No. 2—09—1362
Order filed March 23, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF	)	Appeal from the Circuit Court of
SUSAN LEESE,	)	Lake County.
	)	
Petitioner,	)	
	)	
and	)	No. 04—D—2475
	)	
BRENT LEESE,	)	
	)	
Respondent-Appellant,	)	Honorable
	)	David P. Brodsky,
(Berger Schatz, Petitioner-Appellee).	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Burke concurred in the judgment

Held: Trial court did not abuse its discretion in admitting, under the business records exception to the rule against hearsay, the testimony of lead counsel regarding work and time sheets submitted by other attorneys at the law firm.

Law firm is entitled to seek fees under section 508(c)(2) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508(c)(2) (West 2008) (allowing for a law firm to seek fees based upon an engagement agreement between client and counsel entered into "reasonably soon" after retention) where the client reviewed the agreement for a period of 22 days, during which time he remained in contact with counsel, implicitly consenting to the work being performed.

Law firm was not without ability to petition for fees based on alleged unconscionable provision(s) in the engagement agreement concerning the client's ability to challenge the fees because: (1) if we read the provision(s) to unconscionably limit the client's ability to challenge the fees, we would sever it from the remainder of the agreement, preserving the law firm's ability to petition for fees under section 508(c)(2) of the Act; and (2) even if the problematic provision caused the entire contract to be void as against public policy (which it does not), the law firm would be entitled to petition for fees under a *quantum meruit* theory. Moreover, the complained-of provision did *not* prevent the client from challenging the fees, because the trial court *did* conduct a hearing wherein the firm carried the burden of establishing the reasonableness of its fees and the client had the opportunity to submit his own evidence and cross-examine the firm's witness.

Respondent-appellant Brent Leese challenges the trial court's ruling on petitioner-appellee Berger Schatz's petition for setting final fees and costs, wherein it granted Berger Schatz attorney fees in the amount of $22,586. We affirm.

I. BACKGROUND

The law firm of Berger Schatz represented Brent Leese over a five-year period in both pre- and post-decree matters pertaining to the dissolution of marriage between Brent and his former wife, Susan Leese. Following the dissolution, Brent continued to communicate with Berger Schatz, and, in particular, Michael S. Sabath, who was the lead attorney on the case. When, in early August 2007, Sabath realized that the matters Brent raised would involve potentially lengthy post-decree litigation, Sabath drew up an engagement agreement that set forth a fee arrangement for the post-decree matters. Sabath encouraged Brent to review the agreement, which he did. Twenty-two days later, Brent signed the agreement and returned it to Sabath. During those 22 days, Brent spoke with Sabath (or other representatives of Berger Schatz) on nine separate occasions.

The engagement agreement set forth, in Paragraph 1.B, that, if Brent had any questions about any charges on a bill, he must submit them in writing or else waive his right to object to the charge

stated on the bill. Attached to the agreement was a chart of the hourly rates of the Berger Schatz attorneys, several of whom worked on Brent's post-decree manner. For example, the chart established that Sabath, a partner at the firm with 15 years experience, charged an hourly office rate of $365 and a court rate of $400. Reuben A. Bernick, a senior associate who performed tasks at Sabath's direction, charged hourly rates of $330 and $365, respectively.

Berger Schatz performed work under the agreement from August 2007 through September 2008. On November 26, 2008, Berger Schatz filed a petition for setting final fees and costs, seeking, against Brent, $22,925.09 in fees and costs. Brent challenged the petition. On a subsequent status date, the trial court gave the parties an opportunity to settle, but they were unable to do so.

At the hearing on the petition for fees, held June 12 and July 21, 2009, Sabath both represented and testified on behalf of Berger Schatz. Brent, through his new attorney, cross-examined Sabath, who was the only witness at hearing.

Sabath sought to admit Berger Schatz's billing statements and supporting documentation including various post-decree motions and petitions addressed or drafted by the firm during the relevant time period, performed in furtherance of Brent's interests, such as: (1) a petition pertaining to maintenance filed by Susan (August 15, 2007); (2) a petition for interim attorney's fees and costs filed by Susan (August 15, 2007); (3) a six-count amended petition for rule to show cause for indirect civil contempt and other relief filed by Brent (August 28, 2007); (4) a petition for rule to show cause and other relief filed by Susan (July 2, 2008); and (5) various motions to strike, motions regarding discovery, and other motions.

Brent objected to the admission of the billing statements and post-decree motions, arguing that they were hearsay. As to the billing statements, Sabath responded that he was submitting the

statements to "allow the court to assess the appropriateness and reasonableness of both my actions as well as the services and charges incurred." Sabath testified as to the manner in which the time sheets were generated, and the court ruled that it would admit the time sheets, subject to cross-examination. The court reasoned that the time sheets were generated in the ordinary course of business.

As to the post-decree motions, Sabath responded that he was not seeking to admit the motions for the truth of the matter asserted (*i.e.*, the alleged wrongdoings by the parties), but as evidence of the work performed by Berger Schatz. The court admitted the post-decree motions, noting that they spoke to the issue of work performed and stating that, in any case, they were already part of the court file.

Sabath testified to Brent's success on many of the post-decree motions. For example, the court terminated Brent's obligation to pay Susan maintenance; lowered Susan's request for attorney fees from approximately $25,000 to approximately $5,000; and successfully defended against Susan's request for additional contributions toward their daughter's education and against Susan's rule to show cause. Sabath stated that this success supported the reasonableness and non-gratuitous nature of the projects Berger Schatz undertook in representing Brent. Sabath further testified that the firm's success on several of the post-decree motions required extensive discovery. For example, in order to prove that Susan had begun a conjugal relationship with another man so as to disqualify her from receiving maintenance, Berger Schatz had to hire a process server and obtain a motion to compel the paramour's compliance.

Sabath also testified to the organizational structure of the firm, including his supervision of those who worked on the case. Sabath assigned a great share of the work to Reuben Bernick, a 53-

year old senior associate with 25 years of legal experience. Sabath's supervision of Bernick was minimal; Bernick documented his work and submitted time sheets, and then Bernick and Sabath discussed any completed work so that both attorneys remained current on the case status. Sabath also assigned a fair amount of work to his summer associate, a second-year law student. Sabath explained that obtaining a summer-associate position was an accomplishment and that the summer associate had been through a rigorous interview process. Sabath assigned the associate work that he thought she could handle, and Sabath reviewed her work on a daily basis. The firm billed for work performed by the summer associate at a rate of $125 per hour, the same rate as the senior paralegals in the firm, and Sabath reasoned that assigning the easier projects to the summer associate would save Brent approximately $200 per hour *vis a vie* work performed by Bernick. Additionally, Sabath assigned work to a paralegal at the firm who was actually an attorney (licensed to practice in Canada only), reasoning that members of his paralegal staff were uniquely skilled and efficient.

Sabath noted, however, that upon further review of the billing statement, he did see one item that could be omitted. A relatively new associate at the firm had inadvertently billed for transportation time to the courthouse, an expense that Berger Schatz typically declines to pass onto clients.

Sabath then submitted himself to cross-examination, and Brent, through his new attorney, questioned Sabath regarding Sabath's involvement and supervision of the other attorneys' work. Sabath conceded that he did not *literally* observe the attorneys performing the work. Sabath simply reviewed the work product and discussed it with the attorneys.

Brent also questioned Sabath regarding the legitimacy of fees for work performed during the 22 days that Brent had spent reviewing the engagement agreement. Brent noted that Berger Schatz

billed for approximately $3,000 of work under the agreement during those 22 days.[1] Brent asked whether the fee agreement had to be in place before Berger Schatz could begin billing under the agreement. Sabath explained:

> "No. According to the statute, it either has to be signed at the time or I believe it states reasonably soon thereafter. I never have my client sign the agreement when it's first presented to him. I allow him to take it, review it and return it to me, which was done with [Brent]."

Brent next read paragraph 1.B of the agreement, which stated:

> "[Paragraph 1.B] If you have any question about any charges on a bill, you must submit them in writing to Berger Schatz within thirty (30) days of the date of the bill in question, along with payment for that portion of the bill which is not in dispute. Attempts will be made to reconcile the bill immediately. If you fail to raise any questions concerning your bill, Berger Schatz will presume you have no such objections, and you waive your right to object to any charge stated on the bill in any future proceeding."

Brent asked whether this provision made the entire agreement unconscionable, because an attorney *has* to prove that the bills are reasonable based on the work; it is not an issue that can be waived. There was then some discussion as to whether Brent was asking Sabath to testify to a legal conclusion. Sabath eventually answered:

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[1] In his written brief, Brent asserted that approximately $10,000, not $3,000 was performed during the 22 days at issue.

> "I'm not expecting [Brent] to waive his objection[,] and [I] believe that it's necessary for me to pursue and have the court determine the reasonableness and appropriateness of my fees. Otherwise I would have filed a motion for summary judgment."

At the close of the hearing, the trial court instructed the parties to submit briefs regarding Brent's challenges raised at hearing, *i.e.*, that: (1) because Sabath did not literally observe the attorneys working and because the other attorneys did not testify themselves, much of the evidence admitted to establish the reasonableness of the fees was inadmissable hearsay; (2) the work performed during the 22 days that he was reviewing the agreement did not fall under the agreement; and (3) Berger Schatz was not entitled to petition for fees under the agreement because the agreement was void as against public policy.

The trial court ruled in favor of Berger Schatz. As to Brent's first challenge, the court ruled that evidence such as Sabath's testimony regarding work performed and time sheets submitted by other attorneys was admissible under the business records exception to the rule against hearsay for the purpose of establishing the reasonableness of the fees. However, the court did subtract $138.75 for costs incurred by the firm in traveling to court (an expense Sabath conceded at trial should have been omitted), as well as $250 for what could be characterized as the firm's one instance of inefficient delegation (utilizing a high-level, high-billing partner to file a routine agreed order rather than a lower-level associate).

As to Brent's second challenge, the court noted that section 508(c)(2) of the Act plainly allows for a hearing on the petition of fees where counsel and client entered into a written engagement agreement at the time client retained counsel or *reasonably soon thereafter*. 750 ILCS 5/508(c)(2) (West 2008). The court noted that 22 days was a reasonable amount of time where the

billing records indicate that Brent met or spoke with Sabath at least nine times during those 22 days, which, the court concluded, indicated his acquiescence to the work being performed.

As to Brent's third challenge,[2] the court found that the provision(s) in question did not unreasonably limit Brent's ability to challenge the disputed fees, costs, or work performed. Therefore, the agreement was not void as against public policy. The court found Berger Schatz's

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[2] In his written brief, Brent cites to two additional provisions in the agreement that he believes limit his ability to challenge the reasonableness of fees, Paragraphs 6 and 9. Those paragraphs state as follows:

> "[Paragraph 6] You acknowledge that you have been advised by Berger Schatz of your right, if a dispute arises, to contest, pursuant to an Alternative Dispute Resolution Mechanism ("ADR"), any attorney[] fees and costs charged by Berger Schatz to you, pursuant to this Agreement. You agree to affirmatively waive this right in the event such a dispute arises, as does Berger Schatz.
>
> ***
>
> [Paragraph 9] You acknowledge that you have been advised that if you fail to pay Berger Schatz as required by the terms of this Engagement Agreement, Berger Schatz may elect to withdraw as your attorneys and to subsequently file a Petition for Attorney's Fees and Costs (for the outstanding balance) against you and/or your spouse pursuant to Section 508 of the [Act]. You agree that this Engagement Agreement shall be binding on the Court in connection with assessing any attorney[] fees and costs owed by you to Berger Schatz."

fees reasonable, and, aside from the deductions noted above, it granted the petition for fees in the amount of $22,586.00. This appeal followed.

II. ANALYSIS

On appeal, Brent raises the same three challenges raised in the court below, and he essentially contends that the fees granted to Berger Schatz pursuant to section 508 of the Act were not reasonable. Section 508 states in pertinent part:

> "(c)(2) No hearing under this subsection (c) is permitted unless: (1) the counsel and client entered into a written engagement agreement at the time the client retained the counsel (or reasonably soon thereafter) ***.
>
> (c)(3) The determination of attorney's fees under this subsection (c) *** is within the sound discretion of the trial court. The court shall first consider the written engagement agreement and, if the court finds that [the parties] entered into a contract which meets applicable requirements of court rules and addresses all material terms, then the contract shall be enforceable in accordance with its terms, subject to further requirements [contained herein]. Before ordering enforcement, however, the court shall consider the performance pursuant to the contract. Any amount awarded by the court must be found to be fair compensation for the services, pursuant to the contract, that the court finds were reasonable and necessary. *Quantum meruit* principles shall govern any award for legal services performed that is not based on the terms of the written engagement agreement." 750 ILCS 5/508(c)(2), (3) (West 2008).

The allowance of attorney fees in divorce proceedings rests in the sound discretion of the trial court, and exercise thereof will not be interfered with unless such discretion is clearly abused. See, *e.g.*, *Pedersen v. Pedersen*, 77 Ill. App. 3d 716, 720 (1979).

A. Business Record Exception Rule

Brent contends that the trial court erred in admitting evidence of work performed by attorneys at Berger Schatz other than Michael Sabath. Brent reasons that these attorneys did not testify at trial (or submit an affidavit), and, therefore, any evidence of their work amounts to hearsay.

We first note that Brent cites no authority in support of this particular argument. Therefore, he is in violation of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008), and we may find that he has forfeited the argument. *Velocity Investments v. Alston*, 397 Ill. App. 3d 296, 297 (2010) (the appellate court is not a repository into which an appellant may foist the burden of argument and research).

In any case, it is clear from the record that the trial court did not abuse its discretion in admitting the evidence of work performed by the attorneys that Sabath supervised. See, *e.g.*, *City of Chicago v. Old Colony Partners*, 364 Ill. App. 3d 806, 818 (admission of evidence reviewed under an abuse-of-discretion standard). Under Illinois Supreme Court Rule 236(a) (eff. August 1, 1992), business records may be admitted over a hearsay objection where the party tendering the record satisfies the following foundational requirements: (1) the record is made in the regular course of business; and (2) the record must be made at or near the time of the event or occurrence. *Babich v. River Oaks Toyota*, 377 Ill. App. 3d 425, 430 (2007). Additionally, the foundation should be established through the testimony of the custodian of the records or another person familiar with the business and its mode of operation. *Id*. The basis for the admissibility of the business records is that

the circumstantial probability of their trustworthiness is a practical substitute for cross-examination of the individual making the entries. *People v. Wells*, 80 Ill. App. 2d 187, 194 (1967).

Courts have allowed lead counsel to testify, under the business record exception, to the representation of other attorneys and staff at the firm, to client billing summaries, and to records maintained by other attorneys and staff at the firm who worked on the case. *Heller Financial, Inc. v. Johns-Byrne Co.*, 264 Ill. App. 3d 681, 691-93 (1994). Here, Sabath, the lead attorney on the case, testified that he is familiar with the mode of business at the firm. He testified that the time sheets were generated in the regular course of business at or near the time that the attorneys performed the respective services. He contemporaneously reviewed the work performed by more junior attorneys. Sabath's testimony as to the work performed by other attorneys and staff at the firm as enumerated by the billing statements clearly fell under the business record exception to the rule against hearsay.

B. Fees Incurred During the 22-Day Review Period

Brent next argues that Berger Schatz is not entitled to payment for fees incurred during the 22 days between the time Berger Schatz provided Brent with the engagement agreement for his review and the time Brent returned the signed agreement. Brent relies solely on the language of section 508(c)(2) of the Act, which states:

> "No final hearing under this subsection (c) is permitted unless: (i) the counsel and client had entered into a written engagement agreement at the time the client retained counsel (or reasonably soon thereafter)***." 750 ILCS 5/508(c)(2) (West 2008).

We disagree with Brent's position. As quoted above, section 508(c)(2) plainly allows for a law firm to seek fees based upon an engagement agreement entered into "reasonably soon" after counsel is retained.

Brent contends that the trial court erred in granting fees for work performed during the 22 days because, even though 22 days is not necessarily a lengthy time, "the amount of work that was done in this time period was considerable." However, as the trial court noted, during the 22 days, Brent met with or spoke with counsel *nine* times. At no time did Brent tell Berger Schatz that he wanted it to cease working or billing for the conversations. As such, Brent effectively acquiesced to this "considerable" amount of work.

C. Ability to Petition for Fees

Brent argues that the trial court should have found, and this court should find, the engagement agreement to be void as against public policy because it limits his ability to challenge the fees and it releases Berger Schatz from its burden of establishing the reasonableness of its fees. Brent essentially contends that, if the engagement agreement is void, then Berger Schatz would have no basis upon which to bring a petition for fees. Brent cites to section 508(c)(2) of the Act, which, again, states:

> "No final hearing under this subsection (c) is permitted unless: (i) the counsel and client had entered into a written engagement agreement at the time the client retained counsel (or reasonably soon thereafter)***." 750 ILCS 5/508(c)(2) (West 2008).

Brent finds fault with paragraphs 1.B, 6, and 9, as quoted above. Again, paragraph 1.B., of which Brent primarily complains, states:

> "[Paragraph 1.B] If you have any question about any charges on a bill, you must submit them in writing to Berger Schatz within thirty (30) days of the date of the bill in question, along with payment for that portion of the bill which is not in dispute. Attempts will be made to reconcile the bill immediately. If you fail to raise any questions concerning

> your bill, Berger Schatz will presume you have no such objections, and you waive your right to object to any charge stated on the bill in any future proceeding."

Brent notes that, even when client and counsel have entered into an engagement agreement, counsel still must present sufficient evidence to prove that the fees are reasonable. *Yowell v. Ringer*, 217 Ill. App. 3d 353, 361 (1991); *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 983 (1987). Therefore, according to Brent, any provision in the agreement that in any way releases Berger Schatz from proving the reasonableness of its fees is against public policy.

Brent's argument is unviable, and Berger Schatz is not without ability to petition for fees for at least two reasons. First, and as set forth below, if we read the provision(s) to improperly limit the client's ability to challenge the fees, we could merely sever them from the remainder of the agreement, preserving Berger Schatz's ability to petition for fees under section 5/508(c)(2) of the Act. 750 ILCS 5/508(c)(2) (West 2008). Second, even if the problematic provisions caused the entire contract to be void as against public policy (which they do not), Berger Schatz would be entitled to petition for fees under under a *quantum meruit* theory. Moreover, the complained-of provisions did *not* limit Brent's ability to challenge the fees or chill his tendency to do so, because the trial court *did* conduct a hearing wherein the firm carried the burden of establishing the reasonableness of its fees and Brent had the opportunity to challenge them through the submission of evidence and the cross-examination of Berger Schatz's witness.

At the hearing, Brent argued that the offensive provisions could not be severed from the agreement because the agreement did not contain a severability clause. However, while a severability clause may strengthen the case for the severance of unenforceable provisions, it is not dispositive. See, *e.g.*, *Tortoriello v. Gerald Nissan of North Aurora, Inc.*, 379 Ill. App. 3d 214, 239

(2008) (regarding the severability of unconscionable provisions in arbitration agreements). The test for determining if it is appropriate to sever an unconscionable provision from an agreement and enforce the remainder of the agreement is whether the provisions operate independently of each other or whether the *valid* provisions are so closely connected with the *unenforceable* provisions that to sever the later would be tantamount to rewriting the agreement. *Id*. at 238. Here, severing those provisions that Brent reads to improperly limit his ability to challenge the fees and to release Berger Schatz from its obligation to establish the reasonableness of its fees would not be tantamount to rewriting the agreement. The agreement would still set forth that Berger Schatz would perform post-decree work for Brent at the fees listed in the agreement.

Alternatively, even if the entire agreement were void, which it is not, Berger Schatz would still be entitled to seek fees for work performed under the theory of *quantum meruit*. Where there is a valid engagement agreement, a law firm may petition for fees under section 508(c). 750 ILCS 5/508(c)(2) (West 2008). However, even if there is no valid engagement agreement,[3] the firm could have petitioned for fees in an independent proceeding. See David H. Hopkins, *"Leveling the Playing Field" in Divorce: Questions and Answers About the New Law*, Illinois Bar Journal, Vol. 85, page 415 (September 1997). *Quantum meruit* means "as much as [one] deserves," and it describes a cause of action seeking recovery for the reasonable value of services non-gratuitously rendered, but where no contract exists to direct the payment. *Bernstein and Grazian v. Grazian and Volpe*, 402 Ill. App. 3d 961, 979 (2010) (concerning corporate services). The burden is on the provider to prove that he

[3] We distinguish cases having *no* valid engagement agreement from cases where the work performed was not based on the engagement agreement upon which the petition for fees was brought. See 750 ILCS 5/508(c)(3) (West 2008).

or she provided valuable services to the respondent, that the respondent accepted the services, and that the circumstances were such that it would be unjust for the respondent to retain the services without paying for them. *Id.* Here, Brent accepted Berger Schatz's services in numerous post-decree matters, the majority of which were resolved in Brent's favor (*i.e.*, his maintenance obligation was terminated, he did not have to contribute additional funds to his daughter's education, he had to pay only a small fraction of attorney fees requested by Susan, and many of the allegations in Susan's motion to show cause were striken). Brent never once objected to the services rendered by Berger Schatz. It would certainly be unjust for Brent to reap the benefits of the work performed by Berger Schatz without paying for it.

Even on appeal, Brent does not explain why the fee for services rendered was unreasonable—he merely continues to argue that, as a technical matter, Berger Schatz did not meet its burden to *show* that the fees were reasonable because it submitted hearsay evidence, because it was not entitled to petition for fees for services rendered prior to the date Brent signed the agreement, and because it was not entitled to petition for fees where the agreement was void. Notwithstanding the fact that we reject each of these arguments, we wonder what remedy Brent could possibly receive, given that there already has been a hearing on the reasonableness of attorney fees. Berger Schatz *did* present at hearing sufficient evidence to prove that its fees were reasonable. Brent offered no evidence to show that the work for which Berger Schatz billed was not performed or was unreasonable. Despite this, the trial court reduced Brent's bill by $388.75 for services that *even arguably* could be considered unreasonable or inefficient (transportation costs to court and the use of a senior attorney to perform a simple filing task).

The trial court did not abuse its discretion in granting Berger Schatz's petition for fees for the amount ordered.

III. CONCLUSION

For the aforementioned reasons, we affirm the judgment of the circuit court of Lake County.

Affirmed.