

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA** **CIVIL ACTION**

D A,
Father & petitioner,

vs.

Case No. XX DR YYYY N

R P,
Mother & respondent,

**AMENDED FINAL JUDGMENT AND
ORDER ON THE PARTIES' MOTIONS FOR FEES**

This matter having come before the court on *Date omitted* /2015 on:

- (1) the mother's motion for fees and costs filed *Date omitted* /2015, and
- (2) the father's motion for fees and costs filed *Date omitted* /2015,

it is ordered:

1. The pleadings

The Final Judgment of Paternity was filed on *Date omitted* /2014. In the judgment the court reserved on the issue of fees and costs for further hearings.

The father's petition contained an allegation for fees:

"This is not a complex matter and should the Mother (*sic*) engage in unnecessary litigation the Court (*sic*) should order attorney's fees and costs paid pursuant to the *Rosen* and [*Wrona*] progeny."

The mother's counter petition also contained an allegation for fees:

"Mother (*sic*) is financially unable to pay said attorney or the costs of this action, but Father (*sic*) is well able to do so."

The father objected to the mother's motion because it cites §61.16, which applies to actions for dissolution of marriage, as the legal basis for her claim for fees, rather than §742.045,

which applies to paternity actions. However, this objection has no merit.

All of the text in §61.16 is repeated in §742.045 with some significant additions in §61.16 that are not found in §742.045, such as an allowance for appellate fees. *See, e.g., M.J.I. v. A.J.K.*, 55 So.3d 732 (Fla. 2d DCA 2011).

Further, and more importantly, it is the ultimate facts that are pleaded in her counter petition that give her the basis for her fees and an incorrect citation in a motion does not change the facts she pleaded. It is not necessary to cite any law in a pleading for fees. The ultimate facts pleaded in her counter petition are what put the father on notice of her claim. The ultimate facts for any relief must be pleaded in the petition, answer or counter petition. *See* Rule 1.110(b); *Stockman v. Downs*, 573 So.2d 835 (Fla. 1991); *Watson v. Watson*, 124 So.3d 340 (Fla. 2d DCA 2013).

2. Findings concerning the parties' financial abilities

In the Final Judgment the court found that the father's gross annual income was \$79,851 or \$6,654 gross per month and that the mother's gross monthly income was \$1,373.

The father's amended financial affidavit filed *Date omitted*/2014 shows total assets of \$508,409.45 and total liabilities of (\$230,897.00) for a net worth of \$277,512.45. However, his liquid assets are limited, less than \$10,000 if his Fidelity IRA is included, and most of his assets are illiquid, consisting of real estate and tangible personal property.

The mother's financial affidavit filed *Date omitted*/2013 shows total assets of \$56,262.01 and zero liabilities. Her assets consist of a bank account, \$500.53, a car that is paid for, valued at \$7,500, and an I.R.A. worth \$45,417.48.

3. Ruling

A decision about attorney's fees is based on the income, assets and liabilities of the parties at the time of the judgment, not a later time. *Minsky v. Minsky*, 779 So.2d 375 (Fla. 2d DCA 2000); *Duchesneau v. Duchesneau*, 692 So.2d 205 (Fla. 5th DCA 1997); *Mishoe v. Mishoe*, 591 So.2d 1100 (Fla. 1st DCA 1992).

3.1 The father's motion for fees Here, the father's petition pleaded the factors and considerations in "*Rosen* and [*Wrona*]" as the ultimate facts for his entitlement to fees. *Rosen v. Rosen*, 696 So.2d 697 (Fla. 1997) and *Wrona v. Wrona*, 592 So.2d 694 (Fla. 2d DCA 1991). Both of those decisions were actions for dissolution of marriage and not paternity. Nevertheless, those decisions apply to a paternity case and a request for fees in a paternity case.

§742.031 is also cited by the father in his motion and his argument. However, that statute has very limited application. It is concerned only with the attorney's fees required for a determination of the fatherhood of the child and not with the litigation to determine a parental responsibility order, a time-sharing schedule and a child support order. *See, e.g., Starkey v. Linn*, 723 So.2d 333 (Fla. 5th DCA 1998). Here, there was no litigation about the fatherhood of the child. The mother's answer admitted the father's allegation of paternity, so the parties agreed that he was

the father. Consequently, this statute has no application here.

In *Rosen* the supreme court ruled that when the financial abilities of the parties is pleaded as the basis for a fee award, the financial resources of the parties is the “primary factor” to be considered under §61.16. *Id.* at 700.

The *Rosen* decision also ruled that the court may consider “equitable” factors when awarding fees under that statute, such as, “... the scope and history of the litigation; the duration of the litigation; the merits of the respective positions; whether the litigation is brought or maintained primarily to harass (or whether a defense is raised mainly to frustrate or stall); and the existence and course of prior or pending litigation,” *Id.* This court has considered these factors as well as the relative finances of the parties in this order.

The court has also considered the decision of *Wrona*, which requires a trial court to consider that “[t]here are occasions ... in which it is clear that litigation expense cannot be cost-effective or is incurred primarily for emotional reasons. Under these circumstances, the trial court should attempt to protect marital resources ...” by setting a case management conference before trial so the parties can focus on whether the litigation is worth the expense or whether it is driven by emotions.

In *Wrona*, however, the trial was over and the final judgment was on appeal. In that circumstance, the appellate court remanded the case to the trial judge to determine if one party or the other had unreasonably depleted “marital resources” to pursue litigation for emotional rather than cost-effective reasons. *Id.* at 698.

So, applying the factors in the decisions of *Rosen* and *Wrona*, **the court denies the father’s motion** for fees and costs because the court finds that the mother did not engage in unreasonable, excessive, vexatious or frivolous litigation. Rather, “both parties vigorously litigated this case but not to a degree warranting sanctions by way of assessment of attorney’s fees.” *Elliott v. Elliott*, 867 So.2d 1198 (Fla. 5th DCA 2004).

The parties agreed about the issue of paternity but disagreed about the parental responsibility order, the time-sharing schedule and the child support order. In short, this was a litigation about those issues. The lack of agreement on those issues does not make this litigation unnecessary or unreasonable. On the contrary, because they could not agree this lawsuit was necessary.

See, e.g., Hallac v. Hallac, 88 So.3d 253 (Fla. 4th DCA 2012): a party’s refusal to accept a reasonable offer of settlement is not by itself a legally sufficient basis for an award of attorney’s fees to the other party.

3.2 The mother’s motion for fees and costs

Comparing the financial abilities of the parties, the father is better able to pay for the cost of this litigation than the mother. The father’s gross annual income was \$79,851 or \$6,654 gross per month and that the mother’s gross monthly income was \$1,373.

The father’s Second Amended Financial Affidavit filed *Date omitted*/2014 shows total

assets of \$508,409.45 and total liabilities of (\$230,897.00) for a net worth of \$277,512.45.

The mother's financial affidavit filed *Date omitted*/2013 shows total assets of \$56,262.01 and zero liabilities.

In these circumstances, the court finds that the father has the financial ability to assist the mother with the payment of her reasonable fees and costs and she needs financial assistance from him in order to obtain competent counsel.

The court now turns to the reasonable and necessary fees and costs required to represent the mother in this matter. "When someone other than the client is required by an agreement or a statute to pay the other party's attorney's fees, ... the trial court [may] award only a *reasonable* fee." *Franklin & Marbin, P.A., v. Mascola*, 711 So.2d 46, 48-49 (Fla. 4th DCA 1998). (*Emphasis in original and citations omitted.*)

The lawyer seeking fees must testify and the lawyer must support his request with detailed billing records. "[Here], appellee's attorney did not testify ... Without the attorney's testimony as to the reasonableness of the hours expended and the hourly rate, the evidence does not support the award." *Brewer v. Solovsky*, 945 So.2d 610 (Fla. 4th DCA 2006). *See also Warner v. Warner*, 692 So.2d 266 (Fla. 5th DCA 1997). The party requesting fees "must prove with evidence the reasonableness and necessity of the fee sought." *Chouri v. Chouri*, 2 So.3d 987 (Fla. 2d DCA 2008).

To prove the hours worked, the "attorney fee applicant should present records detailing the amount of work performed." *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1150 (Fla. 1985). An "award of attorney's fees requires competent and substantial evidence. ... Competent evidence includes invoices, records and other information detailing the services provided as well as the testimony from the attorney in support of the fee." *Brewer v. Solovsky, supra*.

The reasonableness of a fee is proven by proving the reasonable number of hours and the reasonable hourly rate. "The number of hours reasonably expended, determined in the first step, multiplied by a reasonable hourly rate, determined in the second step, produces the lodestar, ..." *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1151 (Fla. 1985).

In a Chapter 61 or 742 case, the testimony of the lawyer seeking the fees does not have to be corroborated by another lawyer. §§61.16 and 742.045 provide: "[a]n application for attorney's fees, suit money, or costs, whether temporary or otherwise, shall not require corroborating expert testimony in order to support an award under this chapter."

The mother was represented by two different law firms in this matter. Her first attorney did not testify and her records are not in evidence. However, her second lawyer did testify and the detailed billing records of his firm are in evidence.

The court finds there is no duplication of the hours billed requested by the mother because of her second lawyer's time spent to learn about the pleadings and the course of the proceeding and the facts when he got into the case. If the mother was requesting fees for the work of both of her lawyers, the question of a duplication of effort when one lawyer got out and another got in would be a concern, but only the fees of her second lawyer are at issue on her motion.

The court has reviewed those records and finds that there is some duplication of the time of the various lawyers in the law firm representing the mother for time they spent working together, for which it is not reasonable to charge the father, even if it is allowable under her contract with that firm. However, Mr. G testified that these duplications were deducted from the hours requested in his motion. The court finds that the duplications have been correctly deducted as he testified, that is \$2,931.25 for Mr. G and \$1,988.75 for Ms. R.

The court finds that the hourly rates charged by the attorneys and the paralegal in the firm representing the mother, Mr. G \$375 an hour, Ms. F \$300 an hour, Ms. R \$225 an hour, and Ms. J, the paralegal, \$90, are reasonable for attorneys and a paralegal in this community of their training and experience. The court also finds that the employment of a paralegal in this matter was reasonable.

Therefore, the court finds that the total fees requested by the mother in her motion are reasonable and necessary, \$24,674.

Regarding her costs, the court finds that her requested costs are for the appearance of a court reporter and transcripts, all of which are reasonable and necessary for her representation in this matter, \$1,782.98.

Therefore, the total of the mother's requested fees and costs, \$26,456.98, rounded, \$26,457, are reasonable and necessary.

The court finds that the mother is unable to pay any of her fees and costs because her net monthly income is \$1,239.41, (Final Judgment *Date omitted*/2014, Ex. A.) Further, the court imputed that income to her. At the time of the trial, the mother was unemployed.

The mother's financial affidavit filed *Date omitted*/2013 shows total assets of \$56,262.01 and zero liabilities. Her assets consist of a bank account, \$500.53, a car that is paid for, valued at \$7,500, and an I.R.A. worth \$45,417.48.

The father's net monthly income is \$5,081.76. (Final Judgment *Date omitted*/2014, Ex. A.) His Second Amended Financial Affidavit filed *Date omitted*/2014 lists assets of \$508,409.45 and a net worth of \$277,512.45. However, his liquid assets are limited, less than \$10,000 if his Fidelity IRA is included, and most of his assets are illiquid, consisting of real estate and tangible personal property.

In these financial circumstances, it is reasonable to order the mother to pay some of her expense for this litigation. She has an I.R.A. from which she can withdraw funds to pay some of her fees. There is no evidence that she will incur and a penalty or income taxes for a withdrawal, although that seems likely. Nevertheless, these are funds available to her with which she can pay some of the expense of this litigation.

(1) The court orders that the mother shall pay 10% of her fees and costs or \$2,646 and the father shall pay the balance.

The court finds that the father has the ability to pay 90% or \$23,811.30 of the mother's reasonable and necessary fees and costs from his income in installments if not from his assets.

The court notes that the father's Second Amended Financial Affidavit lists an expense of

\$640 for “monthly child support paid to the mother,” but this is not a proper living expense of the father. Considering his net monthly income and his proper living expenses, he has the ability to pay \$750 a month toward the mother’s reasonable fees and costs and still meet his own living expenses.

(2) Therefore, the court orders the father to pay directly to the mother’s attorney the sum of \$23,811.30, which sum shall bear interest at the rate allowed by law for judgments from this date, in monthly installments of \$750 each until paid in full. He may prepay the amount due at any time, the principal balance plus accrued interest at the time of prepayment.

4. Amended Final Judgment

This Amended Final Judgment is a final order on the issue of attorney’s fees and costs , which was reserved by the court in the Final Judgment.

Done and ordered in Fort Myers, Lee County, Florida, this _____

R. Thomas Corbin, Circuit Judge

Copies provided to:
_____, Esq., and _____, Esq.