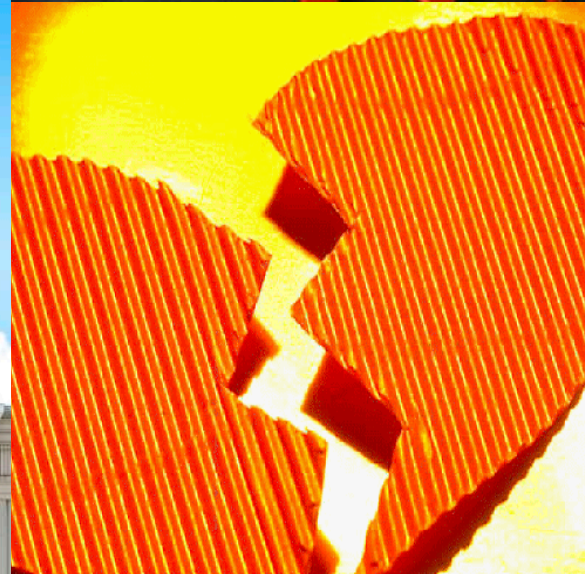
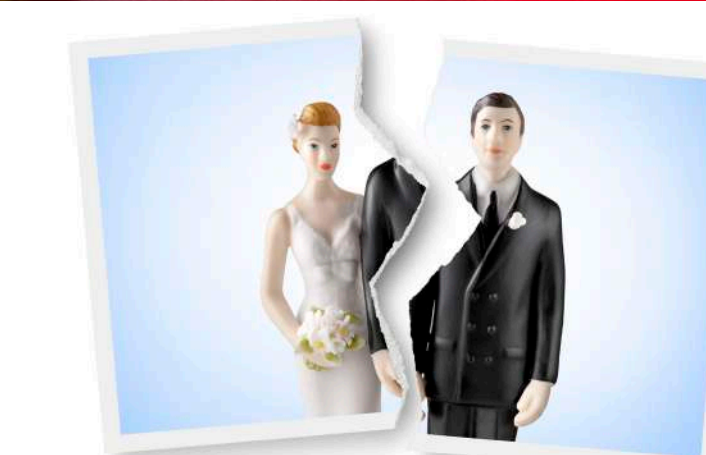
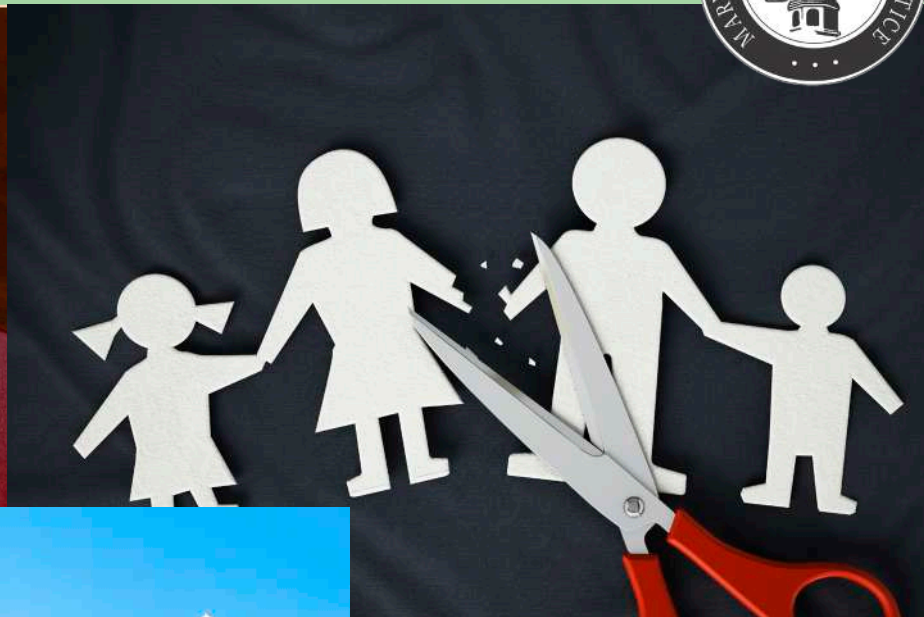


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Maryland Family Law in the 21st Century

Attorney's Fees and Costs and When They Are Awarded in a Family Law Case

By Barton D. Moorstein

With the costs of litigation rising every year, and with the monetary consequences and emotional significance of divorce, custody, property distribution and alimony creating a long-term impact on a person's life, there are few issues that are of a more strategic importance than a court making an award of attorney's fees and costs in domestic cases. In a typical high-stakes divorce, usually one party lacks sufficient funds to pay attorney's fees in advance, or to sustain over the long term, the fees and costs that will be generated by contentious litigation. From an attorney's perspective, when a client's resources are finite, domestic relations practitioners often rely upon the hope that a court will make up the difference between what is paid and what is earned. Especially when a client takes an unreasonable position, and a court looks to the attorney as being responsible for high litigation fees and costs, the result can be particularly unfair for the practitioner.

The family law practitioner, nevertheless, can take steps to convince a judge that his or her fee requests are reasonable and necessary to justify the granting of an attorney's fee award as often and as fully as possible. The awarding of attorney's fees and costs are entirely discretionary, and many judges are reluctant to grant attorney's fee awards in an amount commensurate with value of time contributed by the practitioner. The best way to assure an appropriate fee award is to submit well-documented, detailed and specific fee requests.

I. General Rules

As a general rule, American courts do not award attorney's fees. The "American Rule"¹ is that attorney's

1 *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).



fees are ordinarily not recoverable by a prevailing party in a lawsuit. In Maryland, "[t]he general rule is that costs and expenses of litigation, other than the usual and ordinary Court costs, are not recoverable in an action for [compensatory] damages."²

Exceptions to the American rule exist in Maryland. Attorney's fees may be awarded where parties to a contract have an agreement regarding attorney's fees;³ or where the wrongful conduct of a litigant justifies the awarding of attorney's fees through "bad faith" litigation (See Maryland Rule 1-341); or in other similar bad faith litigation such as where a plaintiff in a malicious prosecution action, who has incurred counsel fees in the defense of the criminal charge, may be awarded those fees as damages in the civil action.⁴ The other main exception to the American Rule is where the court has the authority to make an award of attorney's fees pursuant to a statute. Where a statute allows for the imposition of such fees, fees and costs may be awarded.⁵ It is this last exception, the legislature's grant of authority to a judge to make such an award, which is the primary basis for litigants requesting attorney's fees.

II. Attorney's Fees and Costs Pursuant to a Contractual Agreement

Pursuant to the Family Law Article, § 8-101, parties in a domestic case can enter into enforceable separation agreements which the courts are "empowered to recognize and enforce."⁶ Provisions regarding who pays attorney's fees and under what circumstances the attorney's fees are to be paid, may be included in the separation agreement.⁷ The typical attorney's fee provision in a

2 *Collier v. MD-Individual Practice Ass'n*, 327 Md. 1, 11, 607 A.2d 537, 542 (1992) (quoting *McGaw v. Acker, Merrill & Condit Co.*, 111 Md. 153, 160, 73 A. 731, 734 (1909)).

3 *Empire Realty Co., Inc. v. Fleisher*, 269 Md. 278, 305 A.2d 144 (1973).

4 *Tully v. Dasher*, 250 Md. 424, 244 A.2d 207 (1968).

5 *Freedman v. Seidler*, 233 Md. 39, 47, 194 A.2d 778, 783 (1963); *Mercedes-Benz of North America, Inc. v. Garten*, 94 Md.App. 547, 618 A.2d 233 (1993).

6 *Jackson v. Jackson*, 14 Md.App. 263, 286 A.2d 778 (1972).

7 *Peterman v. Peterman*, 14 Md.App. 310, 286 A.2d 812 (1972).

property settlement agreement will contain language such as:

“in the event that it becomes necessary for either party to file suit or to institute legal proceedings of any type against the other party in order to enforce any term or provision of this Agreement, or in order to recover damages for the breach of this Agreement by the other party, then in such event the party who prevails, or substantially prevails, in such suit, action or proceeding shall, in the discretion of the court, be entitled to an award from the court or other judicial tribunal of all costs incurred by the prevailing party in prosecuting, or in defending, such suit, action or proceeding, as the case may be, including, but not limited to, filing fees, costs of discovery, expert witness fees, and reasonable attorney’s fees.”

In resolving disputes regarding enforcement of an attorney’s fee provision within separation agreements, courts are required to apply the law of contracts. As such, a separation agreement is subject to the same general rules governing other contracts, and particular questions must be resolved by reference to the particular language of the agreement⁸. A settlement agreement, that has been incorporated but not merged into the divorce decree, may also be enforced by the court as an independent contract.⁹

When an award of “reasonable” attorney’s fees is sought based upon the terms of a separation agreement, the losing party is entitled to have the amount of fees and ordinary expenses proven with certainty and under the standards ordinarily applicable for proof of contract damages.¹⁰ Accordingly, competent evidence must be presented by the moving party to justify an award of attorney’s fees under the terms of the separation agreement. The moving party has the burden of presenting evidence sufficient for a trial court to render a judgment as to the reasonableness of the attorney’s fees sought. Be aware, however, that request for fees under the terms of a separation agreement needs to be justified by more than “a mere compilation of hours multiplied by fixed hourly rates or bills issued to the client”. The request for fees must specify the services performed, by whom they were performed, the time expended thereon, and the hourly rates charged. The evidence must include “detailed records that contain the relevant facts and computations undergirding the computation of charges” as without such records, the reasonableness of the fees can

⁸ Pumphrey v. Pumphrey, 11 Md.App. 287, 273 A.2d 637 (1971).

⁹ Fultz v. Shaffer, 111 Md.App. 278, 681 A.2d 568 (1996).

¹⁰ Holzman v. Fiola Blum, Inc., 125 Md.App. 602, 726 A.2d 818 (1999).



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be determined only by conjecture or opinion of the attorney seeking the fees and would therefore not be supported by competent evidence.”¹¹

Effective January 1, 2014, new rules have been placed to address an award of attorney’s fees to a prevailing party pursuant to a contract with a “prevailing party” provision. (See Maryland Rule 2-705). This rule does not apply where a claim for attorney’s fees is sought in a domestic case where fees are authorized by statute, but is applicable to a suit which seeks attorney’s fees emanating from a contractual “prevailing party” provision as contained in a separation agreement. The specific language of the rule requires that a party who seeks attorney’s fees from another party pursuant to this Rule shall include a claim for such fees *in the party’s initial pleading or, if the grounds for such a claim arise after the initial pleading is filed, in an amended pleading filed promptly* after the grounds for the claim arise. Upon a finding by the court in favor of a party entitled to attorney’s fees as a “prevailing party,” the court shall determine the amount of an award after considering a variety of different factors.

The factors which a court is obligated to consider include (1) If the party seeking attorney’s fees prevailed

¹¹ Holzman, supra, 125 Md.App. at 638-39, 726 A.2d at 836 (citing *Maxima Corp.*, 100 Md.App. at 452-53, 641 A.2d 977).

with respect to a claim for which fee-shifting is permissible, the court is required to consider the factors set forth in Maryland Rule 2-703 (f) (3) and the principal amount in dispute in the litigation, and may consider the agreement between the party seeking the award and that party's attorney's and any other factor reasonably related to the fairness of an award. The evidence supporting the request for attorney's fees must include at a minimum: (A) a detailed description of the work performed, broken down by hours or fractions thereof expended on each task; (B) the amount or rate charged or agreed to in writing by the requesting party and the attorney; and (C) the attorney's customary fee for similar legal services.

Although the detailed "Lodestar" analysis required by Maryland Rule 2-703 (f) (3) does not appear to apply here, the prudent practitioner should nevertheless accentuate the factors that a court is to consider under that rule. Those factors include (A) the time and labor required; (B) the novelty and difficulty of the questions; (C) the skill required to perform the legal service properly; (D) whether acceptance of the case precluded other employment by the attorney; (E) the customary fee for similar legal services; (F) whether the fee is fixed or contingent; (G) any time limitations imposed by the client or the circumstances; (H) the amount involved and the results obtained; (I) the experience, reputation, and ability of the attorney's; (J) the undesirability of the case; (K) the nature and length of the professional relationship with the client; and (L) awards in similar cases.

III. Attorney's Fees Pursuant to Statute

The general rules applicable to a request for attorney's fees based on a statutory provision arising out of a domestic case are consistent across the board. These standards apply whether the request emanates from a claim, or defense to a claim, for divorce (Family Law Article, §7-107), property disposition (Family Law Article, § 8 -214), alimony (Family Law Article, §11-110), custody and/or child support (Family Law Article, §12-103), or appointment of counsel for a minor (Family Law Article, §1-202). In all of those circumstances, before a court may make an award, the court is obligated to consider the financial resources and financial needs of both parties and whether there was substantial justification for prosecuting or defending the proceeding. In determining the appropriate amount of an attorney's fee award, the court should consider "(1) whether the [fee amount awarded] was supported by adequate testimony or records; (2) whether the work was reasonably necessary; (3) whether the fee was reasonable for the work

that was done; and (4) how much can reasonably be afforded by each of the parties."¹² The amount of the attorney's fees award is within the discretion of the chancellor and a reviewing court will not disturb the award unless that discretion was exercised arbitrarily or the judgment was clearly wrong.¹³ Furthermore, a litigant is *not* required to support a request for attorney's fees with expert testimony, as a court is authorized to make a fee award based upon the record before the court and observations at trial.¹⁴ "Of course, the court, as an experienced trial judge and former lawyer of longstanding, is qualified to opine as to reasonableness of attorney's fees based on its familiarity with the time and effort of counsel as evidenced by the presentations in the proceedings before the court."¹⁵ Expert testimony, nonetheless, can assist the Court in detailing the factors underlying an award of fees, by opining as to the reasonableness of the hourly rate, amount of time spent on particular issues, and the necessity of performing the work.

On the other hand, if a court finds that there was an absence of substantial justification of a party for prosecuting or defending a proceeding, and absent a finding by the court of good cause to the contrary, the court *shall* award to the other party the reasonable and necessary expense of prosecuting or defending the proceeding. See, e.g. Family Law Article §11 – 110 (d); 8-214 (d); 7-107 (d) and 12- 103 (c). Under these circumstances, an expert may also assist the court in determining the substantial justification for prosecuting or defending a particular action during the pendency of litigation or at trial, provided that the expert has a detailed knowledge of the facts leading up to the opinion being rendered.

IV. Attorney's Fees and Costs on Appeal

In addition to seeking an award of attorney's fees at trial, a litigant is also entitled to attorney's fees on appeal payable in advance of, or pending, the appeal.¹⁶ Although not limited only to claims for alimony, the court has ruled that Family Law Article §11-110 contemplates an award of attorney's fees when an appeal is taken from a decision resolving alimony issues. Although the award is subject to appellate review, and appellate court will not disturb the appellate attorney's fee award "unless it is shown that the discretion was exercised arbitrarily or the judgment was clearly wrong."¹⁷

Because the party seeking reimbursement of fees bears the burden to present evidence concerning the

¹² Lieberman v. Lieberman, 81 Md.App. 575, 568 A.2d 1157 (1990).

¹³ Danziger v. Danziger, 208 Md. 469, 475, 118 A.2d 653 (1955).

¹⁴ Sharp v. Sharp, 58 Md.App. 386, 406, 473 A.2d 499 (1984).

¹⁵ Kline v. Chase Manhattan Bank, 43 Md.App. 133, 145-46, 403 A.2d 395 (1979).

¹⁶ Ridgeway v. Ridgeway, 171 Md. App. 373, 910 A. 2d 503 (2006).

¹⁷ Ridgeway, supra, 171 Md. App. at 386, 910 A. 2d at 511. (2006).



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reasonableness of the attorney's fees, expert testimony in making a request for an award of attorney's fees on appeal is almost mandatory. As the litigant bears the burden of establishing the anticipated reasonable amount of time to be incurred in pursuing the appeal, as well as the appropriate hourly rate and the reasonableness for pursuing (or defending) the appeal, an attorney who has both trial and appellate experience can lay an appropriate foundation for an appellate attorney's fee advance.

V. Seeking an Advance of Litigation Fees Costs and Suit Money

Getting into a case knowing that complex issues will be litigated mandates that a litigant request (at the beginning of litigation) an advance of attorney's fees, suit money and costs. Complex and/or contentious domestic litigation concerning real property or business valuations, earning capacity, and custody frequently requires expert testimony. A real property appraiser, vocational rehabilitationist, business evaluator, forensic accountant, psychologist or other similar expert is required in order to present to the court evidence to support these claims. The cost of a forensic evaluation of a small business can easily exceed \$10,000, as can a psychological evaluation by a respected mental health care professional. The potential or existing earning capacity of a spouse and time needed

for an economically dependent spouse to become "economically rehabilitated" also requires testimony from a vocational rehabilitation expert, the costs for which can be many thousands of dollars. The development and presentation of these issues may require substantial investment of time and money.

These potential costs can, and should, be sought at the very commencement of litigation. The Maryland domestic statutes authorizing attorney's fee awards also authorize the payment of reasonable and necessary suit monies and costs. See Family Law Article §§7-107 (a), 8-214 (a), 11-110 (a) (3) and 12-103 (a). The requests for these awards should be made at the earliest opportunity, and should be followed up with an expedited hearing on these issues in order to protect a client's interests.

Expert testimony is necessary in order to bring before the court the factual basis for an opinion setting forth for the anticipated fees and expenses in presenting your claim. The testimony by an "expert" is admissible "if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony". Maryland Rule 5-702.

The expert should be experienced in the field of domestic law, well-regarded in the legal community, generally familiar with the anticipated costs and expenses to be incurred concerning the particular case, and aware of the claims of both litigants and the litigation posture of the matter. The expert should review all docket entries, the retainer arrangement, the attorney's fee statements for both sides, the initial pleadings including financial statements, any motion practice, and any discovery that has been propounded or responded to. The expert should meet with counsel to discuss the main points of contention and why the litigation posture has evolved to its then existing status. The expert should review any potential or existing fee arrangements with other expert witnesses to determine what will be involved and the anticipated cost of using that expert. After reviewing this information, an experienced attorney should be able to state with a reasonable degree of litigation certainty, what the reasonable anticipated time, costs and fees will be incurred in presenting the claim.

VI. Use of Expert Testimony at Trial

Expert testimony can be helpful at the merit trial to testify about whether the fee request is (1) supported by adequate records; (2) whether the work was reasonably necessary; (3) whether the fee was reasonable for the work that was done; and (4) whether the hourly rate requested is consistent with the rate generally charged in the community based upon the complexity of the case and the experience of the attorney. As with the expert who will be opining about anticipated future litigation fees and expenses, the expert who testifies at trial needs to qualify as an expert and then needs to testify about the facts giving rise to the legal conclusion. These facts should include reviewing the docket entries, the retainer arrangement, the attorney's fee statements for both sides, the initial pleadings including financial statements, any motion practice, and any discovery that has been propounded or responded to.

A detailed conversation between the expert and counsel is necessary particularly where fees have escalated because of what counsel may consider to be unreasonable litigation maneuvers. Email communications and correspondence review will assist the expert in justifying whatever opinion the expert may provide in allocating responsibility for unreasonable or unnecessary litigation tactics.


VII. Conclusion

A court's decision regarding attorney's fees can have a determinative impact in a domestic case. If an economically dependent spouse will be in need of support and

must prove the value of assets acquired during the marriage, the costs of doing so may be unattainable without receiving an advance financial contribution from the economically dominant spouse. Similarly, an attorney will be hesitant to become involved in litigation without some comfort in knowing that he or she will be appropriately compensated for pursuing the client's interests in a manner required by the facts of the case. Fortunately, Maryland case law and statutes enable the prepared attorney to advocate for and to be awarded appropriate compensation in a timely manner. ■

Biography

Barton D. Moorstein is the managing partner of Blank, Moorstein & Lipshutz, LLP located in Montgomery County, Maryland. Mr. Moorstein graduated from the University of Michigan and the George Washington University Law School. He has been a member of the Maryland and District of Columbia bars since 1979. He has extensive trial and appellate experience in both jurisdictions. His broad practice encompasses domestic law, employment law and business and contract disputes. He has been qualified, and has testified in court and in deposition, as an expert in civil litigation, family law and employment law attorney's fees, as well as in reasonable appellate attorney's fees. He has been recognized as a "Super Lawyer" in Maryland and the District of Columbia since 2008.



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