



NO. [REDACTED]

IN THE MATTER OF
THE MARRIAGE OF

[REDACTED]

AND

[REDACTED]

AND 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 **[FOR PROPERTY DIVISION CASE]**

NOW COMES [REDACTED], Respondent, files this his Brief on

Entitlement to Attorney's Fees, and in support would show as follows:

The issue presented regards the legal standards the Court must follow in determining whether to award interim attorney's fees. Here, there are no substantial contested issues pertaining to the minor child the subject of this suit and neither party anticipates that the issues pertaining to the child are going to be any major issue at trial.

Thus, any request for interim fees can only be considered under TFC 6.502(4).

An award of interim attorney's fees must:

- Be based on the needs of the applicant weighed against the ability of the community estate to pay. *Herschberg v. Herschberg*, 994 S.W.2d 273, 279 (Tex. App. – Corpus Christi 1999, pet. denied).
- May not be enforced by contempt – but only as a debt. *In re Bielefeld*, 143 S.W.3d 924, 930 (Tex. App. – Fort Worth 2004, orig. proceeding).

- May not make the opposing party destitute in order to pay fees. *Herschberg* at 279.
- Cannot be used to make an interim division of the property or to equalize one party to the other pending final division. *Herschberg* at 278.
- 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).
- Past due attorney’s fees incurred during the litigation are in the nature of a debt and cannot be addressed via interim orders. *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).
- Fee-shifting is not a mechanism for greatly improving an attorney’s economic situation. *Rohrmoos v. UTSW DVA Healthcare LLP*, 578 S.W.3d 469, 487 (Tex. 2019).
- 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.
- The party seeking the fee-shifting award bears the burden of proof, which includes documentation of the services performed. The proof must be sufficient to permit a court to perform a meaningful review of the fee application. Redaction prevents such review. *Sullivan v. Abraham*, 488 S.W.3d 294, 299-300 (Tex. 2016); *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 764 (Tex. 2012).
- Where entries are “so heavily redacted that the trial court could not possibly have had sufficient evidence to determine that the entire amount requested was not excessive or extreme, but moderate or fair,” the billing records constitute insufficient evidence to support a fee-shifting award. *McGibney v. Rauhauser*, 549 S.W.3d 816, 821 (Tex. App. – Fort Worth 2018, pet. denied).
- A trial court is not at liberty to blindly assume that fees for every communication between counsel and client should be, in fairness, awarded in a lawsuit. *McGibney* at 823.
- “The time shown in heavily redacted portions of the billing records is deducted from the lodestar.... Redacted entries must be excluded if they do not provide sufficient information to classify and evaluate the activities and hours expended.” *Randolph v. Dimension Films*, 634 F. Supp. 2d 779, 800 (S.D. Tex. 2009).
- 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).

Respectfully submitted,

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Certificate of Service

I certify that a true copy of the above was served on counsel for [REDACTED]
[REDACTED] in accordance with the Texas Rules of Civil Procedure
on September 17, 2020.

/s/ Michelle M. O'Neil
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