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Attorney's Fees in Divorce

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It is perfectly clear that a lawyer's primary duty is to his client, but that duty must be exercised in strict accordance with the code of ethics, with the duty of the lawyer to his profession, to the courts, to the state and to himself. The fixing of attorney's fees is a very difficult and delicate matter.

In case of an agreement as to the terms of divorce with regard to incidental matters, the question of agreement upon attorney's fees is bound to arise. If both lawyers, that is, if the lawyers for both sides, approach the whole matter of adjustment in a spirit of fairness, agreement upon such fees should be fairly easy to achieve. If agreement is not possible, then the attorneys should not permit their own selfish interest in fees to prevent them from making a desirable agreement in the interest of their clients. Everything else may be agreed to except fees and they may, by stipulation or otherwise, be left to the court or courts handling the matter to fix.

Fundamental considerations to be taken into account in fixing attorney's fees, whether by the attorneys themselves through agreement or by the courts, by stipulation or by the local authority that have to fix fees for the representation of the wife, are fairly clear, although involving many complications.

Under the Code of Ethics the Supreme Court of Florida has adopted as a Rule of Court the Code of Ethics. There are three subdivisions of the Code of Ethics:—Rule A consists of 36 sections of "Ethics Governing Judges"; and Rule B consists of 46 sections of "Ethics Governing Attorneys"; and Rule C consists of 10 sections of ethics governing "Circuit Court Commissions, who are charged primarily as agents of the court with questions arising under the Code of Ethics." [1] Sections 12 and 13 of Rule B read as follows:

12. "Fixing the Amount of the Fees.—In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

"In determining the amount of the fee, it is proper to consider (1) the time and labor required, the novelty and difficulty of the questions involved

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1. *Code of Ethics* as adopted by the Sup. Ct. of Fla. (1941).

and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed or will involve the loss of other employment while employed in the particular case or antagonisms, with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from his services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

"In determining the customary charge of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

"In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. "Contingent Fees.—A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness."

It will be noticed that a schedule of minimum fees, adopted by the Bar Association in any particular jurisdiction, may be considered in this connection.

In other cases the Supreme Court of Florida has laid down some general Rules as to fees in decisions in cases other than divorce or separation cases. We have quoted a footnote by Mr. Chief Justice Fred Davis in the *Scott v. Kirtley* case.[2]

The opinion in the case frankly changes the common law rule as to the collection of attorney's fees out of property realized for the client through his services and his skill. In that case, from the body of the opinion, we quote, as follows:

"We are of the opinion that where, as the result of services rendered by an attorney at law in suing for and recovering for his client certain real estate, the client has realized the real estate as fruits of the attorney's professional services, under an express or implied understanding on the part of both attorney and client, that a reasonable attorney's fee would be charged, and would of necessity be payable out of the property realized by the client as a result of the successful efforts of the attorney in litigating for it, that even in the absence of any express contract for a definite amount of fee, an equitable lien, based upon the fundamental maxim or equity that no one shall be unjustly enriched at another's expense, may be implied and declared by a court of chancery, out of general considerations of right and justice which must be applied to the relations of the attorney and client with reference to the fruits of the transaction, and the circumstance of their dealings with each other, with the understanding that the services of the attorney would be payable out of what the client should realize as a result of the successful efforts of the attorney."

2. Scott v. Kirtley, 113 Fla. 637, 152 So. 721 (1933).

A further quotation from the footnote is as follows:

"Faced with the task of trying to apply the ancient conceptions of the practice of law to modern conditions wherein the employment of clerks and stenographers, the procurement of occupational licenses and payment of taxes for the privilege of becoming an attorney for hire, the burden of office rent, purchase of legal supplies and the necessity of constantly spending money to keep current a working law library, suggest to the mind of the writer of this note that the implications of our statutes recognizing lawyers as public servants for hire as well as officers of the court, should be given some consideration by the present day courts in declaring what, if any, is to be considered as the common law in the light of known conditions of the present day."

We shall consider the common law case of *Baruch v. Giblen*.[3] From that case we make a rather full quotation:

"The matter of fixing attorney's fees often involves the most delicate technique of the lawyer's art. The primary, though not the exclusive, elements that enter into the determination of such a fee are the amount and value of the services rendered, the responsibility undertaken, the importance and results of the litigation, and the time required in the conduct of it. In estimating the value of an attorney's services his skill, experience, professional reputation, and the amount of his business may be taken into consideration. The prices usually charged for similar services in the same court and community may also be shown.

"There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into disrepute and destroys its power to perform adequately the function of its creation.

"A client's financial rating may have much to do with fixing the amount of his lawyer's fee when done by express contract and at arm's length, but when the lawyer comes into court relying on a quantum meruit that must be tested by the value of the services rendered. In other words, the fee fixed must bear a just relation to the prevailing philosophy with reference to the value of the lawyer's services and must bear some relation to the results secured. No one has an inherent right to practice law. He does so by grace or franchise of the State and he accepts that franchise fraught with a public trust. In the experience of every practitioner conditions will arise that may preclude him from charging an adequate fee or in fact any fee whatever, but such cases make no difference in his loyalty and the zeal he exhibits in behalf of his client.

"In cases where, as in this case, the attorney relied on an implied contract or a quantum meruit for compensation he is entitled only to the reasonable value of his services. It consequently becomes necessary to determine such reasonable value by resort to the record to ascertain the amount of labor performed and to the evidence of those competent to testify to determine the

3. Baruch v. Giblen, 122 Fla. 59, 164 So. 831 (1935).

value of said labor or services, the skill expended, and such other elements as may enter into his compensation. An attorney interested in the outcome is competent to give evidence as to the value of his services, his legal knowledge, and his professional experience.

"The testimony of duly qualified witnesses given as expert opinion evidence is admissible and may be offered in support of the issue as to the value of the services of an attorney though such issues may be proven by other evidence and other circumstances affecting it. The rule is generally approved that while expert testimony is strongly persuasive as to the value of an attorney's services it is not conclusive, neither is it binding on the court or the jury. Such evidence should be weighed with reference to the nature of the services, the time consumed in their performance, and other incidents peculiar to the case in which it was performed."

In decisions in some divorce cases what has been said by the court with reference to fees in divorce cases, also applies to fees in suits for alimony unconnected with divorce, and to annulment cases where the wife defeats the husband's suit for divorce.

There has been much controversy in recent years with regard to decisions of the Supreme Court of Florida reducing the amount of attorney's fees awarded to attorney for the wife by the lower courts. Some of the criticisms of the Supreme Court may be justified, but in many such decisions an examination of the record will show that the fault, if any, was that of the attorney who failed to make proper presentation and proof in the lower court as to the work done, the risks taken, the results accomplished and the value of the services based upon expert testimony.[4]

We have already seen that in the *Ball case,* the court did not disturb the award of $25,000.00 as attorney's fees for the wife because the record itself made clear the amount of work done, and the expert testimony of attorneys practicing in the very county where the case was decided, justified the award. The Supreme Court sits in Tallahassee and is made up of lawyers (several of whom have served for years as Circuit judges) from various parts of the state. The quotation from the Code of Ethics given above indicates that fee schedules adopted by Bar Associations may be considered. It is probably not necessary to say that in the larger cities, where costs of practicing law and of living are higher, the minimum fees provided by such schedules are much higher than in smaller cities and towns where the overhead of law offices and

4. The question of the amount of attorney's fees has been discussed in many cases. Since no two of the cases are alike and since decisions as to the amount of fees properly awarded, even ten years ago, should not be controlling today, under the authority of the Margaret Ann Super Market vs. Scholl case, 159 Fla. 748, 34 So.2d 238 (1948), it is not thought necessary to discuss amounts, except to cite the cases in which the court itself discussed such amounts. Clark, 155 Fla. 574, 20 So.2d 900 (1945); Arendall, 61 Fla. 496, 54 So. 957 (1911); Haddon, 36 Fla. 413, 18 So. 779 (1895); Tenny, 147 Fla. 672, 3 So.2d 375 (1941); Baldwin, 154 Fla. 624, 18 So.2d 681 (1944); Diem, 136 Fla. 824, 187 So. 569 (1939); Buchanan, 154 Fla. 396, 18 So.2d 7 (1944); Cole, 146 Fla. 196, 200 So. 544 (1941). Particular attention is called to the Clark case in which the court indicated that there should have been expert testimony as to a proper amount to be awarded for temporary counsel fees.

the cost of living are both less than in the larger cities. The expert testimony, therefore, as pointed out in the *Giblen Case* [5] should be that of attorneys who practice in the same community and in the same court where the fees are awarded. The Supreme Court should not be blamed for reducing fees in cases where lawyers themselves do not lay the proper foundation.

Under the Rules of the Supreme Court for appeals, we are expected to shorten the record when a case is appealed, but if the question of attorney's fees is involved, the amount of work actually done, whether in court or in negotiating for an agreement, or in investigating should somehow appear in the record. In the *Stein Case*, as will be seen, affidavits showing the amount of preliminary work done, the risks taken and the results accomplished were filed in Court. Expert testimony, based upon the court file and upon hypothetical questions assuming the facts set out in the affidavits to be true, was taken. Since that case, including all preliminary investigations and negotiations had been pending in Dade County, the testimony of lawyers practicing in Miami formed the basis for the awards.

Since, as we have several times pointed out, most divorce cases now proceed upon the basis of an agreement, reached sometimes after long negotiations between the attorneys for the respective parties, it may be safe for the courts to assume that each of the attorneys knows more about the difficulty and extent of the negotiations than will appear in the actual record, and therefore courts, while not absolutely bound by such agreements, should be very cautious about upsetting them. The presumption is, of course, that each attorney obtained for his own client the best results possible and that necessarily includes the amount of attorney's fees agreed upon.

Since this matter of attorney's fees has been so much in controversy, a common law case involving attorney's fees, which was submitted to Judge George E. Holt, Senior Circuit Judge of the Eleventh Judicial Circuit, without the intervention of a jury, has been decided. His opinion was dated July 12, 1949. The plaintiff was the attorney who had represented a wife charged with adultery by her husband. The attorney for the wife fought, for a period of some sixteen months, the question of the jurisdiction of the court with the result that he won the case for the wife and procured the dismissal of the divorce suit. Thereafter he sued the husband at common law. At first blush, it would seem that the question of fees was a matter which should have been settled in the divorce case. Even though it was finally held that the court was without jurisdiction the husband, who had invoked its jurisdiction, would have been estopped to question upon that ground an order awarding fees to the attorney for the wife. Whether the court had jurisdiction for any other purpose or not, it certainly had jurisdiction to hear and decide upon evidence

5. Baruch v. Giblen, 122 Fla. 59, 164 So. 831 (1935).

and testimony as to the residence of the husband. Under the authority of the *Sherrer Case* [6] it had jurisdiction for that purpose at least. The attorney representing the wife, however, properly proceeded for her and in her interest, without complicating the matter by attempting to procure an award of attorney's fees before the dismissal of the case. Judge Holt himself, in his opinion, points out that not having been awarded attorney's fees as against the husband in the Chancery Court, the weight of authority is to the effect that the husband is not liable in a common law action for attorney's fees for the wife, although several states have decided to the contrary. Since the precise question has never been decided by the Supreme Court of Florida, Judge Holt's opinion cannot be taken to be settled law in Florida, unless his judgment on appeal is affirmed by the Supreme Court of the State. But, for the time being at least, his ruling on the question of law prevails in this Circuit. It seems that on principle he is right, but I shall not undertake to predict what the decision of the Supreme Court of Florida will be.

However, the opinion and verdict are apparently sound and seem to me to be so well reasoned and so important that we have incorporated excerpts from that opinion at the end of this article.

Because I have practiced divorce law myself, and because a great many of my opinions as to attorney's fees in divorce cases are based upon my own personal experience, and because I thought we should have an objectively reasoned discussion of the factors involved by an able lawyer, who specializes in other matters, I have asked Mr. Robert B. Cole of Miami, a member of the firm of Evans, Mershon, Sawyers, Johnston and Simmons, to point out some matters which in his opinion, in the light of the decisions, should be taken into account in divorce cases, as distinguished from other types of cases. Mr. Cole's specialties with his firm are corporate, financial and tax matters, and therefore I believe his opinion as to the financial considerations involved should be more valuable than mine, and certainly more objective. The following quotations are from his memorandum, but the footnotes are my own.

"There are books, law review articles and opinions of the Courts which cover fully the elements controlling the amount of atorney's fees in legal matters of all types. A review of these sources indicates, however, that the problems unique to divorce cases are not pointed out to the extent that they should be. Also, many of those sources do not take into account the current purchasing power of the dollar or the variations in the expense of practicing law among various communities.

"Most divorce cases, even those which appear to be contested, are in fact agreed upon by the parties. The agreement normally extends to the fixing of attorney's fees. The record in those divorce cases which are in fact vigorously contested often is no greater than in those cases where in fact the divorce, property settlement and attorney's fees have been agreed upon. The

6. Sherrer v. Sherrer 334 U. S. 343 (1948).

record does not tell the story. The real contest where there is one is usually behind the scenes and pertains to the property settlement. The attorney's file, and facts which do not appear in any file, rather than the Court file show the extent of the contest.

"Judges are prone to feel that since they at one time (often years ago) practiced law, they are in a position to determine the proper amount of an attorney's fee. They do not take the same liberty with fees of other professional men based on expert testimony.

"Often the Judges are not personally familiar with the current cost of practicing law nor with the differences in such expense among the various communities within a State.[7]

"Courts have in recent years recognized that economic conditions have changed, particularly in personal injury cases in which verdicts many times as great as those previously approved have been sustained.[8] The Courts know that most of these cases are handled by the attorneys on a contingent fee basis and that the percentage has not changed. Therefore, in effect, they have approved much higher attorney's fees in personal injury cases by reason of the decreased purchasing power of the dollar. There is no reason why the same factor should not be recognized in divorce cases.

"In those divorce cases where attorney's fees are in issue the attorney must see that the record shows the extent of the services performed by him. This will not appear in the ordinary case from the Court file. It must be shown by reference to the file of the attorney handling the matter, or by evidence or by affidavit. The record also should include expert testimony of witnesses who are able to evaluate the service in terms of modern economic conditions, taking into account the cost of practicing law in the particular community. Such expert testimony based on a record showing the time consumed by the attorney and the results accomplished should be given great weight by the courts.[9]

"Contested divorce cases often involve a risk to the person and reputation of the attorney. There is probably no contest as bitter as that between an estranged husband and wife who will agree on nothing. Often either party to such a contest will do anything to hurt the other party's attorney. Only

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7. Without making any odious comparisons it may be said that due to higher rents, higher salaries for secretarial help, higher telephone bills and other matters of that sort, the overhead of a properly run first-class law office is five times or more as high in some of the larger cities than it is in some of the smaller towns. Therefore, expert testimony should be given by attorneys who are familiar with the conditions in a particular community.

8. From the opinion in the case of Margaret Ann Super Market v. Scholl, 159 Fla. 748, 34 So.2d 238 (1948) we quote the following language: "The degree of the negligence, the extent of the injury and its equivalent in labor and commodities, are the main criteria available to a jury to measure the amount of its verdict in a personal injury action. Jurors are not permitted to divine their judgments from the ether, they are realists and are not actuated by the philosophy of the cemetery. They get leads to their verdict from the tangible and the commonplace and it speaks in terms of what the dollar will buy, so it availeth little when cotton is 50 cents, corn $2.50, steak $1.00 and common labor $6.00, to cite cases that were decided when cotton was 5 cents, corn was 50 cents, steak 25 cents and common labor $1.00. The disparity is such that a verdict or judgment so predicated looks capricious. It would be as reasonable to expect a carpenter to construct a house on the basis of prices that prevailed in 1939. Respect for law will not emerge from judgments so capricious." This was a personal injury case. The court sustained the judgment for an amount which would have been reduced only a few years ago.

9. In cases where the wife is without money, the fee is necessarily contingent. All of the discussions in the books as to attorney's fees recognize that in such cases (that is where the fee is contingent) the attorney is entitled to a larger fee than in cases where he takes no risk.

recently an Atlanta husband shot his wife's divorce lawyer, and that happens not infrequently. The element of risk is well known to attorneys who handle these cases. Only such attorneys are in a position to evaluate the services in terms of the risk involved.

"The Courts have sometimes greatly concerned themselves about the amount of attorney's fees paid in divorce cases. Probably in some instances the courts have been justified, but it should be recognized that the divorce practice is a specialty, just as other fields of law. The expert in any field, be it law or some other, is sought out and is justified by reason of his skill, in charging higher fees than others who are less skillful or do not have so good a reputation. The wife in a divorce suit is certainly entitled to good representation of her own choice. In order to get it, her attorney should have the assurance that he will be paid in accordance with the ability of the husband, taking into account the skill and reputation of the attorney; otherwise, the wife may be deprived of the type of representation to which she is entitled."

An attorney who has a volume practice can successfully handle divorce cases in which Masters are appointed for a smaller fee than in cases where the judge takes the testimony himself. The reasons are: First, that it is rather difficult to get appointments in many Circuits; Second, that once the taking of testimony is started before the court itself, it should proceed until all of the testimony, at least for one side, has been taken; Third, those circumstances constitute more of an interference with the routine of the average lawyer than would be the results of several shorter hearings before a Master, which could be continued from time to time until all of the testimony had been taken.

The amount of fees properly allowed depends largely upon the personality of the client. I hope it will not start a controversy, but I must say that where the client is a woman, the amount of work spent in fruitless conferences and long explanations is generally much greater than in cases where the client is a man. It is well known that women are more articulate than men and therefore waste more time in discussing a problem, which is as important to them as divorce, than do men. As a rule, men are inclined to keep their mouths shut about their troubles, although there are some very pronounced exceptions to the rule. In addition to the time spent in "holding his client's hand," the lawyer must suffer considerable nerve strain in explaining the same proposition over and over.

Some clients are more nervous than others. Some are unwilling to leave any decisions to the attorney without long and elaborate explanations. These matters do not appear in the cold record. There is another consideration that may or may not appear in the record which entitles a lawyer to larger fees. If the attorney wants it taken into consideration, he must make it appear either by evidence, affidavit, or otherwise that a great deal of time and argument was spent in negotiations. When it does appear in the record, that the attorneys for one side or the other were too combative, and perhaps lacking

also in experience and ability or compelled by their client to do a large amount of unnecessary work, the court may properly take that into account.

In considering unnecessary work—in the *Randall case* [10] Judge Buford pointed out that there were 2200 pages of record but that 200 pages would have been sufficient. It also appeared that the extra work and the superfluous pages of the record were the fault of the attorneys for the husband. The clear inference is that the Court took the unnecessary work into account in allowing to the attorneys for the wife a fee of $7000 in the Circuit Court, and $1000 in the Supreme Court.

Since then Judge Terrell, because the attorneys for the wife had incurred unnecessary expense and done unnecessary work in the taking of depositions in another state, permitted the amount of the fee to stand, but required that the lawyers responsible for the unnecessary bulk of the record should absorb the expense of those depositions out of state depositions.[11] In fixing fees the court has indicated that the attorney for the wife can testify as to the services rendered, but that he is not a proper witness as to the reasonable value of his own service.[12]

In the interest of the state itself and of justice, fees should not be reduced below a reasonable amount. Low cost of litigation results in failure to attract to the legal profession men of high ability, character and standing. Cheap litigation has never resulted in the development of sound principles of law.

Divorce is never a pleasant subject, particularly where the parties have their own emotions deeply involved or where serious matters of property and custody, support and maintenance of children are involved. There has been too much of a tendency on the part of the attorneys and courts to try to base reasonable fees upon the time consumed. Without question, services which result in a quick conclusion of the case on proper terms are more valuable to the client, than long drawn out negotiations or litigation which produces no better result. It is certainly better for the client to avoid the nerve strain, the worry, and the wear and tear upon the health of the client, which will probably result from protracted litigation.

Following is a summary of the facts of the *Chertkof Case* [13] and excerpts from the opinion of Judge Holt.

After preliminary papers were filed contesting jurisdiction the court heard arguments on a motion to dismiss and referred the case to a master. A transcript of 200 pages of testimony including master's recommendation was returned to the court. On the second reference the plaintiff was successful in defending the action. The divorce case consumed sixteen months of litigation and the plaintiff herein was awarded only $1000 temporary attorney's

10. Randall v. Randall, 158 Fla. 502, 29 So.2d 238 (1947).
11. Rubinow v. Rubinow, 40 So.2d 561 (1949).
12. Kennedy v. Kennedy, 101 Fla. 239, 134 So. 201 (1931).
13. Chertkof v. Loew, Civil No. 20902B, Eleventh Circuit, Fla., July 12, 1949.

fees and the order dismissing the cause contained no provisions for additional attorney's fees. It is disclosed by the testimony that the defendant herein has an annual income of more than $200,000.

The plaintiff expended a great deal of time, and energy and that he performed creditably is without question as he was successful in maintaining his position.

The sole legal question is whether the attorney for the defendant wife may bring a separate action against the husband for reasonable compensation after the dismissal of the divorce suit.

Judge George Holt in his opinion in *Chertkof v. Loew* [14] held that: "The husband is liable for services of the attorney rendered to his wife in a divorce action brought by him against her.

"I cannot follow the contention that the courts frown upon a separate suit against the husband for attorney's fees. . . . Generally the husband is not liable in an independent action for attorney's fees for his wife. . . . It would be a travesty and create a dangerous precedent if under the facts the plaintiff be denied the relief which he seeks. . . . To deny him relief here would be to say that he won his case but lost a fee.

"It is therefore, my conclusion, that legally, defendant is liable to plaintiff for reasonable compensation for services rendered to the wife of the defendant in a suit brought by the defendant against his wife for divorce. . . .

"As both judge and jury . . . I find the services . . . were of such a character and nature as to create liability for payment of a reasonable fee therefor.

". . . I further find that the defendant is a man of extreme wealth and is fully able to pay. . . . Therefore, I find that a reasonable fee for the services of the plaintiff in the circumstances described (based upon all the evidence adduced) is the sum of $10,000.

". . .

"In so far as attorney's fees and compensation of officers of the courts are concerned, there seems to me to be a concerted effort on the part of some to reduce the lawyer to the servile condition of the slave. . . .

"It is my opinion that the lawyer needs protection so that he may pursue his profession in such a manner that the best interest of the public will be served, protected and defended. The lawyer should not be the object of unwarranted criticism or attach . . . [nor] be awarded unreasonable fees nor charge excessively for his services.

"There is a reasonable middle ground between the two extremes. This I propose to follow. . . .

"The Plaintiff is entitled to the reasonable value of his services. He has worked hard. He has been successful. He has not been paid."

14. *Supra.*