Conduct in Litigation and Counsel Fee awards
By Joel R. Brandes

Counsel fee awards in matrimonial actions are purely discretionary. The authority for counsel fee awards is Domestic Relations Law §237 and 238. They provide that in certain matrimonial actions the court" …may direct either spouse to pay counsel fees…to the attorney of the other spouse to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented…,"

Unlike maintenance and child support, there is no formula a judge may apply to determine the amount of counsel fees. There is no "judicial rule of thumb" which ties the award of counsel fees to the amount of maintenance, child support or distributive award. Each case is decided on its own merits. And, since 2010 there is one limitation on the court's exercise of discretion - that "*counsel fees shall be awarded to the less monied spouse*".[1]

In 1987 the Court of Appeals ruled that in exercising its discretionary power to award counsel fees, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions.[2]

The "financial circumstances of the parties", which encompasses the need of one spouse and the other spouse's ability to pay, has always been a factor in counsel fee determinations. It has been held that where, as a result of an equitable distribution or distributive award, a spouse will have sufficient funds to pay his or her own attorney's fees, it is an abuse of discretion to award counsel fees.[3] However, this rule is not ironclad, but is dependant upon other financial circumstances of the party seeking counsel fees. For example, in Hackett v Hackett,[4] the Appellate Division held that the wife should not have been denied attorney fees on ground that she would have sufficient funds to meet that obligation after marital assets were distributed, where the husband was employed as vice-president of an electronics firm and earning approximately $67,000 per year at time of trial while she was earning $4 per hour as nurse's aide. An award of $10,000 was warranted although the wife was to receive substantial distribution of assets and adequate maintenance.

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1 Laws of 2010, Ch 329, effective October 12, 2010.
2 DeCabrera v. Cabrera-Rosete, 70 N.Y.2d 879, 881, 524 N.Y.S.2d 176 (1987)
3 See Basile v. Basile 122 App Div 2d 759, 505 NYS2d 448 (1986, 2d Dept); Richards v Richards 189 A.D.2d 1025, 592 N.Y.S.2d 872 (3d Dept., 1983) (citing, inter alia, see generally, 2 Foster, Freed and Brandes, Law and the Family § 3:52, at 469 [2d ed] ....)
4 147 A.D.2d 611 538 N.Y.S.2d 20 (2d Dept., 1989)

In exercising its discretion on an application for a counsel fee award the Court may consider the merits of the case and a spouse's conduct in the litigation. There are many different types of conduct that fit in this category which courts have considered in determining such applications. We have categorized the cases as follows:

(a) Misrepresenting income. In Griggs v. Griggs,[5] the Appellate Division held that in misrepresenting her income for the purpose of increasing the plaintiff's obligation to support her, the wife forfeited any entitlement she might otherwise have had to counsel fees.

(b) Failure to reveal all the relevant facts in seeking ex parte relief. In Robert v. Robert, [6] the court opined that the former wife would not have been granted ex parte relief had the issuing court known more of the facts. In light of the financial circumstances of both parties, together with all the other circumstances of the case, an award of 25**%** of the attorney's fees demanded by the former wife for her attorneys was appropriate, as well as an award of 50**%** of the remaining fees and costs demanded by her.

(c) Concealing or dissipating assets. In Brody v. Brody, [7] the Appellate Division held that while a less-monied party should not be expected to exhaust all, or a large portion, of the finite resources available to her or him, the court may consider the conduct of the less-monied spouse in the dissipation of assets available during the course of the litigation. The court's award reflected consideration of the relevant factors, including the wife's conduct in dissipating assets during the litigation rather than using available funds to pay her attorneys or to pay for necessary items for the children or herself.

(d) Uncompromising nature of the defendant. In Unger-Matusik v. Matusik,[8] the Appellate Division found no abuse of discretion in Supreme Court's award of $20,000 in counsel fees to plaintiff where it specifically held that **"**having presided over all aspects of this action for divorce, the Court is convinced that it was the uncompromising and contentious nature of defendant, not plaintiff, which necessitated the extraordinary counsel fees incurred by plaintiff.**"**

(e) Misconduct with regard to marital property. In Mastrandrea v. Mastrandrea [9,] the Appellate Division held, in awarding the fees requested, that the court properly concluded that defendant's conduct, including his inappropriate attempt to sell one of the marital residences to a friend, caused the Wife to incur additional attorney's fees.

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5 44 A.D.3d 710, 844 N.Y.S.2d 351 (2d Dep't., 2007)
6 51 A.D.3d 756, 858 N.Y.S.2d 700 (2d Dep't., 2008)
7 137 A.D.3d 832, 27 N.Y.S.3d 190 (2d Dep't., 2016)
8 276 A.D.2d 936, 715 N.Y.S.2d 449 (3d Dep't., 2000)
9 268 A.D.2d 293, 702 N.Y.S.2d 19 (1st Dep't., 2000)

(f) Discovery misconduct and delay. In Blay v. Blay, [10] the Appellate Division found that Supreme Court did not abuse its discretion in awarding counsel fees to the wife where counsel fees were partially based upon additional work required to sort out the confusing financial arrangements created by plaintiff and his family business, plaintiff's failure to advise defendant of the business restructuring and the failure to turn over complete financial documents in response to demands.

(g) Failure or refusal to comply with interim orders. [11]

(h) Lack of merit, unnecessary and repetitive motions. [12] In Lerner v. Lerner, [13] the Appellate Division affirmed the award of legal fees where the record provided ample support for the Supreme Court's criticism of the husband and his attorney including frivolous appeals that were never perfected, the belated substitution of the husband's father-in-law as lead attorney despite his admitted lack of knowledge of matrimonial law and the husband's excessive interference with his attorney's performance.

(i) Unreasonable conduct. In Graham v. Graham[14], the Appellate Division affirmed the award of counsel fees against the husband based upon the fact that the husband's unreasonable conduct in the prosecution of the action added greatly to the wife's expenses.

(j) Failure to substantiate allegations that the wife engaged in tactics to prolong the litigation. [15]

(k) Tactics designed to harass. [16] and

(l) Bad faith litigation. In Cion v. Cion, [17] the Appellate Division upheld the award of counsel fees to plaintiff, but modified it to increase the award to the full amount she sought, finding that the litigation "evidently result[ed] from a bad faith attempt by defendant, an individual of substantial means, to avoid paying any of his child's expenses."

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10 51 A.D.3d 1189, 857 N.Y.S.2d 784 (3d Dep't., 2008)
11 Wells v. Wells, 151 A.D.2d 474, 542 N.Y.S.2d 263 (2d Dep't., 1989)
12 Melnitzky v. Melnitzky, 284 A.D.2d 240, 726 N.Y.S.2d 649 (1st Dep't., 2001) [insistence on litigating matters of dubious merit]; Yerushalmi v. Yerushalmi, 136 A.D.3d 809, 26 N.Y.S.3d 111 (2d Dep't., 2016) [making repetitive motions to terminate pendente lite obligations]; Fredericks v. Fredericks, 85 A.D.3d 1107, 927 N.Y.S.2d 109 (2d Dep't., 2011) [engaged in unnecessary litigation]
13 201 A.D.2d 375, 607 N.Y.S.2d 929 (1st Dep't., 1994)
14 175 A.D.2d 540, 572 N.Y.S.2d 800 (3d Dep't.,1991)
15 Ciociano v. Ciociano, 54 A.D.3d 797, 863 N.Y.S.2d 766 (2d Dep't., 2008)
16 Cass v. Cass, 213 A.D.2d 362, 624 N.Y.S.2d 406 (1st Dep't., 1995)
17 253 A.D.2d 595, 677 N.Y.S.2d 143 (1st Dep't.,1998)

Conclusion

Frequently, in determining counsel fee applications, courts use the term "obstructionist conduct" as a catchall phrase for conduct which prolonged or delayed the litigation. Most of the appellate decisions do not indicate the exact nature of the conduct the court considered obstructionist, but just conclude that a party engaged in obstructionist conduct. [18]

However, decisions from the Supreme Court sometimes go into great depth in detailing a litigants conduct when a litigant has been obstructionist. A prime example is the unreported disposition in R.S. v B.L. [19,] where after a 21-day trail, the Supreme Court found that the wife was not credible and that her unreasonable conduct, which resulted in unnecessary and costly litigation, included:" hiring and firing top-tier members of the matrimonial bar, each time materially increasing the cost of the proceeding to both sides; prolonging discovery by non-compliance with scheduling orders; lying on her net worth statement by inflating expenses by large amounts in 22 separate categories and lying on the witness stand over and over again, each time requiring the Husband to spend time and money disproving her lies, and the Wife's counsel to spend time and money seeking to defend what turned out to be lies; litigating the admissibility of post office records and imposing the cost on the Husband of a federal proceeding to obtain certified copies of the post office records; arguing and re-arguing over absurdly long witness lists full of names, which the Wife's counsel admitted he did not vet prior to (or even weeks into) trial, and who ultimately refused to testify, in the case of Linda Feder even after the Wife represented that she was an "essential" and "crucial" witness and even after the Wife's counsel "spent ... a good amount of time ... with her"; arguing and re-arguing over expert witnesses (including a mental health expert, a vocational expert, an actuary, a real estate appraiser, a medical insurance consultant, a forensic accountant, and a certified public accountant) not designated as expert witnesses by October 1, 2012, as required by a Stipulated Order; hiring Proskauer Rose LLP as "special Benefits counsel," who billed the Wife $115,000, and whose work must have been duplicative, since they did not consult with any of her prior counsel, her prior expert, the Husband's expert and ABC: paying enormous sums of money to these expert witnesses, even after the court ruled they could not testify; paying enormous sums of money to other consultants; arguing and re-arguing numerous other issues and rulings over and over again; using trial subpoenas containing over 100 blunderbuss discovery requests; engaging in long, repetitive and wasteful examinations and cross-examinations; misrepresenting the contents of supposedly identical hospital records, resulting in hours of lost trial time, two arguments on non-trial days, and briefing of an Order to Show Cause; seeking adjournments for

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18 See, for example Johnson v. Chapin, 49 A.D.3d 348, 854 N.Y.S.2d 18 (1st Dep't., 2008), aff'd as modified, 12 N.Y.3d 461, 881 N.Y.S.2d 373 (2009), [pattern of obstructionist conduct]

19 46 Misc.3d 1218(A), 9 N.Y.S.3d 595 (Table), 2015 WL 543459.

alleged leg ailments that did not preclude the Wife's attendance at Knick games or long drives to Philadelphia and Ithaca; and refusing to allow her counsel to speak with the court, even during the lunch break, after hours or on the telephone without a court reporter present, adding the cost of the court reporter, and the cost of the attorney time spent waiting for court reporters.