Forum

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Party's Family Wealth Should Be Weighed in Divorce-Fees 'Leveling'

By Fred Silberberg

Getting a divorce is an expensive proposition. Aside from the additional costs associated with maintaining two households, there is the issue of attorney fees.

Family law attorneys are expensive, and for good reason. There are few areas of practice with as many minefields and as much emotional stress as this one. Not only does the lawyer have to be a lawyer, he also has to be a therapist and an expert in a half-dozen substantive areas including accounting, probate and tax. As most lawyers know, the collection of receivables in a family law practice can be a problem.

The outcome of a case can depend in large part on the amount of legal effort put into it. While many cases are rather straightforward and neither require a significant amount of work nor the involvement of experts and consultants, a certain percentage of cases do. And the fact of the matter is that one spouse is often in control of the financial resources, while the other is not.

For that reason, the Family Code allows a court to make orders for the payment of attorney fees and costs. The general rule here is that the order is based upon the need of one spouse and the ability of the other spouse to pay for that need.

The fees are supposed to be reasonably necessary to prosecute the case, and the spouse requesting fees has to show that. The code provides for fee awards in order to "level" the proverbial playing field. However, there is a loophole here that has neither been addressed by the Legislature nor by the courts.

The playing field is definitely not level when one spouse has the resources of his or her family available and the other doesn't. In those situations, rather than leveling the playing field, the court can be used as weapon to destroy the other party.

There are plenty of family law cases in which one spouse is fortunate enough to come from a family that has extensive financial resources and the other does not. There are plenty of cases involving "trust fund babies" whose parents bring them to the lawyer's office and arrange for counsel. There is certainly nothing wrong with parents trying to care for their cubs, even when those cubs are full-grown bears. This situation, however, does result in a completely slanted playing field and it gives those cubs a distinct advantage in the process over and above the disenfranchised spouse.

If the policy of the law is to level the playing field, then it has to be leveled across the board.

Case law and statutes make it clear that the point of a fee award is to provide for parity in the family law court, which is a court of equity. The question as to what is ordered against a spouse turns, in large part, on ability to pay.

Thus far, the determination of ability to pay has, for the most part, been limited to looking at the individual resources of a particular party that are within that party's control. Judges will not, as a general rule, make an order for the payment of attorney fees against a party whose parents, or other relatives, have an ability to pay. The theory here is that the party does not have the individual ability — and that the parents could cut off the funding at any point in time.

While that may be true in theory, it is often not true in practice. If a spouse has funding ability through parental help, and if that spouse is ordered to make payments to the other spouse, logic would dictate that the family would provide the funds.

In order to level the playing field, the law should reflect that, in California, disparity of income amongst the population is great, affluence is widespread in some areas and rags-to-riches stories are commonplace. Without change, the family law court cannot be a court of equity.

The court's analysis of the attorney-fees question should not end simply because a party is the recipient of family money that is being used for litigation purposes. While it may be true that the money could run out at any point if the benefactors cut off the beneficiary, in most cases the benefactors are more than willing to pay to pummel the other side into capitulation.

There is nothing wrong with making a fee order based on ability established during the course of a case, where that ability is shown by an ongoing stream of payments for the benefit of a child, even when those payments may be made directly to the lawyer and do not go through the party's hands.

Savvy family law attorneys know how to play this game. When the trust fund client comes in, those lawyers have the parent sign a guaranty for the payment of fees. That guaranty can often be an open book to allow litigation that may run into the hundreds of thousands of dollars. While the lawyer is protected and will get paid, the adverse party simply cannot defend against an ongoing onslaught of actions because they do not have the resources, and the court will not order the payment. The adverse party is forced into capitulation out of economic necessity.

Capitulation in this sense can have dramatic consequences, including loss of custodial time with children and loss of a home or other assets to which a party is entitled, as well as loss of support.

If our laws governed these situations, the courts would not be used as swords to slay the disenfranchised spouse. If parties were advised going into a case, that to the extent the family funds litigation, that spouse will be called upon to pay additional attorney fees, there would be a deterrent effect.

To the extent that there was not a deterrent effect, the disenfranchised spouse would be able to defend himself or herself with an appropriate fee award.

Divorces don't simply happen. They are frequently the result of long-term planning on the part of the spouse who wants out of the relationship. That planning, and the execution of such plans, can involve an extensive cadre of supporters, including investigators, accountants and therapists, as well as attorneys. When someone has the resources to provide themselves with same, regardless of the source, the court has to protect the other spouse with parity in terms of attorney fees. To do anything less than that is not to act as a court of equity.

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