

Grant Motion and Reverse trial court order; Opinion Filed June 9, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-00555-CV

**KELLY DEAN HOLLINGSWORTH AND K. HOLLINGSWORTH & ASSOC., P.C.,
Appellants**

V.

**WALAAL CORPORATION D/B/A AMBASSADOR CAB, FARHAN RIYALE, BASHIR
SALAH, E.P.D.A., INC. D/B/A ALAMO CAB, TESHAI H. SBAHTU, D.E.C.D.A., INC.
D/B/A STARCAB, GIRMA WOLDE-RUFAEL, BEKELE KIDANE, Appellees**

**On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-03638**

MEMORANDUM OPINION

Before Chief Justice Wright, Justice Lang-Miers, and Justice Stoddart
Opinion by Justice Stoddart

Before the Court is Kelly Dean Hollingsworth's motion challenging the trial court's order to pay the cost of the reporter's record.¹ *See* TEX. R. CIV. P. 145(g)(1). We grant the motion and reverse the trial court's order.

BACKGROUND

The trial court's order follows a hearing on the court reporter's contest to Hollingsworth's affidavit of inability to pay costs, which asserted Hollingsworth's expenses exceeded his income by approximately \$2,000 per month. *See id.* 145(e),(f)(3). Hollingsworth

¹ The motion was filed jointly with K. Hollingsworth & Associates, P.C. However, under the rules of civil procedure, K. Hollingsworth & Associates is not authorized to bring a Rule 145(g)(1) motion. *See* TEX. R. CIV. P. 145(g)(1).

filed the affidavit seeking to obtain without payment the appellate record of proceedings that resulted in a judgment against K. Hollingsworth & Associates, P.C. and him in excess of \$500,000.² The appeal from that judgment is docketed as appellate cause number 05-16-00534-CV.

Hollingsworth testified at the hearing, which was held three months after the filing of the affidavit, that his sole source of income is from Laney & Bollinger, where he is a contract attorney and is paid fifty-percent of the revenues from work he has performed. Since the filing of his affidavit, his monthly net income has increased from \$3245 to \$4220. His monthly expenses, though slightly different, have remained about the same at approximately \$5200. He has considerable debt, including over \$200,000 in student loans and \$29,000 in legal fees, and has borrowed money from “the existing partners” at Laney & Bollinger to cover some of his expenses. Hollingsworth testified the cost of the reporter’s record was estimated between \$9,000 and \$11,000, and he could not afford to pay the fee. He has borrowed as much money as he can to “keep making up for the thousand-dollar-a-month deficit,” and did not have “any other sources from whom to borrow.” He testified he had furniture and other household goods in two storage units, and had “sold some of the goods to keep things going,” including a pool table.³ He had no assets he could liquidate or sell to pay the fee. To support his testimony, Hollingsworth offered into evidence a legal bill, his student loan statement, and his car loan statement, but he did not offer any tax returns or forms showing his income or any documentation in support of his living expenses.

The court reporter offered no testimony contradicting Hollingsworth’s assertions, and agreed generally with the estimated cost of the trial record.

² The trial clerk did not challenge Hollingsworth’s affidavit and has filed the clerk’s record without payment of costs.

³ He testified he had “recently” moved “from a 4500-square foot house to a 1500-square foot house.”

The trial court denied Hollingsworth's affidavit. In findings of fact made pursuant to rule 145(f)(6), the trial court found, in relevant part that (1) Hollingsworth's affidavit did not comply with the requirements of Texas Rule of Civil Procedure 145(b) and did not include "attachments" showing his inability to pay; and (2) Hollingsworth "failed to carry his burden to prove the inability to afford costs by the greater weight of the credible evidence presented."

APPLICABLE LAW AND STANDARD OF REVIEW

Texas Rule of Civil Procedure 145 exempts a party from paying court costs, including the reporter's fee, if the party files a statement showing he does not have the funds to pay. *See* TEX. R. CIV. P. 145(a),(c). The statement must be sworn to before a notary or made under the penalty of perjury and must either be the form "Statement of Inability to Afford Payment of Court Costs or an Appeal Bond" approved by the Texas Supreme Court or include the information required by the approved form. *See id.* 145(a),(b). Failure to use the approved form is not ground for requiring the party to pay costs, and if a statement contains a material defect or omission, the trial court may direct the party to correct or clarify the statement. *See id.* 145(d).

A trial court may order payment of costs by a party who files a statement only on motion challenging the statement and upon the party's failure, at an evidentiary hearing, to establish his inability to afford costs. *See id.* 145(f)(1)-(5). The trial court may order the party pay only a portion of the costs or pay in installments. *See id.* If the trial court orders the party to pay court costs, the court must support its order with "detailed findings that the [party] can afford to pay costs." *See id.* 145(f)(6). The central inquiry under rule 145 "is not merely whether [the declarant] can pay costs, but whether [the declarant] can afford to pay costs" and still pay for "basic essentials, like housing or food." *See id.* 145, cmt.

On appeal, the trial court's order to pay costs is reviewed for abuse of discretion and will be affirmed unless the record reflects the trial court acted in an arbitrary and unreasonable

manner or without reference to any guiding rules or principles. *See In re A.L.V.Z.*, 352 S.W.3d 568, 570 (Tex. App.—Dallas 2011, no pet.). As the fact finder, the trial court is the sole judge of the credibility of the witnesses and evidence. *In re A.R.*, 236 S.W.3d 460, 471 (Tex. App.—Dallas 2007, no pet.) (op. on reh'g). However, the trial court may not completely disregard the only evidence adduced at the hearing concerning the declarant's ability to pay costs. *See Sansom v. Sprinkle*, 799 S.W.2d 776, 778 (Tex. App.—Fort Worth 1990, orig. proceeding).

DISCUSSION

Hollingsworth challenges the trial court's findings on several grounds, but we find dispositive his arguments that the findings are inadequate because they are not "detailed findings that [he] can afford to pay costs" as required by rule 145 and no evidence was adduced showing he can pay for the record. Of the many findings by the trial court, the only finding that Hollingsworth can afford to pay costs is the finding that he "failed to carry his burden to prove the inability to afford costs by the greater weight of the credible evidence presented." This finding, however, contains no details as to how Hollingsworth can pay for the reporter's record. *See Koehne v. Koehne*, 01-17-00016-CV, 2017 WL 2375789 *2 (Tex. App.—Houston [1st Dist.] June 1, 2017, order) (per curiam) (summarizing trial court's findings which included findings of money spent on attorney's fees and a reporter's record, prior income and expenses, and occasional payments for "odd jobs"). Moreover, the only evidence adduced at the hearing on the reporter's contest was Hollingsworth's testimony that his expenses exceeded his income, he had significant debt, he had borrowed as much money as he could and had no other sources from which to borrow, he had no assets he could liquidate or sell, and he could not pay the estimated reporter's fee. This testimony was uncontroverted. Although the trial court was required to evaluate Hollingsworth's credibility, the trial court was not free to completely disregard the only evidence establishing his inability to pay costs when no evidence was offered in rebuttal. *See*

Sansom, 799 S.W.2d at 778; *see also In re S.T.*, 239 S.W.3d 452, 457 (Tex. App.—Waco 2007, order) (per curiam) (concluding trial court abused its discretion in finding appellant did not prove his indigence where appellant's monthly income as a self-employed carpenter approximated his monthly expenses and, although he had worked as an insurance adjuster in the past making more daily than he did weekly as a carpenter, no evidence was offered to refute his claim that insurance adjusters were not currently in demand).

On the record before us, we conclude the trial court abused its discretion in denying Hollingsworth's affidavit and ordering him to pay the reporter's fee. We grant his motion and reverse the trial court's order. The reporter's record shall be prepared without payment of costs.

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/Craig Stoddart/
CRAIG STODDART
JUSTICE