ATTORNEY'S FEES AWARDS FOR LEGAL SERVICES ORGANIZATIONS AND PRO BONO PRIVATE ATTORNEYS

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Introduction

Because many people going through divorce proceedings have little or no funds to pay for legal assistance, they often acquire that assistance through a legal services organization or from an attorney who works pro bono for little or no fee. There is general agreement that those who provide this form of low-cost public assistance are providing a significant public benefit, and that their actions should be encouraged. On the other hand, there is also general agreement that domestic relations attorney's fees provisions should not permit an attorney to collect from one spouse a fee which is larger than the fee actually charged to the other.

When a pro bono attorney or a legal services organization seeks an award of attorney's fees in a divorce case, these two general principles come into conflict. The clear trend among the reported cases is to decide that the public policy in favor of encouraging low-cost legal aid is greater, and that pro bono attorneys and legal services organizations should be entitled to recover a reasonable attorney's fee, without any special reduction for the limited means of the client. This article will discuss the reported case law both for and against the recent trend.

Legal Services Organizations

The most common type of case considering the question of attorney's fees awards to indigent spouses is the case where an attorney's fees request is made by a legal aid or legal services organization. In the following cases, the courts ruled that the husband had to pay a reasonable attorney's fee to the legal services organization that represented the wife in their divorce proceedings: Lee v. Green, 574 A.2d 857 (Del. 1990); In Interest of G.G.P., 382 So. 2d 128 (Fla. 5th DCA 1980); Butler v. Butler, 376 So. 2d 287 (Fla. 5th DCA 1979); Love v. Love, 370 So. 2d 1231 (Fla. 4th DCA 1979); Beeson v. Christian, 594 N.E.2d 441 (Ind. 1992) (appellate attorney's fees); Ferrigno v. Ferrigno, 115 N.J. Super. 283, 279 A.2d 141 (Ch. Div. 1971); see also In re Marriage of Brockett, 130 Ill. App. 3d 499, 474 N.E.2d 754 (1984) (appellate court reversed trial court's denial of attorney's fees to indigent wife and remanded for apportionment of attorney's fees and costs, directing that the trial court was not to consider that wife was represented by a legal services organization).

The same rule has been applied in other domestic relations cases. See, e.g., In re Marriage of Ward, 3 Cal. App. 4th 618, 4 Cal. Rptr. 2d 365 (1992) (suit by ex-wife to show cause alleging that ex-husband had failed to pay child support as required by stipulated child support order and further requesting modification of child support and security for support, attorney's fees, and reimbursement of medical expenses); Benavides v. Benavides, 11 Conn. App. 150, 526 A.2d 536 (1987) (motion to modify custody award; error to reduce by 50% the amount of counsel fees merely because wife was represented by a nonprofit legal services corporation); Martin v. Tate, 492 A.2d 270 (D.C. 1985) (suit brought by mother against father to obtain permanent custody of children born out of wedlock, as well as child support and attorney's fees). In Spoto v. McCarroll, 250 N.J. Super. 375, 593 A.2d 375 (App. Div. 1991), a custody dispute, the appellate court concluded that the trial court in a matrimonial action had the general authority to award counsel fees to publicly funded legal services agencies and reversed and remanded the case for a determination as to whether there were valid reasons for not ordering such an award on the facts of the case.

Other courts have recognized that a financially able spouse (or ex-spouse) may be liable for attorney's fees where the needy spouse was not obligated to pay attorney's fees to a legal aid organization but was required to turn over to it any fees awarded by the court. See, e.g., In re Marriage of Gaddis, 632 S.W.2d 326 (Mo. Ct. App. 1982) (divorce action; no liability on the facts because of husband's meager financial resources); Olson v. Olson, 438 N.W.2d 544 (S.D. 1989) (suit to change custody; $300 in attorney's fees awarded).

The basic reason for the majority rule that a financially able divorce litigant should be required to pay a reasonable attorney's fee to the legal services organization that represented the indigent spouse is that "there exists no reason to distinguish between publicly-funded legal services organizations and privately-funded legal entities in awarding attorney's fees" in such matters. In re Marriage of Ward, 4 Cal. Rptr. 2d at 370; see also Spoto v. McCarroll, 593 A.2d at 379. The public policy considerations that support the rule were well articulated by the Benavides court:

We are aware that indigents are represented by legal services attorneys in a large number of family relations matters. It would be unreasonable to allow a losing party in a family relations matter to reap the benefits of free representation to the other party. A party should not be encouraged to litigate under the assumption that no counsel fee will be awarded in favor of the indigent party represented by public legal services . . . or as in this case, that a reasonable fee will be discounted for the same reason. "Put in another way, the public should be relieved from the financial

burden of obtaining an indigent plaintiff's divorce or successfully defending against a husband's complaint, to the extent that the husband is able to pay all or part of her attorney's fees. The taxpayer has an interest in recovering where possible a portion of the costs in these situations." [Ferrigno v. Ferrigno.]

An award of counsel fees that does not discriminate against nonprofit legal service entities will encourage nonprofit counsel to expend its resources in the representation of those clients who are unable to afford private counsel in disputed child custody and child support enforcement litigation. The purposes of such acts as the Uniform Child Custody Jurisdiction Act in Connecticut, General Statutes 46b-91, are advanced and are made more available to the poor where there is an expectancy that the nonprofit legal services will recoup at least part of its resources through an award of counsel fees to its clients. Furthermore, a realization that the opposing party, although poor, has access to an attorney and that an attorney's fee may be awarded deters noncompliance with the law and encourages settlement. 526 A.2d at 538.

In essence, the Benavides court noted four grounds for its decision: (1) if the fees were not recoverable, the financially able party would receive an unreasonable benefit from the free representation; (2) the rule helps discourage unreasonable litigation; (3) the rule benefits legal services organizations as well as the taxpayers who fund them; (4) the rule encourages nonprofit legal services organizations to help indigents in divorce proceedings. As the Indiana Supreme Court observed in Beeson, 594 N.E.2d at 443, the rule also "supports the process of allowing access to the courts to those with limited means." Many of these same public policy considerations have been cited by other courts when called upon to determine whether a financially able spouse (or ex-spouse) should pay reasonable attorney's fees to a legal services organization that represented his or her spouse (or ex-spouse) in a domestic relations matter. See, e.g., In re Marriage of Ward, 4 Cal. Rptr. 2d at 368-70; Lee, 574 A.2d at 860; Spoto, 593 A.2d at 379; Ferrigno, 279 A.2d at 142.

In ruling that a financially able spouse should pay reasonable attorney's fees to the legal services organization representing the indigent spouse, many courts also have found support in the United States Supreme Court's decision in Blum v. Stenson, 465 U.S. 886 (1984). See Benavides, 526 A.2d at 537; Lee, 574 A.2d at 860; seealso Martin, 492 A.2d at 274 (litigants were never married). In Blum, the Court ruled that under the Civil Rights Attorney's Fees Awards Act of 1976, reasonable attorney's fees are to be calculated according to the prevailing market rates in the relevant community rather than according to the cost of providing legal services, without regard to whether the prevailing party is represented by private profit-

making attorneys or nonprofit legal aid organizations.

The argument in favor of requiring a financially able spouse to pay reasonable attorney's fees to a legal services organization that represented the indigent spouse is particularly strong where the financially able spouse increased the costs of litigation by taking unreasonable and untenable positions. See Lee, 574 A.2d at 859 (husband spent an amount equal to at least one-seventh of the total marital estate "to litigate the division of that modest estate when the wife's right to a substantial share was apparent").

As indicated above, courts typically require that the financially able spouse pay the attorney's fees directly to the legal services organization "since the object of fee awards is not to provide a windfall to individual plaintiffs." Id. at 860. In Ferrigno, the court ordered that the payment be made to the Treasurer of the United States of America. 279 A.2d at 142.

Of course, if a spouse is not financially able to do so, he will not be required to pay a reasonable attorney's fee to the legal services organization that represented his indigent spouse. See In re Marriage of Gaddis, 632 S.W.2d at 330; Anderson v. Anderson, 153 A.D.2d 823, 545 N.Y.S.2d 335 (1989); cf. Spoto, 593 A.2d at 379 (remanding case for determination as to whether there were valid reasons for not making award).

A court also may decline to rule on whether a financially able spouse (or ex-spouse) is required to pay reasonable attorney's fees to the legal services organization that represented the needy spouse (or ex-spouse) where the proof is defective. For example, in Gammage v. Gammage, 599 So. 2d 569, 575 (Miss. 1992), the court did not address the question because the record was "devoid of matters concerning the legal services corporation's financial guidelines, litigation costs, fees, salaried employees, and other policies and procedures."

Pro Bono Private Attorneys

Indigent spouses may also be represented by a private attorney who agrees to work pro bono. In some cases, the pro bono attorney will work for no fee; in other cases, the work will be done for a reduced fee.

Cases involving pro bono attorneys have consistently held that an award of attorney's fees is permissible. See In re Marriage of Swink, 807 P.2d 1245 (Colo. Ct. App. 1991); Hale v. Hale, 772 S.W.2d 628 (Ky. 1989); see also In re Marriage of Malquist, 266 Mont. 447, 880 P.2d 1357 (1994) (motion by ex-wife to require

ex-husband to pay all past-due medical bills for child in accordance with court's prior ruling). In both Swink and Malquist, the wife had been referred to the attorney in question by a legal services organization.

The Malquist decision marks a change in Montana law. In Thompson v. Thompson, 193 Mont. 127, 630 P.2d 243 (1981), the state's supreme court had held that a trial court could not award attorney's fees under the Uniform Marriage and Divorce Act to a party represented by a legal services attorney. Expressly overruling its decision in Thompson, the Montana Supreme Court observed in Malquist as follows:

When this Court decided Thompson, the case law governing awarding fees to legal services organizations was not fully developed. Subsequent to our decision, however, the majority of jurisdictions ruling on this issue have held that legal services organizations are entitled to attorney fees both in family law cases and in non-family law cases. See e.g., In re Marriage of Ward (1992); 3 Cal.App.4th 618, 4 Cal.Rptr.2d 365; Beeson v. Christian (Ind.1992), 594 N.E.2d 441; In re Marriage of Gaddis(Mo.App. 1982), 632 S.W.2d 326 (family law cases); Shands v. Castrovinci (1983), 115 Wis.2d 352, 340 N.W.2d 506 (landlord tenant); Kleine-Albrandt v. Lamb (Ind. App. 1992), 597 N.E.2d 1310 (wage claim).

We also conclude that policy considerations which were not discussed in our opinion in Thompson militate in favor of allowing the district courts to discretionarily award attorney fees to pro bono attorneys and to Montana Legal Services Association on behalf of indigent clients, providing the statutory criteria of 40-4-110, MCA, and the evidentiary requirements mentioned above are otherwise satisfied.
880 P.2d at 1362-63 (emphasis added). The court went on to note the policy considerations which supported its decision to overrule Thompson, quoting at length from Benavides. The Malquist court also opined:

The deciding factor is not the status of the attorney providing the professional services, but that the indigent client is financially unable to pay for legal representation in a domestic relations proceeding where representation is a practical requirement.
Id. at 1363.

In Hale, 772 S.W.2d at 630, the court noted a policy consideration that is particular to pro bono attorneys as opposed to legal services organizations:

As a matter of economics most private attorneys can devote only a percentage of their time to needy persons without any prospect of remuneration. The allowance of fees in cases such as this will make it feasible for competent attorneys to represent, free of charge to their client, a needy or indigent person who otherwise would find it difficult, if not impossible, to obtain representation in legal matters. The same result has generally been reached in cases where the pro bono attorney charges a reduced fee rather than no fee at all. This issue was directly addressed in Hager v. Hager, 12 Mass. App. Ct. 887, 421 N.E.2d 1261 (1981), where the court held that the trial court had not made an excessive award of attorney's fees even though it exceeded the amount that the former wife was required to pay her attorney. The court specifically ruled:

As the hourly rate of $60 agreed upon between the plaintiff and her attorney was expressly limited by "her lack of ability to pay more," it did not, as contended by the defendant, put a ceiling on the rate at which the defendant could be assessed, in this case $75 an hour.
421 N.E.2d at 1263.

In dicta, the Florida Supreme Court has also indicated that a trial court could require a financially able spouse to pay the needy spouse's attorney's fees at an amount beyond what the needy spouse had agreed to pay. In Sotolongo v. Brake, 616 So. 2d 413 (Fla. 1992), the court considered whether an attorney who represented a mother in a child support modification proceeding and who was hired through her employer-sponsored prepaid legal services plan could recover fees from the father that exceeded the contract amount. The court ruled that the fees agreed to in the plan were the ceiling amount and further opined:

However, we do believe there would be some situations in which a court could enhance the fee other than this type of prepaid legal services contract. Specifically, if a spouse alleges facts establishing that the fee was below the customary and reasonable rate charged for similarly situated clients because of that spouse's inferior economic status, then the burden shifts to the other spouse to disprove the allegation. The failure to disprove the allegation would justify the trial court in enhancing the fee to compensate for the reduction below the customary and reasonable rate.
Id. at 414.

In cases that do not involve an indigent spouse, courts have split as to whether an

agreed-upon attorney's fee is a ceiling on what can be charged to the other spouse. In Shirley v. Shirley, 600 So. 2d 284 (Ala. Civ. App. 1992), the Alabama Court of Civil Appeals held that one spouse could be required to pay the other spouse's attorney's fees at a rate higher than that agreed upon, so long as the higher rate was reasonable. On the other hand, in In re Marriage of Magnuson, 156 Ill. App. 3d 691, 510 N.E.2d 437 (1987), the court ruled that the contracted-for fee was the most that could be charged to the other attorney. In that case, which involved postdivorce litigation, a former wife sought to recover attorney's fees which exceeded the $10,000 amount that she had contracted to pay her attorney. Relying on language in the attorney's fees statute which permitted recovery of those fees "necessarily incurred" by the other spouse, the Magnuson court determined that a spouse had to be personally liable for attorney's fees before the other spouse could be required to pay them. 510 N.E.2d at 444. Because the former wife's liability was limited by the contract with her attorney, the court ruled that the amount her former husband could be required to pay could not exceed that contractual limit.

CONCLUSION

In light of the myriad policy considerations which support the rule, it is not surprising that domestic relations courts throughout the United States are making attorney's fees awards to legal services organizations and to pro bono attorneys. The rationale behind the rule with respect to attorneys working pro bono should be applied not only to cases in which the attorney works for no fee, but also to cases where the attorney works for a reduced rate but seeks to recover a reasonable rate from the financially able spouse. In both instances, attorneys will be encouraged to assist needy clients in divorce and other domestic relations matters if there is a possibility of recovering a reasonable fee for their services.