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

GH,
Petitioner,

vs. **Case No. XX DR YYYY N**
RC,
Respondent,

ORDER ON FORMER WIFE'S MOTION FOR ATTORNEY'S FEES

This matter having come before the court on Month/Day/2014 on the former wife's "Motion for Attorney's Fees," filed Month/Day/2014, it is ordered:

The finances of the parties as of Month/Day/2014 have been determined

This case was tried on Month/Day/2014 and the Final Judgment was filed on Month/Day/2014.

A decision about attorney's fees is based on the income, assets and liabilities at the time of the judgment, not a later time, whether the basis for the fees is §61.16, *Wrona* or *Rosen.* *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).

So, the parties' post judgment financial situations are not relevant to a motion for attorney's fees made pursuant to a reservation of jurisdiction over the issue for post judgment proceedings.

The court made findings in the judgment of their incomes, so those are the incomes of the parties when considering a motion for attorney's fees. The former wife's income is $200 gross per week or $866 gross per month. The former husband's income is $2,573 gross per month and $1,907 net.

Regarding their living expenses, the magistrate found that the former husband's living expenses exceeded his income, $2,073 vs. $1,907.

As for their assets and liabilities, the parties made an agreement for equitable distribution at the trial but they did not value the assets and liabilities in that agreement. They simply agreed that the unvalued items on the list given to the magistrate was a fair division. Therefore, the court has no factual basis for determining the ability of either party to pay his or her fees from the assets either received in their agreed equitable distribution.

The parties did not agree about the distribution of the former marital home. The magistrate distributed that house and the mortgage on it 50/50 as tenants in common. The former husband is in possession of that home. There is about $100,000 equity in that home.

In general, parties are not required to expend their assets to pay their fees and costs if their incomes are sufficient to pay the expense of the litigation, but here their incomes are not sufficient to pay the expense of this litigation, so they will have to spend their assets or incur debt to pay the cost of this litigation.

Statutory and nonstatutory considerations

The legal authority for the former wife's request for fees is F.S. §61.16 and the factors in the decision of *Rosen v. Rosen*, 696 So.2d 697 (Fla. 1997).

Under the statute, "the financial resources of the parties are the primary factor to be considered" when deciding a motion for fees. *Rosen* at 700. Under *Rosen* "other relevant circumstances to be considered include factors 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.* The court has also considered the decision of *Wrona v. Wrona*, 592 So.2d 694 (Fla. 2d DCA 1991).

The non-financial factors in *Rosen* and *Wrona* factors must be considered on any motion for fees. So while "the financial resources of the parties are the primary factor to be considered," 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)" are also considerations.

Proof required at a fee hearing

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).

Corroboration by another attorney is not necessary in a dissolution or paternity case

In a Chapter 61 case, the testimony of the lawyer seeking the fees does not have to be corroborated by another lawyer. §61.16 provides: "[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."

Necessary and unnecessary litigation

In general, this case was necessary because of the inability of the parties to settle the issue of alimony and the distribution of two cars and the marital home. This litigation was necessary to resolve those issues.

At this hearing, there was some argument that the parties may have further post judgment matters for the court to decide since they seem to be having some difficulty carrying out their agreed equitable distribution.

A determination of an entitlement to fees requested

At the hearing, the former wife's counsel asked the court to bifurcate the fee hearing, to decide first if the former wife is entitled to fees, and, if so, to determine the amount of her reasonable and necessary fees at a later hearing if the parties cannot agree on an amount.

The court grants this request.

Reasonableness of the fees

The court finds that the hourly rate charged by the former wife's attorney, $325 an hour, is reasonable for an attorney in this community of his training and experience.

However, the court cannot find that of the total time her counsel spent on this matter, 19.8 hours, was necessary and reasonable because the detailed billing records of her counsel are not in evidence. 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, supra*, at 1150.

As requested, the court reserves for further hearings a determination of a reasonable and necessary fee for the representation of the former wife in this matter.

As for costs, the supreme court's "Statewide Uniform Guidelines for Taxation of Costs in Civil Actions" determines the items that are allowable as taxable costs.

However, this request is moot because the court finds that the former wife is not entitled to have the former husband pay all or part of her fees and costs.

Need and ability to pay

The court has considered the non-statutory factors and the need of the former wife for financial assistance from the former husband to pay her fees and costs. The court has also considered the former husband's ability to pay and the former wife's ability to pay.

She cannot pay her attorney a reasonable fee for his necessary services or pay her costs from her income.

The former husband also cannot pay his attorney or his costs from his income because his monthly expenses exceed his net income.

So, both parties will have to pay the cost of this litigation from their assets, that is, from the equity in the former marital home, or perhaps from some of the items in the agreed distribution if any of these have a value sufficient to pay some or all of their fees and costs.

Since the parties agreed that their list given to the magistrate for equitable distribution was of equal value, and because the martial home was divided 50/50, each party has the same ability to pay his or her fees from their equal assets. Neither has a superior ability to pay his or her fees and costs.

Order

Therefore, the former wife is not entitled to attorney's fees from the former husband.

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

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R. Thomas Corbin, Circuit Judge

Copies provided to:

, Esq., and , Esq.