

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2438

September Term, 2014

JAVIER MARTIN

v.

KAREN M. SHEEHAN

Meredith,
Graeff,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: November 20, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case centers on attorneys’ fees. The Circuit Court for Montgomery County found that appellant, Javier Martin, breached the settlement agreement that had been incorporated into a divorce decree governing the dissolution of his marriage to appellee, Karen Sheehan. Pursuant to a fee-shifting clause in the agreement, the court ordered Martin to pay Sheehan’s attorneys’ fees in full, in the amount of \$30,916.37.

Martin contends that the court did not properly consider or apply the statutory criteria under Md. Code (1984, 2012 Repl. Vol.), § 12-103 of the Family Law Article (“FL”). He raises one question on appeal:

Did the trial court err in awarding attorneys’ fees to Sheehan in the amount of \$30,916.37, where the trial court failed to consider (1) Martin’s ability to pay the fees; (2) the relevant financial status of both parties; and (3) the reasonableness of the fees?

Because section 12-103 played no role in the trial court’s award of fees under the parties’ agreement, and because Martin failed to preserve any challenge to the reasonableness of the fees, we affirm the trial court’s ruling.

FACTUAL AND PROCEDURAL BACKGROUND

A. Marriage Dissolution and the Agreement

Martin and Sheehan were married in June 2002. They had one child, E., who was born in March 2003. Their marriage was short-lived: they separated in July 2003, and Sheehan filed for divorce later that year.

Sheehan obtained a final order and decree of divorce in Georgia on June 14, 2004. The divorce decree incorporated a settlement agreement (the “Agreement”), under which Sheehan received sole legal and physical custody of E. Martin, who had moved to his

home country of Spain, received reasonable visitation rights. He and Sheehan agreed to evenly split any reasonable travel costs of sending E. to and from Spain.

The Agreement settled all decisions as to child support and alimony. Martin would initially pay the below-guidelines sum of \$250 a month in child support, and the parties “agree[d] to revisit” this amount in two years and to “discuss in good faith a revised amount . . . that is more in line with [Martin’s] income level.” Child support would be modified automatically every year to reflect cost of living increases according to Spain’s consumer price index. Every two years, Martin was to provide Sheehan with evidence of his current income, so that she could confirm that E. was receiving a level of support that was consistent with Martin’s current income.

B. Attorneys’ Fee Provisions

The Agreement included two clauses requiring the payment of the other party’s attorney’s fees in the event of a breach of the Agreement.

The first clause, which concludes the section on child support, states:

In the event that Husband shall fail to pay when due any monthly amount of child support or fail to provide Wife the financial information outlined above, then Husband agrees to pay to Wife all attorney’s fees (including those incurred in the United States and abroad in Husband’s country of residence) that she might then incur, along with all court costs, travel expenses, translator costs, as a result of Husband’s failure to comply with these obligations.

The second clause constitutes the entire section titled “Noncompliance” and appears to govern the entire Agreement. It states:

Should either party incur any expense or legal fees as a result of the breach of any portion of this Agreement by the other party, the Court shall award reasonable attorney’s fees and suit expenses to the nondefaulting party. No

breach, waiver, or default of any of the terms of this Agreement shall constitute a waiver of any subsequent breach or default of any of the terms of this Agreement.

C. Litigation and Trial Court Proceedings

On November 6, 2013, Sheehan, who had moved to Maryland, filed a request to enroll the out-of-state divorce order. Six days later the court enrolled the order and gave the required notice to the parties.

Sheehan petitioned the court to enforce and modify the child support and custody orders. Among other things, Sheehan requested an order increasing Martin's child support payments and requiring him to contribute to E.'s medical and dental expenses. Martin asserted a counterclaim concerning reimbursement for E.'s travel expenses. In the meantime, the court, at Sheehan's request, appointed a best interest attorney for E.

At the two-day hearing in November 2014, Sheehan contended that Martin had not been paying child support in accordance with his true income. She argued that Martin had lied about his employment since late 2012 and concealed reports of his actual income. She also argued that Martin had failed to send tax returns for 2013 or 2014 and had submitted only a partial indication of his current earnings in the form of one paystub and a letter from his employer stating his expected 2014 earnings. Sheehan alleged that, starting in late 2013, Martin had begun to reduce his child support payments in violation of the Agreement and that he had refused to contribute toward the expenses that Sheehan had incurred for E.'s dental care.

Martin did not travel from Spain for the hearing, but his counsel argued that his decision not to help with E.'s dental expenses was his way of offsetting the consequences

of Sheehan's refusal to reimburse him for the costs of flying E. to and from Spain for visitation. Martin's counsel also argued that the reduction of monthly child support payments was not a breach of the agreement, but a downward adjustment to reflect Spain's declining consumer price index.

The trial court, ruling on the record, ordered Martin to pay \$2,382.00, representing his half of the accrued fees for the best interest attorneys, and \$2,650.87, representing the amounts that he should have contributed to E.'s medical and dental expenses. The court also ordered Martin to pay child support arrearages of \$1,946.00, to account for his unilateral reduction in the payments over the previous fourteen months. In addition, the court increased Martin's monthly child support obligation to \$856.00 per month. Martin has not challenged any of these rulings on appeal.

The trial court then ordered Martin to pay attorneys' fees. Sheehan's counsel had previously submitted invoices for the work performed in representing Sheehan until approximately the beginning of trial. In light of this documentation and the hearing testimony, the trial court stated:

Now, with regard to . . . the attorney's fees, I'll find that *based upon the defendant's breach of this contract* that's required the plaintiff to file suit and pursue the remedies that she's pursuing. So, in reviewing the documents that have been submitted on that, it appears as though in Exhibit No. 34, that the total fees were, that were incurred were \$22,858.67. However, that figure did not include the November 16, 20[14] bill from Mr. Flanagan which was \$3,065.70. If you add those two together, that's \$25,924.37. Additionally, that figure included the [BIA] fees, so I deducted them out, the [\$]2,383, because that's been dealt with already in a different award. So, attorney's fees strictly for Flanagan's representation is \$23,541.37, and I'll award that on behalf of the plaintiff.

(Emphasis added.)

Sheehan’s counsel alerted the trial court to the fifteen hours of work that he had performed, at an hourly rate of \$295.00, since the most recent invoice. The court announced that it would add the resulting amount of \$4,425.00 to the \$23,541.37 from above (the total of which is \$27,966.37).¹ Martin took a timely appeal.

DISCUSSION

Martin argues that the trial court erred because it did not properly consider and apply the statutory factors required by FL § 12-103 before it awarded fees. Because section 12-103 does not apply when the parties have entered into a fee-shifting agreement, and because Martin has failed to preserve the only claim of error available to him, we affirm.

Section 12-103 normally governs matters such as this one, where parties file to enforce and modify orders of child support. Subsection (a) permits a court to award “the costs and counsel fees that are just and proper under all the circumstances.” Subsection (b), however, provides that before awarding counsel fees a court must consider: (1) the financial status of each party; (2) the needs of each party; and (3) whether there was a substantial justification for bringing, maintaining, or defending the proceeding. *See generally Henriquez v. Henriquez*, 413 Md. 287, 296-97 (2010).

¹ In the order that followed this oral ruling, the court ordered Martin to pay attorneys’ fees in the amount of \$30,916.37. At oral argument, Sheehan’s counsel asserted that the additional sum, beyond \$27,966.37, resulted from a post-hearing submission concerning the litigation expenses that Sheehan had incurred, including the expense of effectuating service of process on Martin in Spain. Martin did not dispute that assertion.

Although Martin insists that the court “utterly failed to consider” these criteria, section 12-103(b) did not govern the analysis in this case. Martin and Sheehan agreed that if either of them breached any portion of the Agreement, including the provision pertaining to child support, the court could award fees and expenses to the party who had not breached. Maryland courts have applied contractual fee-shifting agreements in family law cases (*see Rauch v. McCall*, 134 Md. App. 624, 638 (2000)), and the circuit court specifically stated that it was awarding fees “based upon the defendant’s breach of this contract.” In short, this case does not concern an award of fees that is subject to the requirements of section 12-103(b).

Nonetheless, in a case involving a contractual fee-shifting provision, a court ordinarily must assess the fee award for “reasonableness.” *Nova Research, Inc. v. Penske Truck Leasing Co., L.P.*, 405 Md. 435, 447 (2008) (“[c]ontract clauses that provide for the award of attorney’s fees generally are . . . subject to a trial court’s examination of the prevailing party’s fee request for reasonableness”). “Even in the absence of a contract term limiting recovery to reasonable fees, trial courts are required to read such a term into the contract and examine the prevailing party’s fee request for reasonableness.” *Myers v. Kayhoe*, 391 Md. 188, 207 (2006); *see also Rauch*, 134 Md. App. at 640-41 (“the court was still required to analyze the reasonableness of the attorney’s fees, despite the lack of the specific word ‘reasonable’ in the Agreement”). “Moreover, ‘the trial court’s evaluation of a claim for attorneys’ fees must be based on a record that includes information that sufficiently and competently supports the court’s findings.’” *Holzman v.*

Fiola Blum, Inc., 125 Md. App. 602, 639 (1999) (quoting *Maxima Corp. v. 6933 Arlington Dev. Ltd. P’ship*, 100 Md. App. 441, 458 (1994)).

Here, the court made no express finding of reasonableness and compiled no record to support any such finding. Martin, however, failed to question the reasonableness of the requested fees and failed to object to the manner in which the court proceeded in awarding them. Martin’s only mention of attorneys’ fees was in this terse remark to end closing argument: “We’d ask the court to deny their request for attorney’s fees. We have no information with respect to the financial circumstances of both parties, I think Your Honor doesn’t have a clear picture of that.”

Having based his objection on the court’s failure to comply with section 12-303, Martin “will be held to those grounds.” *Klaunberg v. State*, 355 Md. 528, 541 (1999). In view of Martin’s failure to preserve any objection to the reasonableness of the fees and expenses that the court awarded, we decline to address that issue. *See* Md. Rule 8-131(a) (“[o]rdinarily, the appellate court will not decide any [] issue unless it plainly appears by the record to have been raised in or decided by the trial court”).

“Fairness and the orderly administration of justice [are] advanced by requiring counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct, any errors in the proceedings.” *Bryant v. State*, 436 Md. 653, 659 (2014) (citation and quotation marks omitted). If reasonableness were in fact a concern at the time, it was incumbent on Martin’s trial counsel to raise that issue at the time of the ruling, so that the trial court could “pass upon, and possibly correct[,] any errors in the proceedings.” *Bryant*, 436 Md. at 659.

Because Martin cannot wait until this late stage to challenge the award of fees, we affirm the judgment below.

**JUDGMENT OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY AFFIRMED.
APPELLANT TO PAY ALL
COSTS.**