

[REDACTED]

NO. [REDACTED]

IN THE INTEREST OF

[REDACTED] AND
[REDACTED]

CHILDREN

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IN THE DISTRICT COURT

[REDACTED]TH JUDICIAL DISTRICT

[REDACTED] COUNTY, TEXAS

BRIEF ON ENTITLEMENT TO ATTORNEY'S FEES [SAPCR]

NOW COMES [REDACTED], Respondent, who files this his *Brief on Entitlement to Attorney's Fees*, and shows the following in support:

The issue presented is the legal standards the Court must follow in determining whether to award interim attorney's fees. Section 105.001(a)(5) gives the trial court authority to make a temporary order only for the safety and welfare of the child, including an order for payment of reasonable attorney's fees and expenses. Tex. Fam. Code §105.001(a)(5). A party seeking an award of attorney's fees under this section must establish that the fees are necessary *for the safety and welfare of the child*, as opposed to some other improper purpose for which an interim attorney's fee award is not authorized.

An award of past-due attorney's fees is not authorized under Texas Family Code §105.001(a)(5). See *In re Sartain* 2008 WL 920664, at *2 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding). Past due attorney's fees are a debt and are not an appropriate subject for an interim fees hearing. Tex. Fam. Code §106.002; *In re Moers*, 104 S.W.3d 609, 612 (Tex. App.—Houston [1st Dist.] 2003, no pet.). If the interim fees are not directly related to furtherance of the child's

present safety and welfare, then they are not allowable under the code. *In re Rogers*, 370 S.W.3d 443, 447 (Tex. App.—Austin 2012, orig. proceeding).

Additionally, the Texas Supreme Court set out the standard for an award of attorney’s fees. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d. 469 (Tex. 2019). The proper method of proving reasonable and necessary attorney’s fees is to show the number of hours necessary and worked multiplied by the reasonable hourly rate of the attorney and adjusted up or down based on equitable factors.

Attorney’s fees are not permitted in certain circumstances:

- For the purpose of “leveling the playing field”. *Saxton v. Daggett*, 864 S.W.2d 729, 736 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding).
- For the best interest of the child. *Saxton v. Daggett*, 864 S.W.2d at 736.
- Due to disparate wealth of the parties. *In re T.M.F.*, 2010 WL 974577 (Tex. App.—Beaumont 2010, orig. proceeding).
- To conduct discovery and prepare for trial. *In re Sartain*, 2008 WL 920664, at *1 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding).
- Because one party violated the possession schedule and was punished for such actions. *In re Payne*, 2018 WL 1630933, at *2.
- One party filed for a jury trial, making the litigation more expensive. *In re Rogers*, 370 S.w.3d at 446.
- The case is unusually acrimonious and contentious. *In re Rogers*, 370 S.W.3d at 446.
- The children’s mother needs protection. *In re Rogers*, 370 S.W.3d at 447.

- Where mother was paying some towards her attorney's fees and had friends and family assisting. *In re Rogers*, 370 S.W.3d at 447.

An award of interim attorney's fees:

- Cannot be used "to level the playing field" -- that is an abuse of discretion. *Saxton v. Daggett*, 864 S.W.2d 729, 736 (Tex. App. – Houston [1st Dist.] 1994, orig. proceeding).
- Cannot address past due attorney's fees via interim orders because past due attorney's fees incurred during the litigation are in the nature of a debt and. *Saxton* at 736.
- Must be based on evidence showing the reasonableness and necessity of the fees to be incurred. *In re Sartain*, 2008 WL 920664 (Tex. App. – Houston [1st Dist] 2008, no pet).
- Only fees that are reasonable and necessary may be shifted to the opposing party. The amount incurred is not conclusive evidence of reasonableness or necessity. *Rohrmoos* at 487-88.
- The number of hours reasonably expended multiplied by a reasonable hourly rate is the start of the analysis. Other considerations regarding the necessity of the activities may cause an adjustment downward. *Rohrmoos* at 492.
- Generalities about the amount of fees incurred and reasonableness of the fees is insufficient to support a fee-shifting award. *Rohrmoos* at 496.
- Nonlawyer activities must be additionally supported with evidence of the education, experience, and supervision to perform activities that would otherwise be performed by a lawyer. *Gill Sav. Assn v. Int'l Supply Co., Inc.*, 759 S.W.2d 697, 702-03 (Tex. App. – Dallas 1988, writ denied).

When synthesizing the relevant cases together, it is clear that a proper award of interim attorney's fees under §105.001(a)(5) requires that the award be linked to the furtherance of the child's safety and welfare in a meaningful, factually specific manner. It must be a certain, definite, and prospective award.

The code and relevant case law authority are consistent that the actions for which interim attorney's fees may be granted is a smaller, elevated subset of actions related specifically to the child's safety and welfare. This safety and welfare subset must necessarily be distinguished generally from all other actions regarding the SAPCR relevant to the child's best interest. *See In re Casanova*, 2014 WL 6486127, at *4 (Tex. App.—Dallas 2014, orig. proceeding).

Respectfully submitted,

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Certificate of Service

I certify that a true copy of this document served in accordance with rule 21a of the Texas Rules of Civil Procedure on the following on September 24, 2020:
[REDACTED] by electronic filing manager.

/s/ A. Brook Fulks

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