correctness, unless the evidence preponderates otherwise. *See*, e.g.,***Armbrister v. Armbrister***, 414 S.W.3d 685, 692 (Tenn.2013). In weighing the preponderance of the evidence, determinations of witness credibility are given great weight, and they will not be overturned without clear and convincing evidence to the contrary. ***In re Adoption of A.M.H***., 215 S.W.3d 793, 809 (Tenn.2007). We review the trial court's conclusions of law de novo, with no presumption of correctness. ***Armbrister***, 414 S.W.3d at 692.
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> Trial courts have discretion to award attorney's fees, ***McFarland v. Bass***, No. M2013–00768–COA–R3–CV, 2014 WL 3002004, at *5 (Tenn. Ct. App. June 30, 2014), and issue visitation orders, ***Suttles v. Suttles***, 748 S.W.2d 427, 429 (Tenn.1988). The appellate court will not interfere with these decisions except upon a showing of an abuse of that discretion. *See*, e.g.,***Taylor v. Fezell***, 158 S.W.3d 3752, 359 (Tenn.2005) (quoting ***Aaron v. Aaron***, 909 S.W.2d 408, 411 (Tenn.1995)). A trial court abuses its discretion only if it: (1) applies incorrect legal standards; (2) reaches an illogical conclusion; (3) bases its decision on a clearly erroneous assessment of the evidence; or (4) employs reasoning that causes an injustice to the complaining party. ***Konvalinka v. Chattanooga–Hamilton Cnty. Hosp. Auth.***, 249 S.W.3d 346, 358 (Tenn.2008); *see also* ***Kline v. Eyrich***, 69 S.W.3d 197, 203–04 (Tenn.2002); ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn.2001). In other words, if "reasonable minds can disagree as to [the] propriety of the decision made," the trial court's ruling will be upheld. ***Eldridge***, 42 S.W.3d at 85.

Eberbach I, 2014 WL 7366904, at *4.

IV. Analysis

A. Uncovered Medical Expenses

In full context, the November 19, 2010 parenting plan provides:

> Uncovered reasonable and necessary medical expenses, which may include but [are] not limited to, deductibles or co-payments, eyeglasses, contact lenses, routine annual physicals, and counseling will be paid by pro rata share in accordance with [the parties'] income[s]. After insurance has paid its portion, the parent receiving the bill will send it to the other parent within ten days. The other parent will pay his or her share within 30 days of receipt of the bill.

As set out above, the trial court found that Mother did not have any income and, accordingly,

set her pro rata share of the children's unpaid medical expenses at $0. This finding is not disputed on appeal. Rather, at the trial level and on appeal, Father argues that he is not liable for the children's uncovered medical expenses because Mother failed to comply with the requirement to send him those unpaid bills within 10 days of receipt. From our review, the evidence from the July 15, 2014 hearing does not support Father's contention.

At the July 15, 2014 hearing, Mother testified that she had submitted the uncovered medical expenses to Father:

> Q. Ms. Eberbach, have you been submitting the uncovered medical expenses that you've incurred on behalf of the children to Mr. Eberbach?
>
> A. Yes.
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> Q. I—you heard me announce to the Court that—when I was making my opening statement that Mr. Eberbach maintains the insurance and he gets the EOBs; is that correct?
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> A. That is correct.
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> Q. But in addition to that, have you been providing him—all along since May of 2011—bills to be reimbursed?
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> A: I started out providing them, and then his—one of his previous counsels said they couldn't pay them because they didn't know his percentage. So I know periodically they have gotten updates.

Mother explained that she had corresponded with Father's lawyers and had provided Father's lawyers with spreadsheets and documentation concerning the children's medical expenses. The record contains correspondence between Mother, Father, and their lawyers concerning the children's medical bills. This correspondence was admitted as an exhibit to the trial. The first email, dated October 27, 2011, is from Father to Mother. It states:

> Attached are the medical bills and Explanation of Benefits (EOBs) from the insurance company for [child's] hospital visit that you inappropriately put in my name. I have consulted my attorney and have been advised to notify you that these are your responsibility and that you must immediately contact the medical providers to accept responsibility for these charges. You are required to pay these bills. Then, send me a copy of the bills and forward me a signed copy of your 2010 Federal Tax Return so that I can determine how much is my

> portion to pay. . . .

On November 9, 2011, Mother emailed Father, "I have several new bills for which I need reimbursement." The email listed three charges for the children's medical treatment, totaling $552.00. Mother then stated, "I am mailing you copies of the bills. You should be able to get copies from the offices if you need them more quickly." Father replied,

> you have other larger bills you have not paid that you have put in my name you owe cool springs imaging totaling over 1k and there [sic] collection dept is on me for it. Plus you have not turned over your 2010 tax returns yet so by what the parenting plan says we don't know what % I owe. I suggest you stop running up credit at doctors in my name and pay the bills and have your lawyer get [my lawyer] your 2010 tax return so we can figure this out.

On November 10, 2011, Mother sent the following email to her lawyer. "[Father] has no idea what he is talking about. I put the Vanderbilt bills in my name on the 27th of October. I paid them at that time also. They are on the spreadsheet given to [Father's lawyer] and marked as paid." Also, on November 10, 2011, Father's lawyer sent an email to Mother's lawyer, wherein Father's lawyer states: "Mr. Eberbach is delivering his [tax] return to me which I will forward. There are apparently medical bills that need to be paid according to the Parenting Plan based on the income of the parents. Once we are able to ascertain that we can clear these up . . . ." In a November 17, 2011 email between Mother and Father, Mother wrote, in relevant part, "I received some more medical bills since the last time I emailed you. I will keep these until [Father's attorney] figures out the percentages." At the end of the correspondence, Father replied, "Talk to [my attorney] I don't know what to pay until we get the tax returns you were suppose[d] to get us." From the foregoing correspondence, it appears that Father knew, or should have known, that he was responsible for at least some portion of the children's uncovered medical expenses. In this regard, his argument that he should be relieved from paying any portion of the children's bills because Mother allegedly did not strictly comply with the 10 day reporting window set out in the parenting plan is rather disingenuous. Although the parenting plan does set out a timeframe for sending copies of bills as well as a timeframe for paying same, importantly, the parenting plan does not specifically provide that any violation of the time constraints will result in a party being relieved from his or her obligation to pay his or her pro rata share of the children's medical expenses.

In addition to the foregoing correspondence, Mother provided the trial court with a summary that itemized all of the children's medical bills that Mother had paid. This summary, along with supporting documentation, i.e., bills and credit card receipts, was admitted as Trial Exhibit 2. At the hearing, Father did not specifically dispute the amount of

the children's medical bills. Rather, his sole defense was the argument that because Mother allegedly stopped sending him the children's bills within ten days of receipt, this fact should relieve him of any liability. The trial court was not persuaded by Father's argument. As set out in full context above, the trial court specifically found that Father knew about the uncovered medical expenses because Mother had given "unrebutted testimony that Mr. Eberbach maintains the [children's health] insurance and he gets all of the explanation of benefit statements." From the record, it appears that Father did, in fact, receive the children's EOB statements. In the October 27, 2011 email correspondence, *supra*, Father attached EOBs to the email. In addition, Father attached, to his May 30, 2014 response in opposition to Mother's relocation, copies of EOBs from Blue Cross Blue Shield. Although Father's attorney argued that the EOBs would not give Father sufficient information to pay the bills, i.e., would not give him his pro rata share, it is undisputed that the parties were, at the time these bills accrued, operating under the original November 19, 2010 parenting plan. As discussed above, this plan indicates that Mother's income is $0. Furthermore, given the evidence, or lack thereof, concerning the parties' incomes, the trial court determined, after the July 15, 2014 hearing, that Mother did not have any adjusted gross income. Regardless, because the parties were operating under the original parenting plan, which listed no income for Mother, Father knew, or should have known, that he was responsible for 100% of the children's uncovered medical expenses pending modification of the parenting plan and a finding that Mother had income. As such, Father's contention that he should be relieved from reimbursing Mother for the children's medical bills because Mother failed to provide the medical bills within ten days is without merit. Accordingly, we affirm the trial court's judgment, against Father and in favor of Mother, for $26,096.50 for the children's uncovered medical expenses.

B. Attorney's Fees

As set out ***Eberbach I***:

> Tennessee courts follow the American Rule, which provides that litigants are responsible for paying their own attorney's fees unless there is a statutory or contractual provision stating otherwise. ***Taylor v. Fezell***, 158 S.W.3d 352, 359 (Tenn.2005) (citing ***State v. Brown & Williamson Tobacco Corp.***, 18 S.W.3d 186, 194 (Tenn.2000)). Mother claims attorney's fees under the parties' Martial Dissolution Agreement ("MDA"),[1] and Tennessee Code Annotated

[1] Paragraph 18 of the MDA states:

> In the event it becomes reasonably necessary for either party to institute legal proceedings to procure the enforcement of any provision of this Agreement, the prevailing party shall also be entitled to a judgment for reasonable expenses,

section 36-5-103(c) (2010). Tennessee Code Annotated section 36-5-103(c) provides:

> The plaintiff spouse may recover from defendant spouse, and the spouse or other person to whom custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

Under this statute, the Tennessee Supreme Court has noted that awards of attorney's fees are now "familiar and almost commonplace." ***Deas v. Deas***, 774 S.W.2d 167, 170 (Tenn. 1989). Courts grant attorney's fees awards in child custody or support proceedings to "facilitate a child's access to the courts." ***Sherrod v. Wix***, 849 S.W.2d 780, 784 (Tenn. Ct. App.1992) (citing ***Graham v. Graham***, 204 S.W. 987, 989 (Tenn. 1918)). "[R]equiring parents who precipitate custody or support proceedings to underwrite the costs if their claims are ultimately found to be unwarranted is appropriate as a matter of policy." ***Id***. at 785. The amount of attorney's fees awarded under section 103 must be reasonable, and the fees must relate to custody or support issues, and not simply to the dissolution of the marriage. ***Miller v. Miller***, 336 S.W.3d 578, 586 (Tenn.Ct.App.2010); *see* Tenn. Code Ann. § 36–5–103(c).

The party requesting attorney's fees has the burden to establish a prima facie claim for reasonable attorney's fees. ***Wilson Mgmt. Co. v. Star Distribs. Co.***, 745 S.W.2d 870, 873 (Tenn. 1988). The requesting party ordinarily carries this burden by offering an affidavit by the lawyer who performed the work. ***Hennessee v. Wood Grp. Enters., Inc***., 816 S.W.2d 35, 37 (Tenn.Ct.App.1991). A party opposed to the fees request is entitled to a "fair opportunity to cross-examine the requesting [party's] witnesses and to present proof of its own." ***Sherrod***, 849 S.W.2d at 785. However, the trial court need not have a "fully developed record of the nature of the services rendered" in order to award attorney's fees in a divorce case. ***Kahn v. Kahn***, 756 S.W.2d 685, 696 (Tenn. 1988). A trial judge may fix the award of attorney's fees "with

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including attorney's fees, incurred in prosecuting the action

> or without expert testimony of lawyers and with or without a prima facie showing by plaintiffs of what a reasonable fee would be." ***Wilson Mgmt***., 745 S.W.2d at 873.
>
> If a trial judge awards attorney's fees without first hearing the moving party's proof on reasonableness, "it is *incumbent* upon the party challenging the fee [to request a] hearing" on the reasonableness of the fees awarded. ***Kline***, 69 S.W.3d at 210 (emphasis in original); *see also* ***Kahn***, 756 S.W.2d at 697. Alternatively, the party challenging the fees could convince the appellate court that he was denied the opportunity to have a hearing on the reasonableness of the fees through no fault of his own. ***Kahn***, 756 S.W.3d at 697. This court will not reverse a trial court's award of attorney's fees merely because the record does not contain proof establishing the reasonableness of the fees. ***Kline***, 69 S.W.3d at 210. The record must contain some evidence showing that an award of attorney's fees is unreasonable before a reversal of the fees is justified. ***Id***. at 210. Additionally, the record should contain at least an affidavit of the lawyer's hourly rate and time spent on the case. *See* ***Miller***, 336 S.W.3d at 587.

Eberbach I, 2014 WL 7366904, at *5-*6 (footnote in original).

At the July 15, 2014 hearing, Mother testified that she had incurred substantial attorney's fees in this case. Mother submitted, as Trial Exhibit 4, the affidavit of her attorney, Rose Palermo, regarding the fees Mother had incurred. The invoices, on which the bills were submitted, were attached to the affidavit. These invoices itemized the specific services for which Mother had been billed. Mother's attorney, Rose Palermo, billed Mother for twenty-two hours at the hourly rate of $400, for a total of $8,800.00. Taylor Loring, another attorney at the firm, billed Mother for ten hours at $175 per hour, for a total of $1,745.00; Dolores Jenkins, a paralegal, billed for 93.25 hours at $100 per hour, for a total of $9,325. On direct examination, Mother testified that she was "very much" satisfied with her attorney's services.

On cross-examination, Father's attorney did not specifically question the reasonableness of the attorney's fees incurred by Mother. Rather, Father's attorney pointed out that some of the invoices listed services by another attorney in the firm for appellate work on Father's first appeal of this case in ***Eberbach I***, which was pending when the Father filed his opposition to Mother's relocation. On re-direct, however, Mother's attorney reviewed the attorney's fee affidavit and attachments with Mother and showed that the fees billed by the other attorney had, in fact, been subtracted from the fees requested in the affidavit and were not included in the $19,870.00 in fees for work done by Ms. Palermo, Ms. Loring, and Ms. Jenkins. Father's attorney declined to cross-examine Ms. Palermo regarding her billings.

In awarding Mother $19,870.00 in attorney's fees and expenses, the trial court found that the proceedings concerning Mother's relocation "did not need to be contentious" or "as difficult as it's been." The trial court further found that the fees Mother requested "are very reasonable in light of the extensive litigation that has been conducted in this case since Ms. Eberbach gave notice that she was relocating." In light of these findings, which are supported by the record, and considering the undisputed attorney's fee affidavit and invoices, we conclude that the trial court did not abuse its discretion in awarding attorney's fees and costs under the provision of the parties' MDA as well at Tennessee Code Annotated Section 36-5-103(c).

C. Attorney's Fees on Appeal

Mother also asserts that Father's appeal is frivolous, and she seeks an award of her attorney's fees as damages pursuant to Tennessee Code Annotated section 27-1-122, which provides:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

This statute authorizing an award of damages for frivolous appeal "must be interpreted and applied strictly so as not to discourage legitimate appeals." ***Davis v. Gulf Ins. Grp***., 546 S.W.2d 583, 586 (Tenn. 1977) (citing the predecessor to Tennessee Code Annotated Section 27-1-122). A frivolous appeal is one "utterly devoid of merit." ***Combustion Eng'g, Inc. v. Kennedy***, 562 S.W.2d 202, 205 (Tenn. 1978). Following review, we do not conclude that this appeal is devoid of merit or that it was undertaken for delay. Therefore, we respectfully decline to award Mother her appellate fees on this basis.

V. Conclusion

For the foregoing reasons, we affirm the order of the trial court. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed against the Appellant, Christopher W. Eberbach and his surety, for all of which execution may issue if necessary.

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KENNY ARMSTRONG, JUDGE