

Litigated Divorce in the USA As a Waste of Assets

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Keywords

assets, avoidable, bad-faith, cases, depleted, dissipated, dissipation, divorce, *Dralus*, excessive, Florida, futile, *Katz*, litigated, litigation, marital, overlitigated, protracted, resources, unnecessary, unreasonable, waste, *Wrona*

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Introduction

This essay explores the topic of protracted litigation in divorce and how attorney's fees waste¹ assets belonging to one or both parties. I did a legal research project for an attorney involving divorce law in Florida and I accidentally stumbled on this topic that was unrelated to the specific legal research project that I was hired to do.

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm>.

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of case law. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*. Because part of the audience for this essay is nonlawyers, I have included longer quotations from court cases than typical writing for attorneys.

¹ *Waste* is a technical term in law, meaning an abusive or destructive use of property that causes an *unreasonable* injury. Law abhors *waste*.

Overview

In states with so-called “equitable distribution” of marital assets, it is well known among attorneys familiar with divorce law that the final division of marital assets is *usually* close to half to each party. It is *unusual* for one party at divorce to receive more than 60% of marital assets.

Given that the total legal fees for a litigated divorce often exceed \$160,000 total for both parties, and assuming that a skilled litigator might be able to get an extra 2% of marital assets awarded to his/her client, a litigated divorce makes economic sense only if the total marital assets are more than four million dollars.² Because few families have multi-million dollars in marital assets, it makes good economic sense for nearly all divorces to reach a private settlement, thereby avoiding litigation. I emphasize that this conclusion is a generalization and is not be applicable to *every* case.

There are two common reasons why a settlement might not occur: (1) one spouse is furious at the other spouse and insists on a particular result that is unacceptable to the other spouse,³ or (2) one attorney realizes that he/she will receive more legal fees for a litigated divorce than for a settlement, so that attorney encourages the client to litigate in the hope of achieving that client’s desired result, even if the client’s desire result is unlikely. In the first situation, the angry spouse’s attorney should convince his/her client of the economic folly of wasting money on a litigated divorce.⁴ In the second situation, the attorney has a conflict of interest with his/her own client, in that the attorney’s motivation is to maximize his/her income at the expense of his/her client,⁵ instead of doing what is in the best interests of the client. Such a conflict can be contractually avoided by having both spouses and both of their attorneys agree to negotiate a settlement of the

² I obtain this estimate from arguing that litigated divorce makes economic sense only when

$$0.02 \times A > \$80,000$$

where A is the total marital assets and \$80,000 is the single party’s legal fees to obtain an extra 2% of the marital assets. This is *not* an exact calculation, but only an estimate.

³ A spouse may be angry because of perceived wrongful treatment (e.g., adultery, abuse, betrayal, etc.) by the other spouse. Consequently, at least one spouse is adamant about achieving a particular result in divorce (e.g., custody of children, distribution of a particular asset, alimony, reimbursement of educational expenses by the supported spouse, etc.). Settlement discussions may reach an impasse because of the parties rigid insistence on their desired result.

⁴ Getting revenge from litigation — and spending more than \$60,000 on attorney’s fees — is just as rational as purchasing at least three new automobiles and then smashing them with sledgehammers for pleasure. It’s a waste of money and totally *irrational* behavior.

⁵ It is not absolutely clear that litigated divorces maximize an attorney’s income. An attorney specializing in divorce can accept *more* clients if their divorces are negotiated instead of litigated, which offsets the loss of income to an attorney from clients with litigated divorces. Further, clients with large legal fees from litigated divorces may not be able to pay their legal fees.

case, and further agree that the attorneys will withdraw from representation if one or more of the clients insist on litigation. I do not see any easy way to avoid the conflict of interest when one or both clients insist on litigation, but if only one client refuses to negotiate a settlement, that client might be ordered by a judge to pay the attorney's fees of both parties.

According to *Wrona v. Wrona*, 592 So.2d 694, 697 (Fla.App. 2 Dist. 1991),⁶ the way to avoid unnecessary litigation is to ask the judge to schedule a case management conference. Such a conference *may* be effective in Florida, where there is a long series of appellate cases condemning avoidable litigation.⁷ However, appellate courts in other states seem to have ignored the problem of excessive divorce litigation.

There are several reasons why a judge may believe that people are entitled to litigate their divorce dispute:

1. There is a long tradition in U.S. law of allowing litigation when the claims, defenses, and other legal contentions therein are warranted by existing law *or* by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.⁸

It is easy for an attorney to argue that his/her litigation is intended to make new common law, even if making new common law is unlikely. Just because the desired result in litigation is unlikely to be obtained does not make the litigation frivolous.

2. The Florida Supreme Court has held that attorneys could be personally sanctioned for bad-faith litigation,⁹ but attorneys could *not* be sanctioned for long-shot litigation (i.e., litigation in which the party was unlikely to prevail):

Although the trial court felt that the case should have been settled because it was a "long shot," the trial court did not conclude that counsel engaged in bad faith conduct during the litigation. Pursuit of "long shot" claims cannot form the basis for assessing attorneys' fees against an attorney under the inherent authority doctrine. Furthermore, an attorney's failure to force his or her client to settle a colorable claim does not amount to "bad faith" justifying the imposition of attorneys' fees against the attorney.

Diaz v. Diaz, 826 So.2d 229, 232 (Fla. 2002).

⁶ *Wrona* is quoted below, beginning at page 7.

⁷ This long series of Florida appellate cases is quoted below, beginning at page 5.

⁸ Federal Rule of Civil Procedure 11 (b) (2). Federal Rules are *not* applicable to divorce litigation, but the Federal Rules often are reflected in identical or similar state rules of civil procedure, which are applicable in divorce litigation. See, e.g., Pennsylvania Rule of Civil Procedure 1023.1(c)(2) (adopted 2002). Furthermore, the American Bar Association's Model Rules of Professional Conduct 3.1 prohibits litigation that has a frivolous basis.

⁹ *Moakley v. Smallwood*, 826 So.2d 221 (Fla. 2002)

3. Some judges in family court, as former attorneys specializing in divorce, may be unwilling to deny large attorney's fees to their former colleagues for litigated divorces.

While a person may be entitled to litigate his/her dispute, a line of Florida cases discussed below holds that one party is *not* entitled to inflict avoidable litigation expenses on an innocent party in divorce litigation.

Florida Cases

There is an interesting series of cases in Florida that deplore waste of marital assets on divorce litigation. Florida seems to be ahead of other states in the USA in recognizing divorce litigation as a waste of marital assets, which assets could be better spent on the children, spousal support (i.e., alimony), personal savings, or to acquire property for the parties.

Katz

Katz was a landmark Florida case decided in April 1987. Attorneys fees in *Katz* exceeded \$325,000, which depleted marital assets to the point that the marital residence was at risk of being foreclosed for lack of payment of mortgage.¹⁰ However, in *Katz*, the amount of attorneys fees was *not* an issue on appeal, so the appellate court could not rule on attorney's fees. The terse opinion, quoted here in its entirety, says:

We affirm the main appeal and cross appeal. Any motion for rehearing shall be filed in seven days and any response thereto, five days thereafter, this being an expedited case.

One subject compels our observation; namely, our concern for the size of attorney's fees and accounting fees in relation to the total assets of parties engaged in contested dissolution proceedings.

At oral argument counsel for the husband candidly responded to our inquiry with respect to the relationship between such fees and these parties' assets. His frustration seemed to be that shared by the panel in this case when he advised that he estimated all trial and appellate attorney fees, together with trial accounting fees, to exceed 50% of the parties' assets.

It is the responsibility of the marital bar and the bench at trial and appellate levels to be mindful of unnecessary expense in the litigation of contested dissolution matters, as any other. This type of case must be tried and reviewed quickly, without needless and wasted motion. Without responsible direction, not only will the parties — who are represented — have their assets dissipated without good cause, but also their innocent, unrepresented children will see their opportunity for higher education vanish in a nightmarish plethora of motions, transcripts and time sheets.

We urge the Family Law Section of The Florida Bar and the Florida Chapter of the American Academy of Matrimonial Lawyers to consider our concerns. Equally important, we remind ourselves and all trial judges in our district that we are in a position to act upon what a senior member of the Broward County Bar has noted on his door for over sixty years; namely, that it is not how many hours one puts in, but what one puts into the hours.

¹⁰ *Katz v. Katz*, 505 So.2d 25, 26 (Letts, J., special concurrence).

What reasonable parties, having spent years accumulating assets while fulfilling the responsibilities of spouse and parent, would knowingly undertake a contested dissolution if they knew — as they should — that any appreciable percentage of those assets would not be available to them or their children because of their own contrariness — or that of their lawyers?

Katz v. Katz, 505 So.2d 25, 26 (Fla.App. 4 Dist. 1987) (per curiam).

Kass

In *Kass*, the trial court order husband to pay wife's temporary attorney's fees in the amount of \$64,700. Husband's own attorney's fees were almost \$87,000. The award of attorney's fees to wife was upheld on appeal, but the appellate court commented:

This is not to say that this court is putting its imprimatur on the extent of litigation that we perceive from the record before us. The record clearly demonstrates a case which, at least in this writer's view, has been overlitigated to the point of absurdity, considering the length of the marriage and the issues involved. It may be a worn-out exercise in oversimplification for any court, be it trial court or appellate, to entreat parties to "resolve your differences and settle the case." Nonetheless, we must hasten to point out to the parties that which they must surely already know; that if this litigation continues at its present pace, not only their entire marital estate, whatever that may be, but perhaps their parents' estates as well, may be consumed by the cost of this litigation. *Katz v. Katz*, 505 So.2d 25 (Fla. 4th DCA 1987).

Kass v. Kass, 560 So.2d 293, 294 (Fla.App. 4 Dist. 1990).

Mettler

The trial court ordered wife to pay \$42,000 of husband's attorney's fees, and ordered wife to pay \$33,000 of attorney ad litem's fees for representing children. Wife appealed. The appellate court said:

In *Mettler v. Mettler*, 519 So.2d 998 (Fla. 4th DCA 1988) [affirmed without published opinion], this court affirmed the judgment of modification and granted the attorney ad litem's motion for appellate attorney's fees in accordance with the final judgment and the former husband's motion for appellate attorney fees conditioned upon a determination of entitlement pursuant to the final judgment. The final judgment made specific findings of fact that the file reflected a "pattern of extensive, expensive and needless litigation," that appellant "instigates litigation at considerable expense and aggravation over matters that could easily be resolved if she were reasonable" and that her family's resources had enabled her to pursue "this needless, futile and fruitless litigation."

....

We find ample support for the trial court's findings as to the former wife's conduct. Her conduct unnecessarily engendered recalcitrant or vexatious litigation and served to frustrate the public policy of this state to promote settlement of litigation and where possible to reduce the cost of litigation by encouraging cooperation between the parties and attorneys.

Appellant argues the trial court erred in taxing costs against her regardless of either her conduct or her family's ample financial resources, when she herself had no ability to pay any portion of the former husband's fees and costs and such an award must be based upon consideration of the financial resources of both parties subject to their individual control. *See* § 61.16, Fla.Stat. (1987). Contra to the former wife's allegation, the record evidences facts such as the final judgment awarding her lump sum alimony and half interest in the house, some of these funds being used as payment for another house but no disclosure as to use of the remaining funds, and her failure to file a financial affidavit, from which the trial court could have concluded she had some ability to pay.

While the purpose of considering the parties' finances in awarding attorney's fees is to insure that both parties are not limited in their ability to receive adequate representation due to disparate financial status, this equitable principle must be flexible enough to permit the courts to consider cases with special circumstances. *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828, 835 (Fla. 1990). A party's financial status should not insulate them from the consequences of their conduct within the judicial system. See generally *Steinfeld v. Steinfeld*, 565 So.2d 366 (Fla. 4th DCA 1990); *Landers v. Landers*, 550 So.2d 554 (Fla. 5th DCA 1989); *Meloan v. Cloverdale*, 525 So.2d 935 (Fla. 3d DCA 1988). Here appellant abused the system through inequitable conduct which resulted in needless litigation and legal fees. She cannot now avoid the consequences of that conduct by using her diminished financial status as a shield. Rather than impermissibly awarding the fee as a punitive measure, the award was based on the additional work made necessary by appellant. The award serves to avoid an inequitable diminution of former husband's share of the parties' assets. See generally *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980); *Dyer v. Dyer*, 438 So.2d 954 (Fla. 4th DCA 1983). *Mettler v. Mettler*, 569 So.2d 496, 498-499 (Fla.App. 4 Dist. 1990).

Strangely, *Mettler* cited neither *Katz* nor *Kass*, both of which cases were in the same Florida judicial district as *Mettler*. Twelve years later, the Florida Supreme Court cited *Mettler* with approval in *Diaz v. Diaz*, 826 So.2d 229, 232 (Fla. 2002).

Wrona

The appellate court wrote a lengthy discussion of the need to protect marital property, and especially the needs of minor children or a dependent spouse's alimony, from depletion by "avoidable litigation expense":

Since we authorize the trial court to consider the current financial condition of the parties on remand, we discuss what will surely be this couple's biggest economic problem in the future. The attorneys' fees at trial in this case approached \$60,000. [footnote omitted] Post-trial attorneys' fees must also be significant.

This couple has four children that need all the care and education that money can buy. Nevertheless, this couple has spent — and our system of divorce has permitted them to spend — roughly 50% of their entire savings on a divorce battle over a big stamp collection and a house full of Hummel figurines. [FN2] Unless the couple sells their collections to pay their attorneys, it appears that either the attorneys must defer their fees or the parties will ultimately be forced to use virtually all of the equity in their children's homestead to pay for this Pyrrhic victory.

FN2. The twenty-eight page final judgment contains page after page of findings evaluating and distributing items such as: 1) "the German beer maid, dancing girl and five ducks," valued at \$220 and awarded to the husband, and 2) "Seyei snack china," which was valued at \$18 and awarded to the wife as nonmarital property.

Admittedly, many people approach divorce from a very emotional perspective. It is not the purpose of our system of justice, however, to augment those emotions. It is at best tolerable when our system allows a childless, wealthy couple to engage in extended, expensive divorce litigation, seemingly as a form of perverse entertainment. See generally *Katz v. Katz*, 505 So.2d 25 (Fla. 4th DCA 1987). It is entirely another matter when our system allows families to spend limited resources that are needed for the welfare of their children on avoidable litigation.

If the attorneys involved in this case had represented a litigation-sophisticated business, they would have been required to analyze the issues at the beginning of the dispute and develop a cost-effective method to resolve those issues and end the dispute. The business would have demanded an estimation of the fees and costs and asked for a method to minimize those nonproductive expenses. Florida's families are entitled to legal advice that is as sensible and cost-effective as that given to Florida's corporations.

Although we believe this case is the great exception and not the rule, it is an example of the stereotype invoked by the public to unfairly discredit the entire marital bar. We are convinced that both the marital bench and bar are strongly committed to an efficient and effective system of divorce. Nevertheless, the system would sometimes work with greater efficiency if at the outset of a divorce proceeding the parties understood the probable cost of the impending litigation and also understood that, no matter who is ordered to pay the attorneys, the payments will reduce either marital assets or future earning capacity that may be needed to pay child support or alimony. Likewise, we believe that parties would be less willing to engage in needless litigation if they understood that their decision to engage in needless litigation may reduce their distribution of marital assets. These two considerations should be discussed with the parties at an early case management conference whenever the trial court discovers that the parties are about to engage in extensive, avoidable litigation. [FN3] See Fla.R.Civ.P. 1.200(a). This conference would be most helpful if it preceded mediation. [footnote: "It is noteworthy that this case was not mediated."] See Fla.R.Civ.P. 1.740. At the case management conference, the trial court may be able to help the parties to develop an efficient method to resolve their differences. [FN5]

FN3. We are fully aware that trial courts frequently have little ability to know that the parties are preparing for an expensive, avoidable battle. In cases involving children or temporary alimony, the trial court may have an opportunity to discover this problem at the early stages. Otherwise, it is the attorneys' obligation to bring this problem to the attention of the court so that an early case management hearing can be held.

FN5. We are not mandating any expedited or abbreviated trial. Indeed, there are cases in which the case management conference should result in a cooling-off period without much litigation expense so that the parties will have the time to confront their differences with less emotion and more objectivity.

In addition to an early case management conference, trial courts should understand that they have authority to take steps designed to avoid needless expense during a divorce proceeding, especially if that expense adversely affects the best interests of the children or jeopardizes the sources for payment of needed alimony. A primary purpose of Florida's divorce law is "to mitigate the potential harm to the spouses and their children caused by the

process of legal dissolution of marriage.” § 61.001(2)(c), Fla.Stat. (1989). The role of the trial court in a divorce is more extensive if children are involved. § 61.052(2), Fla.Stat. (1989). During any period of continuance, the court is authorized to enter appropriate orders for “the preservation of the property of the parties.” § 61.052(3), Fla.Stat. (1989). Thus, if given the opportunity during the pendency of a dissolution proceeding, a trial court has the power to prevent the parties from wasting marital assets that are needed for children or for future alimony.[FN6]

FN6. The trial court clearly has the authority to limit a judgment for attorneys' fees to an amount that is reasonable to compensate for necessary services. § 61.16, Fla.Stat. (1989). The problem, however, is not restricted to judicial awards of fees. Frequently, one or both parties liberally spend marital assets on their individual attorneys' fees without any court authorization. In this case without court authorization, one party has incurred legal fees twice as large as the other. Unless, the trial court determines that the difference was paid from nonmarital assets or has not yet been paid, it is apparent that these fees have effectively reduced the marital assets available for distribution. Thus, an equal distribution of the remaining marital assets results in an unequal distribution of the marital assets that existed on the date of the filing of the petition.

We are aware that the concept of “avoidable litigation expense” is difficult to define. We are not encouraging attorneys to request a case management conference as a matter of course. Likewise, the trial court cannot limit a party's access to the court or prevent litigation expenses that are legitimate. There are occasions, however, in which it is clear that litigation expense cannot be cost-effective or is incurred primarily for emotional reasons. Under these circumstances, the trial court should attempt to protect marital resources that will be needed to support children or to pay alimony.

In this case it is too late for a case management conference. When parties have already expended marital resources on avoidable divorce litigation, the trial courts have the power to adjust the equitable distribution so that the party causing this depletion of marital resources will be the party who suffers the economic loss. Occasionally, this will require more than an order shifting one spouse's attorneys' fees to the other. In other words, these expenses may become a relevant factor “necessary to do equity and justice between the parties” in establishing an equitable distribution of marital assets and liabilities. § 61.075(1)(h), Fla.Stat. (1989). Moreover, the avoidable litigation expense should not become a factor that allows a party to avoid reasonable obligations for alimony and child support.

We emphasize that, from this record, we cannot and do not determine that any specific party was responsible for all or part of the avoidable litigation expense in this case. It seems clear, however, that this divorce did involve extensive, avoidable litigation expense.

On remand, the trial court should determine whether it is necessary to reallocate marital assets to fulfill the terms of an appropriate final judgment. The trial court may require the parties to use nonmarital assets to pay the litigation expense if it determines that the marital assets must be protected for the benefit of the children or as a source of alimony. The parties' reasonable obligations to one another, and especially to their children, should not be reduced merely to preserve their respective collections or to fund past or future avoidable litigation.

Wrona v. Wrona, 592 So.2d 694, 696-698 (Fla.App. 2 Dist. 1991).

Vogedes

In *Vogedes*, the marital property totaled approximately \$466,000.¹¹ The appellate court concluded:

On remand, the trial court may, if it wishes, take further testimony as needed because of the reversal, lamentably, in light of the plunging estate occasioned by the parties' war. *Vogedes v. Vogedes*, 596 So.2d 147, 148 (Fla.App. 4 Dist. 1992) (per curiam).

Judge Polen wrote a concurring opinion that concluded:

All of this brings me to the same point the majority opinion seems to be addressing where it refers to the "plunging estate occasioned by the parties' war." See *Katz v. Katz*, 505 So.2d 25 (Fla. 4th DCA 1987) Litigation, and particularly appellate litigation, does not come free. Even where the price in dollars may be nominal vis-a-vis the parties' financial position — not the case here — it also extracts an emotional fee from the litigants and expends precious time and resources of the judiciary. We are loath to speculate on the motivations of the combatants in these proceedings. (It is fortunate, indeed, that we do not have minor children caught up as innocent victims of this particular war.) It is possible, I suppose, that appellant surmised a successful attack on one or more of the issues raised would lead to a more beneficial economic outcome for him. Perhaps that may yet occur. Perhaps there are other considerations not revealed to us through these proceedings. Still, it seems to me the unfortunate aspect of this case, to use the majority's description, is the considerable expenditure of resources, with little, if any, benefit to either of the parties concerned.

Vogedes v. Vogedes, 596 So.2d 147, 148-149 (Fla.App. 4 Dist. 1992) (Polen, J., specially concurring).

Dralus

A Florida appellate court was appalled that wife's attorney billed approximately \$20,000 in fees for a divorce involving approximately \$55,000 of marital property distributed to wife. Wife then asked the trial court order husband to pay wife's legal fees. The trial court ordered husband to pay wife's legal fees, but the appellate court reversed, saying:

At the onset, we must note that we are alarmed by the amount of the fees billed and collected by the wife's attorney. [footnote omitted] In the arena of marital law, this is a case of very modest financial proportions. The parties' marriage lasted twenty years and produced one minor child who was seventeen years of age at the time of the final hearing. The husband is a salesperson employed by Sears and the wife was working part-time in a flower shop. The net value of their marital assets was \$109,201.00, the vast majority of which is comprised of the equity in the marital home and the husband's future pension benefits. The case presented no serious financial issues and no new or unique issues of law. No exceptional results were achieved. The husband made a weak attempt to obtain primary residential custody of the minor son and bickered over the division of personal property accumulated during the marriage. These conflicts produced an abundant crop of pleadings and contempt proceedings focused at the husband. However, the discovery was neither extensive nor

¹¹ *Vogedes v. Vogedes*, 596 So.2d 147, 148 (Polen, J., concurring).

complex and the basic conflicts were resolved by stipulations and the uncontested opinion of a certified public accountant the wife retained. The trial consumed one-half day.

Against this backdrop, the wife's attorney billed the wife \$10,051.50 in attorney's fees and \$2,510.82 in costs for the case through trial. He billed an additional \$8,431.00 in fees and \$298.70 in costs for the postjudgment proceedings on property distribution and allocation of fees and costs for a grand total of \$21,292.02. In contrast, the total net value of marital assets, principally the equity in the marital home, distributed to the wife was \$54,600.00. Thus, the wife's attorney's fees and costs represent 39% of her net worth accumulated over the life of the marriage. To pay part of this obligation, the wife was forced to sell her jewelry and obtain a \$16,000.00 commercial loan.

In the posttrial proceedings, the wife sought to shift the awesome burden of these fees onto the husband. In support of his charges, the wife's attorney submitted three affidavits to the court which detail costs expended and hours worked. [footnote omitted] The first affidavit represents charges through trial. The second affidavit shows the charges for the posttrial proceedings. The third affidavit is the wife's attorney's estimate of the fees charged and costs incurred which he believed were unnecessary and resulted from the husband's lack of cooperation and "stonewalling." This amount came to a total of \$3,417.70. [footnote omitted] Trial counsel then stipulated that expert testimony on the issue of fees would not be necessary. The wife's attorney made an unsworn statement to the court explaining the affidavits. The husband's attorney made no objection to the affidavits, made no attempt to question the wife's attorney under oath and, in fact, stated, "I don't have any quarrel with the amount of fees." The trial court made no *Rowe* [*Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985)] findings nor did it request evidence upon which such findings could be based. It made no specific ruling on the issues presented by the third affidavit [FN5] nor did it make a determination of fault on the part of the husband. The court did express its dismay as to the amount of the fees in relation to the value of the case, stating:

But what we have done in this case, just taking Mr. Coleman's¹² fees, and I'm sure Mr. Dralus has had fees, we've taken assets, total assets of a hundred and nine thousand dollars, and I would guess that at least thirty-five percent of their total assets have gone to pay attorneys to divide that hundred and nine thousand dollars.

I'm not proud of a system that allows that to happen of [sic] peoples [sic] lives, but it's happened.

FN5. The dissent points out that the trial judge commented at the conclusion of the proceedings that he had not presided in the case-in-chief and could not say whose fault the fees were. The trial court, however, had before it Mr. Coleman's affidavit that detailed the unnecessary hours expended which were attributed to the husband's fault. The trial court did not address the substantive truth of that affidavit and, therefore, did not rule on the issue.

[The trial judge] then ordered that the husband pay one-third of the fees.

From the record before us, it appears that the judicial process in this case has failed, as far as the attorney's fee issue is concerned. At least part of the blame for this unfortunate circumstance falls upon the husband's trial counsel. Knowing full well that the husband could be required to pay all or a substantial part of the wife's fees, the husband's counsel failed to object to the amount of fees or to require Mr. Coleman to produce proper proof of the *reasonableness* of the fees charged. In fact, he stipulated to an amount which would raise

¹² Mr. Coleman was wife's trial attorney in *Dralus*.

grave questions in the mind of any reasonable person. Thus, the record is inadequate to enable this court to fully resolve the attorney's fee issue.

Mr. Coleman argues that it is now too late to explore the reasonableness of his fee. He asserts that the stipulation at the trial level, followed by the trial court's award without the benefit of *Rowe* findings, together with the failure of the wife to question reasonableness in this appeal, deprives us of jurisdiction to address the matter. In support of his position, he cites numerous cases in which appellate courts have declined to address issues which they determine not to be properly before them. There is a distinct difference, however, between declining to consider a matter and lacking the authority to do so. In considering the constitutionality of a statute applied retroactively, our supreme court in *Cantor v. Davis*, 489 So.2d 18, 20 (Fla. 1986), explained its authority to address issues not raised in the trial court:

Prudence dictates that issues ... should normally be considered at the trial level to assure that such issues are not later deemed waived. *Once this Court has jurisdiction, however, it may at its discretion, consider any issue affecting the case.* (Emphasis supplied.)

Although such power of an appellate court should be used sparingly, it is clear that it exists. Nonetheless, in this case, it is not necessary to rely solely on our discretionary authority since the wife raised the general issue of attorney's fees in her cross-appeal. Necessarily entwined in the issue of what percentage of fees the husband should pay is the reasonableness of the fees charged. The husband cannot be required to pay all or part of an unreasonable fee.

It is generally accepted that a court in a dissolution proceeding does not have the authority to interfere with the contractual obligation of a client to pay his or her lawyer. An exception to that rule occurs when, as here, the lawyer seeks to impose a charging lien in the dissolution case. See *Lochner v. Monaco, Cardillo & Keith, P.A.*, 551 So.2d 581 (Fla. 2d DCA 1989); *Conroy v. Conroy*, 370 So.2d 1188 (Fla. 2d DCA 1979), *cert. denied*, 381 So.2d 765 (Fla. 1980).[FN6] Mr. Coleman seeks to impose a charging lien on the wife's remaining assets for the unpaid balance of his fee. He has thus submitted for the court's determination the issue of what, if anything, his client should pay him. [footnote omitted]

FN6. This line of cases may not reflect the current flow of the law in domestic relation cases. This court in *Wrona v. Wrona*, 592 So.2d 694(Fla. 2d DCA 1991), expressed its concern regarding the wasting of marital assets on avoidable litigation expenses and emphasized the authority of the court to limit attorney's fees to an amount that is reasonable to compensate for necessary services. In *Browne v. Costales*, 579 So.2d 161 (Fla. 3d DCA), *review denied*, 593 So.2d 1051 (Fla. 1991), the court, in addressing the issue of attorney's fees charged to the wife, found them to be excessive and unreasonable and remanded to the trial court for a redetermination of the wife's fees.

....

We, therefore, reverse the portion of the order relating to the wife's attorney's fees. We do not pass on the reasonableness of Mr. Coleman's fee, since it is within the province of the trial court to determine such issue in its reconsideration of who should pay all or part of those fees. Thus, we remand with the following instructions.

....

(2) In the event the amount paid thus far to Mr. Coleman is more than the amount the court determines to be reasonable, the court shall order a refund of the excess, and the wife will be discharged from further obligation on such attorney's fees.

Dralus v. Dralus, 627 So.2d 505, 506-508 (Fla.App. 2 Dist. 1993).

Tomaino

Wife hired a \$300/hour divorce attorney in Illinois to review the work of her \$250/hour divorce attorney in Florida, and then she asked the court to order Husband to pay for both of her attorneys. The appellate court reversed the trial court's order on attorney's fees, because of duplication of efforts by Wife's two well-qualified attorneys.

Getting divorced is a very costly proposition in Florida. Attorney's fees seem to rise astronomically. If the parties have assets to fight about, attorneys fees of \$50,000 to \$200,000 are not unusual. We have warned before about the excesses in this area. See *Katz v. Katz*, 505 So.2d 25 (Fla. 4th DCA 1987).

This problem of escalating litigation and fees has to be solved. There must be an incentive on both parties to economize on legal fees and costs if the cost of divorce is to be controlled. There may be ways of limiting discovery, using court-appointed experts to review financial information rather than having each party hire their own, or allocating the sum total of reasonable fees of both parties between the litigants on some proportional basis so that each shares at least some responsibility for fees in the ultimate award. The Bench, Bar and the legislature need to do some serious thinking about solutions to preserve the validity and integrity of the system. Otherwise, it will fall by its own costly weight.

Tomaino v. Tomaino, 629 So.2d 874, 875-876 (Fla.App. 4 Dist. 1993).

These paragraphs of *Tomaino* were quoted with approval in *Wiederhold v. Wiederhold*, 696 So.2d 923, 925 (Fla.App. 4 Dist. 1997).

Cole

Trial court ordered husband to pay wife's attorney fee of \$30,500, but husband argued he could afford to pay only \$9000. Appellate court affirmed and ordered husband to pay wife's attorney out of husband's future earnings. The appellate court then wrote the following one-paragraph comment.

The second district's observations in *Wrona v. Wrona*, 592 So.2d 694 (Fla.2d DCA 1991), are especially worthy of reiteration in this case. All too often, the parties in domestic litigation forget that their actions have costs attached to them. Attorneys must be encouraged to explain at the start the probable costs of impending litigation and to clarify to the parties that "no matter who is ordered to pay the attorneys, the payments will reduce either marital assets or future earning capacity that may be needed to pay child support or alimony." *Id.* at 697. All concerned should keep in mind that a primary purpose of Florida's divorce law is "[t]o mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage." § 61.001(2)(c), Fla.Stat. (1993).

Cole v. Cole, 648 So.2d 252, 253 (Fla.App. 3 Dist. 1994) (per curiam).

Donoff

The appellate court quoted the opinion of the trial court, “in hopes that the parties heed some of the wisdom imparted to them by the trial court”:

These are all matters of serious financial concern but just as stated in the Final Judgment the Court feels that the litigation in these matters has been excessive. Both parties seem to irritate each other to the point where both parties take extreme positions. This has resulted in ridiculously large litigation costs over the course of this divorce which are getting to the point of endangering the financial security of the children in an otherwise affluent family. The court has previously ruled that the parties have equivalent abilities to pay their legal costs and the Court has not found that one side should bear the other side's legal costs due to a higher proportion of excessive litigation. Both sides are litigating themselves into a much lower standard of living. Continual litigation is going to result in complaints by both sides that the Final Judgment of the Court did not award them sufficient money because they have spent so much money litigating. It will result in petitions to modify the Final Judgment, further emergency hearings because of the inability to pay the Higashi School and so on. It would be a tragedy if the children suffered because the parties cannot stop litigating.

Donoff v. Donoff, 691 So.2d 1091, 1093 (Fla.App. 4 Dist. 1997).

The appellate court concluded:

We agree with the trial court that the instant case has been over litigated to the point of absurdity. The mere fact that the former wife alone has incurred over \$300,000 in fees demonstrates the ridiculous amount of litigation the parties have engaged in. Accordingly, we feel compelled to emphasize once again our disdain for excessive fees in dissolution of marriage actions. See *Katz v. Katz*, 505 So.2d 25 (Fla. 4th DCA 1987) (recognizing the responsibility of the parties, the marital bar and the bench at the trial and appellate level to be mindful of unnecessary expense in the litigation of dissolution matters so as not to dissipate assets of innocent unrepresented children); *Tomaino v. Tomaino*, 629 So.2d 874 (Fla. 4th DCA 1993); and *Kass v. Kass*, 560 So.2d 293 (Fla. 4th DCA 1990) (also recognizing that the problem of escalating fees in dissolution of marriage actions needs to be solved).

Donoff v. Donoff, 691 So.2d 1091, 1093 (Fla.App. 4 Dist. 1997).

Dziuba

A Florida appellate court wrote:

Finally, the former husband has appealed the trial court's order that denied attorney's fees to both parties. In the trial court and in this appeal, the former husband has argued that the former wife engaged in unnecessary litigation and therefore should be required to contribute to his attorney's fees. See § 57.105, Fla. Stat. (1999); *Rosen v. Rosen*, 696 So.2d 697 (Fla. 1997). Although the former wife presented this same argument to the trial court, she has not made that argument on appeal. The trial court found that both parties needed assistance to pay their fees, both parties lacked an ability to pay the other's fees, and both parties engaged in unnecessary litigation. The record supports these findings.

We remind attorneys and parties in divorce proceedings that the appellate courts' discussions in cases such as *Rosen, Wrona v. Wrona*, 592 So.2d 694 (Fla. 2d DCA 1991), and *Dralus v. Dralus*, 627 So.2d 505 (Fla. 2d DCA 1993), are intended to deter parties from unnecessary litigation and to encourage litigants in divorce to make efficient, cost-effective decisions. When attorneys invoke these cases to provoke litigants into yet another round of evidentiary hearings to determine which party was the more litigious or unreasonable, they are encouraging the very conduct that the cases seek to discourage. *Dziuba v. Dziuba*, 784 So.2d 1192, 1194 (Fla.App. 2 Dist. 2001).

Moakley v. Smallwood, (Fla. 2002)

Judge Renee Goldenberg, writing in her handbook on Florida family law, repeatedly suggests that attorneys who engage in unnecessary litigation could be personally sanctioned.¹³ As support for her view, Judge Goldenberg cites *Moakley v. Smallwood*, and *Diaz*, in which the Florida Supreme Court held that attorneys who engaged in bad-faith litigation could be ordered to reimburse the reasonable attorney's fees of the opposing party.

Remarkably, the Florida Supreme Court in *Moakley* failed to cite either *Katz*, *Wrona*, *Dralus*, or their progeny. Instead, the Florida Supreme Court in *Moakley* cited mostly non-divorce cases in its review of the law, for example:

In *Pittman*, this Court approved an award of fees against an attorney, where the trial court found that the attorney had unnecessarily conducted foreclosure proceedings on a mortgage for the sole purpose of increasing his fee and that the attorney was acting in his own self-interest and against the wishes of his client. *United States Sav. Bank v. Pittman*, 80 Fla. 423, 86 So. 567, 572 (1920).

Moakley v. Smallwood, 826 So.2d 221, 224 (Fla. 2002)

Diaz, (Fla. 2002)

In *Diaz* — a companion case to *Moakley* — the Florida Supreme Court considered attorney's fees in a divorce case. Earlier, an intermediate appellate court wrote in *Diaz*:

The trial court concluded that at the outset of this case, it should have been obvious that (1) the wife had made a generous and desirable settlement offer; (2) there was no realistic possibility to do better in litigation; and (3) there was a high probability that the husband in litigation would do much worse. In litigation, it was probable that the \$200 per month child support figure would increase to the much higher guidelines level; that fifty percent of the marital share of the husband's pension and retirement plans would be placed at risk; and that the permanent alimony claim was unlikely to succeed. The trial court concluded that the

¹³ Renee Goldenberg, *Florida Family Law & Practice*, James Publishing Co. (Oct 2007). (See her remarks at page vi: "In 2002, the Florida Supreme Court ... showed the legal community that it was serious about therapeutic justice for the Family Court by creating a new basis for monetary sanctions against lawyers." And at page 1-5: "There is ample evidence in the appellate decisions of the frustrations of the bench with the waste of the marital estate in the adversary process. The warnings are over. Now it will no longer be tolerated.")

majority of the time spent on litigation in this case was baseless. We conclude that this determination is supported by competent substantial evidence. *Diaz v. Diaz*, 727 So.2d 954, 957 (Fla. 3d DCA 1998), quoted by the Florida Supreme Court in *Diaz*, 826 So.2d at 230.

Because the trial court made no finding of bad-faith conduct by husband's attorney, the Florida Supreme Court quashed the order for reimbursement of wife's litigation expenses.

Although the trial court felt that the case should have been settled because it was a "long shot," the trial court did not conclude that counsel engaged in bad faith conduct during the litigation. Pursuit of "long shot" claims cannot form the basis for assessing attorneys' fees against an attorney under the inherent authority doctrine. Furthermore, an attorney's failure to force his or her client to settle a colorable claim does not amount to "bad faith" justifying the imposition of attorneys' fees against the attorney.

We share the frustration of the trial court and the appellate court that, all too often, dissolution litigation is unnecessarily protracted, where a reasonable settlement at the outset would minimize the dissipation of assets and the emotional drain on the parties and their families. [FN1] See, e.g., *Mettler v. Mettler*, 569 So.2d 496, 498 (Fla. 4th DCA 1990). However tempting it would be to employ the inherent authority of the courts as a sword in dissolution cases to promote the laudable goal of reducing the amount and intensity of adversarial litigation that can result in dissipation of the parties' assets and that can have a destructive effect on the parties' emotional well-being, we cannot permit the inherent authority of the trial court to become a means to this end in this case.

FN1. As to the appropriate bounds of an attorney's advocacy in a family law case, we cite with approval from the publication by the American Academy of Matrimonial Lawyers, *Bounds of Advocacy: Goals For Family Lawyers* (2000), specifically section 1.3: "An attorney should refuse to assist in vindictive conduct and should strive to lower the emotional level of a family dispute by treating all other participants with respect"; and section 1.5: "An attorney should attempt to resolve matrimonial disputes by agreement and should consider alternative means of achieving resolution." p. 7-8. These goals also recognize that there is "substantial evidence of the destructive effect of divorce conflict on the children." *Id.* at 9 n. 13.

Diaz v. Diaz, 826 So.2d 229, 232 (Fla. 2002).

As with *Moakley*, the Florida Supreme Court in *Diaz* failed to cite either *Katz*, *Wrona*, *Dralus*, or their progeny. In both *Moakley* and *Diaz*, the issue was personally sanctioning an **attorney** for bad-faith litigation, while *Katz*, *Wrona*, *Dralus*, and their progeny involve ordering a **litigant** to pay for avoidable litigation. Because avoidable litigation can be good-faith litigation, *Moakley* and *Diaz* are distinguishable from the other Florida cases quoted in this essay.

Walker

A Florida appellate court tersely wrote:

.... As found in the final judgment, Mr. Walker is entitled to an adjustment for litigation expenses he incurred as a result of Mrs. Walker's misbehavior during the divorce proceedings. See *Wrona v. Wrona*, 592 So.2d 694, 698 (Fla. 2d DCA 1991) (stating that when parties have expended marital resources on avoidable divorce litigation, the circuit court may adjust the equitable distribution so that the party who caused the depletion bears the economic loss).

Walker v. Walker, 827 So.2d 363, 365 (Fla.App. 2 Dist. 2002).

Higginbotham

A three-judge panel of a Florida appellate court unanimously found that parenting assessment depleted marital assets, and was therefore *not* "in the best interests of the children" because of the \$20,000 expense of that assessment. I quote the entire appellate opinion:

We affirm the decision of the trial court in this matter but write on areas that otherwise cause us concern.

Dissolution of marriage cases are fraught with anxiety, emotion, and uncertainty. This case involves a seven-year marriage with three minor children. The issues were neither complex nor voluminous.

This court has previously expressed concern about parties spending limited resources that are otherwise needed for the welfare of the children. See *Wrona v. Wrona*, 592 So.2d 694 (Fla. 2d DCA 1991). Here, the trial court [footnote omitted] signed a stipulated order appointing a licensed psychologist to perform a parenting assessment, pursuant to section 61.20, Florida Statutes (2002). See Fla. Fam. L.R.P. 12.363. The psychologist selected was from Manatee County. The Husband's gross monthly income was \$5446 including overtime, and the Wife's gross monthly income was \$1560. The assets of the parties were modest. The cost of the twenty-nine-page parenting assessment was \$20,000. Scant mention was made of the assessment in the amended final judgment.

If a judicial system is trying to reach a child placement decision in the best interest of the child, it is difficult to grasp how it is in the best interest of the child to deplete the resources of the family to this extent. The concept should be to devise a more cost-effective way of doing a parenting assessment or fashion a court order that would set a financial cap on the amount to be expended, with appropriate directions to the party performing the assessment. The expert, without guidance from the court, may feel compelled to perform an array of tests not otherwise necessary. In fact, the parenting assessment in question delineated that fourteen psychological tests were performed regarding the parents and seven psychological tests were performed regarding two of the parties' three children.

The cost of the parenting assessment here was 24% of the parties' combined gross annual income and 100% of the parties' net worth as reflected on the Husband's financial affidavit.

Affirmed.

Higginbotham v. Higginbotham, 857 So.2d 341, 342 (Fla.App. 2 Dist. 2003).

Bogos

A recent case from Florida suggests that divorce attorneys and family court judges have still not found a way to prevent unnecessary divorce litigation. In *Bogos* the final judgment of the trial court was issued in July 1997. The trial judge determined that wife had reasonable attorney's fees of \$16,500, and ordered husband to pay \$9165 of her attorney's fees. Husband appealed and, five years after the final order of the trial court, the appellate court reversed and remanded. The appellate court remarked in a footnote:

This case displays symptoms of the onset of *Wrona's* disease. See *Wrona v. Wrona*, 592 So.2d 694 (Fla. 2d DCA 1991). This divorced family includes two young children who will need the financial and emotional resources of both of their parents to succeed. Hopefully, on remand, the parties will find a cure for these symptoms and will resolve the remaining issues civilly and without undue expense.

Bogos v. Bogos, 821 So.2d 383, 384, n.1 (Fla.App. 2 Dist. 2002).

Four years later, *Bogos* was again before the same appellate court, which remarked:

We reluctantly reverse once again. In our prior opinion, we warned that this case displayed the symptoms of the onset of *Wrona's* disease [592 So.2d 694 (Fla. 2d DCA 1991)] and we urged the parties to find a swift cure for the financial and emotional sake of their young children. The parties have been unable to do so. In an effort to assist in the resolution of this matter, on remand the circuit court may

Bogos v. Bogos, 936 So.2d 1184, 1186-87 (Fla.App. 2 Dist. 2006).

Kasm

Twenty years after *Katz*, divorce attorneys and family court judges have still not found a way to prevent unnecessary divorce litigation. The appellate court wrote:

Both parties, having now spent over \$50,000 in attorneys' fees, appear no closer to resolving the financial issues remaining from their childless, ten-year marriage. The symptoms of *Wrona's* [FN2] disease appear in the record. In hopes of treating these symptoms before they become a full-blown illness that could devastate this couple financially, we remand with a more detailed mandate than usual.

FN2. *Wrona v. Wrona*, 592 So.2d 694, 696-97 (Fla. 2d DCA 1991);
see also *Bogos v. Bogos*, 821 So.2d 383, 384 n. 1 (Fla. 2d DCA 2002).

Kasm v. Lynnel, 975 So.2d 560, 565 (Fla.App. 2 Dist. 2008).

This is the second time that the *Kasm* case was before the Florida intermediate appellate court. The first time was in *Kasm v. Kasm*, 933 So.2d 48 (Fla.App. 2 Dist. 2006).

Florida Family Law Procedure

In November 1995, the Florida Supreme Court amended the Family Law Rules of Procedure for the first time in response to cases like *Katz*, *Wrona*, and *Dralus*. Notice the slowness of change in the law — the first edition of these new rules came more than eight years after *Katz*. There were three places where *Katz* and progeny affected the new rules of procedure.

First, there was the case management conference mentioned in *Wrona*:

RULE 12.200. CASE MANAGEMENT AND PRETRIAL CONFERENCES

(a) **Case Management Conference.** A case management conference may be ordered by the court at any time on the court's initiative. A party may request a case management conference 30 days after service of a petition or complaint. At such a conference the court may:

....

(7) pursue the possibilities of settlement;

....

Commentary

1995 Adoption. This rule addresses issues raised by decisions such as *Dralus v. Dralus*, 627 So.2d 505 (Fla. 2d DCA 1993); *Wrona v. Wrona*, 592 So.2d 694 (Fla. 2d DCA 1991); and *Katz v. Katz*, 505 So.2d 25 (Fla. 4th DCA 1987), regarding the cost of marital litigation. This rule provides an orderly method for the just, speedy, and inexpensive determination of issues and promotes amicable resolution of disputes.

This rule replaces and substantially expands Florida Rule of Civil Procedure 1.200 as it pertained to family law matters.

In re Family Law Rules of Procedure, 663 So.2d 1049, 1063-65 (Fla. 1995).

Second, there was a new mandatory financial disclosure form, which simplified discovery.

Rule 12.285 Mandatory Disclosure

....

Commentary

1995 Adoption. This rule creates a procedure for automatic financial disclosure in family law cases. By requiring production at an early stage in the proceedings, it is hoped that the expense of litigation will be minimized. *See Dralus v. Dralus*, 627 So.2d 505 (Fla. 2d DCA 1993); *Wrona v. Wrona*, 592 So.2d 694 (Fla. 2d DCA 1991); and *Katz v. Katz*, 505 So.2d 25 (FLA. 4th DCA 1987). A limited number of requirements have been placed upon parties making and spending less than \$50,000 annually unless otherwise ordered by the court. In cases where the income or expenses of a party are equal to or exceed \$50,000 annually, the requirements are much greater.

In re Family Law Rules of Procedure, 663 So.2d 1049, 1070 (Fla. 1995).

And, third, there was a caution in the use of masters instead of judges.

Rule 12.490 GENERAL MASTERS

....

Commentary

1995 Adoption. This rule is a modification of Florida Rule of Civil Procedure 1.490. That rule governed the appointment of both general and special masters. The appointment of special masters is now governed by Florida Family Law Rule of Procedure 12.492. This rule is intended to clarify procedures that were required under rule 1.490, and it creates additional procedures. The use of general masters should be implemented only when such use will reduce costs and expedite cases in accordance with *Dralus v. Dralus*, 627 So.2d 505 (Fla. 2d DCA 1993), *Wrona v. Wrona*, 592 So.2d 694 (Fla.2d DCA 1991), and *Katz v. Katz*, 505 So.2d 25 (Fla. 4th DCA 1987).

In re Family Law Rules of Procedure, 663 So.2d 1049, 1076 (Fla. 1995).

In adopting these new rules of procedure for family courts, the Florida Supreme Court clearly approved of the need expressed in *Katz*, *Wrona*, and *Dralus* to reduce legal expenses of divorces in Florida.

Other States

I have made several searches of the Westlaw databases to find cases in other states in which an appellate court either approved or ordered a litigant to compensate the other party for unnecessary or avoidable litigation in a divorce. This is a difficult search to do in online legal databases such as Westlaw, because the target words and phrases are much more commonly found in ordinary cases about the financially stronger party paying their ex-spouse's legal fees, as a way of helping that the weaker party litigate their divorce. I am *not* especially interested in cases in which a judge remarks how the high cost of attorney's fees depletes marital assets — everyone who has experienced a litigated divorce knows that — although such cases at least recognize the existence of a problem that needs a solution.

Holloway, (Tex.App. 1983)

An appellate court in Texas ordered a husband to pay the entire cost of the appeal, because his attorney filed 646 pages of documents, “most of which is irrelevant to this appeal” and “were not referred to in the briefs”:

Rule 448 of the Texas Rules of Civil Procedure provides that if the case is reversed on appeal, the appellant shall be entitled to an execution against the appellee for the costs occasioned by the appeal, but further provides that the court may tax the costs otherwise for good cause. In the exercise of our discretion under this rule, we tax the entire costs of the appeal against Pat Holloway. We conclude that good cause exists for doing so because Pat Holloway's counsel has caused to be filed in this court a transcript in four volumes aggregating 646 pages, most of which is irrelevant to this appeal, including abandoned

pleadings, temporary orders, motions in limine, numerous notices of intention to take depositions of various witnesses with written interrogatories attached, commissions to take depositions, notices to take oral depositions, docket sheets, jury lists, briefs filed in the trial court, and the like. These papers, all of which were included in the specific request of counsel, are not referred to in the briefs, but they have added hours to our labor in finding and studying the documents relevant to the appeal. In previous cases we have taxed the costs of unnecessary papers against the successful party, but this sanction has evidently been too mild to deter this reprehensible practice. Consequently, in this case, we tax the entire cost of the appeal, including the eight volume statement of facts, against appellant Pat Holloway. *Holloway v. Holloway*, 671 S.W.2d 51, 63 (Tex.App. 5 Dist. 1983).

Schussler, (N.Y.A.D. 1985)

A trial court in New York state ordered that husband-defendant pay attorney's fees of wife-plaintiff, after the husband "engaged in unnecessary and protracted litigation". Husband appealed, and the appellate court affirmed the award of attorney's fees.

Finally, we address defendant's contention that the award of counsel fees to plaintiff's attorney should be deducted from the marital assets. The record establishes that, after plaintiff commenced this action in Nassau County, defendant brought several proceedings in New York County, and took an appeal to the Appellate Division, First Department, seeking to modify the temporary custody award, 86 A.D.2d 787, 447 N.Y.S.2d 7. He brought two posttrial motions, also seeking, inter alia, to alter the custody arrangement, and took appeals from the denial of those motions. The trial of this action lasted 11 days, largely due to defendant's placing six expert witnesses on the stand to counter the testimony of plaintiff's one expert witness. Defendant has engaged in unnecessary and protracted litigation in an apparent attempt to exhaust plaintiff emotionally and financially. Under these circumstances, the award of counsel fees should not be deducted from the total value of the marital assets, but is deemed defendant's separate liability, payable from his separate property. *Schussler v. Schussler*, 487 N.Y.S.2d 67, 71 (N.Y.A.D. 2 Dept. 1985).

Kelly (N.J.Ch. 1992)

Husband "rejected a recommendation of the Matrimonial Early Settlement Panel that was close to the advice of his then attorney."¹⁴ The trial court issued a judgment that "closely approximated" the recommendation of the Panel. Wife then filed for reimbursement of her attorney's fees because husband allegedly unreasonably rejected both the recommendation of the Panel and of his attorney. The trial court denied wife's motion for attorney's fees, for the following reasons:

Fees in family actions are normally awarded to permit parties with unequal financial positions to litigate (in good faith) on an equal footing. *Anzalone v. Anzalone Bros. Inc. and Anzalone*, 185 N.J.Super. 481, 486-7, 449 A.2d 1310 (App.Div.1982). With the addition of bad faith as a consideration, it is also apparent that fees may be used to prevent a maliciously motivated party from inflicting economic damage on an opposing party by forcing expenditures for counsel fees. This purpose has a dual character since it sanctions a

¹⁴ *Kelly v. Kelly*, 620 A.2d 1088, 1089 (N.J.Super.Ch. 1992).

maliciously motivated position and indemnifies the “innocent” party from economic harm. *Fagas v. Scott*, supra, 251 N.J. Super. at 194, 197-200, 597 A.2d 571.

In the first instance, if both parties litigate in good faith, fees would not be awarded unless the parties economic positions were disparate. Clearly, the parties must provide the court with financial information in such a case. However, the second instance, **where one party acts in bad faith, the relative economic position of the parties has little relevance.**¹⁵ The purpose of the award is to protect the “innocent” party from unnecessary costs and to punish the “guilty” party. The court should afford protection and impose punishment regardless of the assets available to the innocent party. Accordingly, the need to produce economic information lessens as the “bad faith” of the party against whom fees are sought increases; conversely the court may not award fees in the absence of disclosure demonstrating economic disparity unless the moving party shows “bad faith”.

In this case, there is no economic disparity. Although the Defendant's gross weekly income is approximately three times that of Plaintiff (\$631 v. \$245), after adjustment for allowable tax and union dues expenses the disparity is considerably less (\$433 v. \$200). When child support and alimony payments are considered the parties are in essentially identical economic positions (\$218 v. \$205). Moreover, the equitable distribution ultimately ordered divided the parties' assets equally. Thus, absent a showing of bad faith, a fee award is inappropriate.

The term “bad faith” is not easily defined. The revised Fourth Edition of BLACK'S LAW DICTIONARY defines bad faith as

“the opposite of ‘good faith’, generally implying or involving actual or constructive fraud or a design to mislead or deceive another or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.”

This definition requires that the action of the party against whom fees are sought must be such as to suggest an improper motive. It implies something more than a showing of a mistaken, unreasonable or frivolous position (although the degree of unreasonableness may be such as to permit an inference as to motive). It requires a party to have malicious motives, to be unfair, to desire to destroy the opposing party, to use the court system improperly to force a concession not otherwise available.

We can conclude with some certainty that bad faith and frivolity are not synonymous. In 1988, the legislature adopted N.J.S.A. 2A:15-59.1 permitting the recovery of counsel fees if the pleading of a non-prevailing was “frivolous”. [footnote omitted] That term is statutorily defined as either (1) “in bad faith solely for the purpose of harassment delay or malicious injury” or (2) “without any reasonable basis in law or equity”.

....

Thus, under N.J.S.A. 2A:15-59.1 the court may award fees for “bad faith” positions or “unreasonable” positions while under N.J.S.A. 2A:34-23 only “bad faith” positions (in the absence of financial inequality) support an award of fees.

Several other considerations support the conclusion that a mistaken or frivolous position — as opposed to a maliciously motivated position — cannot support an award of fees in a dissolution context. First, of course, is the general philosophy that, absent specific authorization to the contrary, the court should allocate fees to the litigant incurring them.

¹⁵ Emphasis added by Standler. This sentence has been quoted in two published appellate opinions in New Jersey.

[citation omitted] Although this may impose a financial burden upon a prevailing litigant, it insures that meritorious defenses are not discouraged for fear of an adverse decision and consequent award of fees. After balancing the “unfair” burden of imposing the cost of his victory on a successful litigant against the danger of deterring the presentation of meritorious positions, the Supreme Court clearly favors free access. See Pressler, Current N.J. Court Rules, Comment 1 on R.4:42-9 (1992) at 997-8.

....

For this reason, Defendant's [Husband's] failure to accept the recommendations of his attorney and the Matrimonial Early Settlement Panel, although very close to the ultimate determination made after trial, does not invoke the award of fees. The Defendant is under no obligation to accept such recommendations or advice. Indeed, a party is not obligated to negotiate. So long as the position assumed is not motivated by an attempt to “torture” the other party, bad faith cannot be found. Plaintiff may not like the position taken by Defendant, but he is entitled to take that position.

Kelly v. Kelly, 620 A.2d 1088, 1090-1092 (N.J.Super.Ch. 1992).

The trial judge concluded:

In sum, Defendant's pendente lite behavior does not clearly suggest malice and his failure to accept the recommendation of either his lawyer or the MESP is not legally sufficient to justify the award of fees. While this result imposes a substantial burden on Plaintiff, it is, in light of her economic parity, required by the judicial philosophy of imposing fees upon the party incurring them. While the wisdom of a policy encouraging settlements by threatening to award fees if an “unreasonable” position prevents a settlement may be fairly debatable, the adoption of such a philosophy (which constitutes a reversal of the status quo) must first occur. Such directions must come from an Appellate Court and under existing law I am compelled to deny the application.

Kelly v. Kelly, 620 A.2d 1088, 1092 (N.J.Super.Ch. 1992).

While *Kelly* is only a trial court opinion and thus has no precedential value, *Kelly* has been cited in two reported opinions of the intermediate appellate court in New Jersey.

Kelly v. Kelly, 262 N.J.Super. 303, 307, 620 A.2d 1088 (Ch.Div.1992), did state that "where one party acts in bad faith, the relative economic position of the parties has little relevance" because the purpose of the award is to protect the innocent party from unnecessary costs and to punish the guilty party. Here [in *Yueh*], in what could be considered an unexpected ruling after the course of events, at the very end the judge said defendant was the culpable party, despite the plaintiff being in constant disregard of court orders and discovery procedures.

Yueh v. Yueh, 748 A.2d 150, 157 (N.J.Super.A.D. 2000).

In 2008, another appellate court in New Jersey wrote:

While neither party has addressed the Rule 5:3-5(c) factors on award of counsel fees, including the financial circumstances of the parties and their ability to pay, it is clear that "where one party acts in bad faith, the relative economic position of the parties has little relevance." *Kelly v. Kelly*, 262 N.J.Super. 303, 307, 620 A.2d 1088 (Ch.Div.1992). The court in *Yueh v. Yueh*, 329 N.J.Super. 447, 748 A.2d 150 (App.Div.2000), cited the *Kelly* case and explained that where a party acts in bad faith the purpose of a counsel fee award is to protect

the innocent party from unnecessary costs and to punish the guilty party. *Id.* at 461, 748 A.2d 150.

Welch v. Welch, 951 A.2d 248, 254 (N.J.Super.Ch. 2008).

Morino v. Swayman, (Alaska 1999)

A dissenting judge in Alaska remarked about unnecessary divorce litigation:

We also should not encourage unnecessary hearings in cases involving change of visitation or custody. Such hearings force the custodial parent to pay attorney's fees, call witnesses, and incur the expense of psychologists and other experts. Professor Janet Weinstein notes the counterproductive effect of unnecessary litigation on all parties:

Rather than teaching parents to communicate and collaborate effectively after divorce for the benefit of their children, [the adversarial system] builds higher walls.... Further, the process is disempowering, as it forces the parties to place their fates in the hands of their attorneys and the court. In the process, the family's resources are expended and depleted with no beneficial outcome for the child or the parents.[FN15]

FN15. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of the Child and the Adversarial System*, 52 U. Miami L.Rev. 79, 133 (1997). See also *id.* at 124 (“Litigation costs drain resources which could otherwise be used for the children's needs.”).

Morino v. Swayman, 970 P.2d 426, 432 (Alaska 1999) (Fabe, J., dissenting).

Julius, (N.J.Super. 1999)

A trial judge in New Jersey appointed a guardian ad litem for husband, after husband had retained and then fired *nine* successive attorneys during the first 18 months of a divorce case. This case is an extreme example of how to control a litigant who is dissipating marital assets.

A year and a half after inception of this litigation, at a point where defendant had gone through major expenditures for some nine attorneys (not counting others who had been interviewed and rejected), and faced with yet another request for relief of counsel, the initial trial judge in this matter found that defendant was sufficiently “confused” to “warrant a psychological evaluation” as to his “mental and emotional circumstances”. The judge directed that defendant submit to a psychiatric evaluation by Dr. Allwyn Levine, who would advise the judge whether a guardian *ad litem* should be appointed on defendant's behalf. The judge stated that if necessary, she would appoint Elwell, who happened to be present in the courtroom on another matter, as defendant's guardian ad litem. The judge expressed concern that defendant's

depletion of what may arguably be marital liquidity and marital funds in order to secure the services of very competent attorneys in this matter over the year-and-a-half, is a wasteful effort, even the attorneys would agree. And we just can't permit it to go on any further, but I do want the benefit of Dr. Levine's report before I impose on [defendant] ... [a guardian ad litem who] would be doing the decision making and negotiating and, in fact, securing the services of counsel.

The judge told defendant that if he failed to make an appointment with Dr. Levine by December 20, 1995, she would appoint a guardian ad litem to act on his behalf. An order was entered on December 20, 1995 after defendant appeared in court pro se. Although not finding defendant in contempt, the order indicated that "Mr. Julius ... seems to be suffering from some confusion as to what is expected of him in this matter and how to proceed...."

On December 29, 1995, based upon plaintiff's counsel's representations that defendant had not complied with the December 20 order, the trial judge entered an order appointing Elwell as guardian ad litem for defendant. Defendant did not attempt to appeal from this decision.

Julius v. Julius, 727 A.2d 79, 80 (N.J.Super.A.D. 1999).

The appellate court affirmed the appointment of the guardian ad litem for Mr. Julius:

R. 4:26-2(b)(4) provides that "[t]he court may appoint a guardian ad litem for ... an alleged incompetent person on its own motion." See also *Chambon v. Chambon*, 238 N.J.Super. 225, 231, 569 A.2d 822 (App.Div.1990). Here, defendant, an apparently intelligent party, exhibited patterns of behavior during the lengthy matrimonial litigation which were reasonably interpreted by the trial judge as either deliberately obstructive or the result of psychological stress or disease. An order for defendant's psychiatric examination was initially ignored. The circumstances clearly warranted appointment of someone who would enable the litigation to move forward while protecting defendant's interests.

....

.... The court had to act to prevent waste of the marital assets and in connection with defendant's business operations. No less significantly, the court had to ensure fairness in the ongoing matrimonial litigation. Whether by designation of an attorney-in-fact, fiscal agent, or by other equitable appointment, the court of chancery is not powerless to devise practical means of rendering justice in the face of problems created by a litigant intentionally or unintentionally.

Here, objective evidence of defendant's troubled psychiatric history lends support to our appraisal of the scenario confronting the judges below. Defendant was not legally incompetent. However, he appears to have been, at least until a change in medication midway through 1996, psychologically unwilling or unable to comply with the court's directions, to represent himself effectively, or to allow counsel to do so.

Julius v. Julius, 727 A.2d 79, 85-86 (N.J.Super.A.D. 1999).

Staple, (Mich.App. 2000)

In a negotiated divorce settlement agreement, wife waived her right to seek modification of the amount of alimony, despite an unambiguous statutory entitlement to have the amount of alimony modified. Wife later moved in trial court to increase the amount of alimony. The trial court denied wife's motion and wife appealed. The appellate court held that the divorce settlement agreement was binding and enforceable, and that wife had forever waived her right to seek a modification of alimony. The appellate court said:

We are mindful of this Court's earlier expression of dissatisfaction with any approach that leaves the litigants and their lawyers unsure of how to frame the settlement with certainty and

confidence that their alimony agreement is modifiable or nonmodifiable. On this point, our Court's earlier expression regarding the importance of clarity merits repeating:

Having reached a resolution regarding the intent of the parties, we now express our conviction that it is a waste of precious judicial and client resources for the parties to leave to this court the determination of the parties' intent regarding whether the alimony is in gross or periodic. In order to prevent this very type of protracted litigation, the parties' or the court's intent should be clearly and unequivocally expressed upon the record and in the ultimate instrument that incorporates the alimony provision.

All too often, the parties involved have no idea what the differences are between alimony in gross and periodic alimony, much less how those intentions should be expressed in the judgment. Accordingly, it should be incumbent upon the bench and bar to make it crystal clear to the parties what it is they are agreeing to and what the implications of their acquiescence may be.

[*Pinka v. Pinka*, 520 N.W.2d 371, 374 (Mich.App. 1994).]

Staple v. Staple, 616 N.W.2d 219, 228-229 (Mich.App. 2000).

Northcutt, (Va.App. 2002)

A trial court in Virginia awarded husband \$1500 in attorney's fees, wife appealed, appellate court affirmed and also ordered the trial court to order wife to pay husband's "reasonable amount of attorney's fees" on appeal and remand. The appellate court summarized the facts:

In contrast, the evidence showed that wife's actions exacerbated the parties' financial problems. Wife delayed the sale of the family business for more than nine months, and it took a court order to finally effectuate the sale. [FN4] In the interim, interest on the business debts continued to accrue. Similarly, wife refused to return a leased vehicle timely, thereby causing husband to incur penalties. Wife also conceded that she had contributed nothing to running the family business post-separation and that husband did all the work. Finally, wife admitted that she did not make all the marital property available for auction, notwithstanding a court order requiring her to do so. Husband valued the wrongfully retained property at \$5,895.

FN4. Husband requested court approval for the sale of the business in July 1999 and had identified a buyer willing to pay \$600,000 for the business. Wife, however, insisted that the business should be sold at auction. The court ordered a sale by auction as she requested. However, wife never completed the procedures necessary for this type of sale. Instead, she eventually agreed to the private sale in February 2000 but did not complete the necessary paperwork until April 2000.

Northcutt v. Northcutt, 571 S.E.2d 912, 915 (Va.App. 2002).

The appellate court addressed the merits of ordering wife to pay part of husband's legal fees:

.... Wife contends that the trial court abused its discretion in awarding husband \$1,500 in attorney's fees because wife caused "unnecessary litigation."

The parties were before the trial court on July 30, 1999 for a full hearing on the merits. At that hearing, wife requested additional time to prepare appraisals of the family business and present them to the court. The trial court awarded the divorce and rescheduled the support and equitable distribution hearing for August 24, 1999 to allow wife time for her appraisals. When the parties reconvened on August 24, 1999, wife insisted that the business be auctioned rather than sold at private sale because she felt an auction would secure a higher sales price.

Although it required wife to assume the risk of any price below \$600,000, the trial court allowed wife to proceed as she requested and ordered sale by auction no later than October 1999. Wife did not complete the auction procedures.

Husband then scheduled a final hearing for January 5, 2000. At wife's request, this hearing was rescheduled to February 23, 2000. Finally, on February 23, 2000 wife agreed to the private sale for a purchase price of \$600,000. The trial court approved the sale and ordered that the parties "execute promptly all such documentation such that this sale may be completed as soon as possible." Nevertheless, wife did not execute the deed until compelled to do so at a subsequent court appearance on April 11, 2000.

There were similar delays in proceeding to final distribution because wife did not promptly pursue discovery. The trial court granted several continuances at wife's request, and she still failed to produce an accounting. As the trial court stated at the end of the equitable distribution and support hearing, "I'm fed up with this case and the delays that have been occasioned so unnecessarily, and some of the delays ... have created a decrease in [the] value of the property of the marriage. This has been horrible." Under these circumstances, the award of a part of husband's attorney's fees was reasonable. Thus, the trial court did not abuse its discretion in awarding husband attorney's fees.

Northcutt v. Northcutt, 571 S.E.2d 912, 916 (Va.App. 2002).

McGreevey (N.J.Ch. 2008)

About a month after I posted the first version of this essay, a trial court in New Jersey decided the divorce case of James E. McGreevey, the former governor of New Jersey, and his wife, Dina Matos. They were married on 4 October 2000 and apparently began living in separate homes sometime after October or November 2004. However, for legal purposes, they agreed that their marital assets should be valued on 15 Feb 2005.¹⁶ The husband filed for divorce in February 2007.

The husband offered his wife a settlement of approximately \$300,000 for her share of marital assets after the 4.4 year marriage. The greedy wife refused the settlement offer and the divorce was litigated.¹⁷ After each of the ex-spouses spent approximately a half-million dollars on legal fees, and after an 11-day trial, the judge awarded the wife a lump sum payment of \$110,000 in marital assets but no alimony. The wife made a very bad decision to spend approximately five dollars in attorney's fees for each dollar she was awarded from her ex-husband. If the wife had accepted the settlement offer, not only could she have avoided a half-million dollar debt for attorney's fees, but also she would have received three times more money from her ex-husband than the eventual award from the judge.

¹⁶ *McGreevey v. McGreevey*, at pages 5 and 30 (N.J.Super.Ch. Div. 8 Aug 2008).

¹⁷ Kathleen O'Brien, "McGreevey divorce: A double-barreled smack-down from the judge," *Newark Star-Ledger* (10 Aug 2008 07:59 EDT); Angela Delli Santi, "No clear winner in ex-NJ Gov. McGreevey divorce," *Associated Press* (11 Aug 2008 16:15 EDT).

The opinion of the judge in the trial court is instructive about the waste of money on legal fees in this case. At the beginning of the opinion, the judge provided an overview of the case and an observation that there are “no winners” in divorce litigation.

Initially, general findings with reference to the testimony in this case must be addressed. It was apparent to this court that both parties took widely divergent positions and were unwilling to compromise despite significant efforts by the court system to have them resolve their matter out of the spotlight, by utilization of mediation and settlement conferences. Their positions were polarized and as the court will find in detail later, were somewhat disingenuous and unsubstantiated. As was expressed to the parties on numerous occasions, their ability to work together and fashion a financial settlement was clearly in their best interest. No one in a matrimonial case ever wins. Although the posturing in this case suggests that both parties were confident that they would prevail on most, if not all of their issues, rarely is that the case. Especially, in a matter as high profile as this, the court was disappointed that much of the testimony, particularly as it related to public figures within the State of New Jersey, and the dirty laundry associated therewith, needed to be aired in public and in the press. As will become apparent, there are no “winners” in a litigation of this type.

McGreevey v. McGreevey, at page 2 (N.J.Super.Ch. Div. FM-20-01166-07G 8 Aug 2008)

http://www.judiciary.state.nj.us/decisions/McGreevey_opinion.pdf

The trial judge wrote:

Mrs. McGreevey’s demeanor in the courtroom and her position of an entitlement to an extremely generous standard of living reflected her anger and disappointment as to the end of her marriage. Her testimony was designed to generate a greater amount of support based upon circumstances that ended her marriage. The factors she suggested are not supported by the law and evidence.

Ibid. at page 3.

In considering wife's demand for alimony, the trial judge remarked on wife’s “extensive debt” and “excessive” expenses:

Currently ... she has an enormous amount of debt considering she last earned \$82,000 per year. Her mortgage and home equity line debt totals over \$400,000 and her unpaid attorney’s fees are over \$400,000 as well. This extensive debt is what creates her “need” at this time. Without this debt, she would be able to manage even though these expenses, as a homeowner and mother, are higher now than during the beginning of her marriage. Many of her expenses (such as \$700 per month for clothes and \$700 per month for vacations) are clearly excessive.

Ibid. at page 5. Underlining in original.

Wife's debt was despite her receiving \$275,000 as an advance on royalties for her “tell-all” book about her marriage. *Ibid.* at pages 18-19.

Both parties asked the judge to order the other party to reimburse some of their attorney's fees.

The trial judge wrote:

The plaintiff, who has had three different attorneys (two firms and one sole practitioner), has amassed fees totaling \$498,000. Of this amount, only \$169,478.97 has been paid.

Mr. Haller's firm incurred fees of over \$205,000 from January 1, 2008 up until present.

Mrs. McGreevey has had one firm for the entire case. She has incurred fees of \$526,468.66. Of that amount she has paid \$50,500.

Both attorneys are asking that the court assess fees against the other party for various reasons, primarily the "bad faith" they assert motivated their adversary.

In reviewing the factors outlined above [in New Jersey Court Rule 5:3-5(c)] the court finds the following:

(1) The financial circumstances of the parties;

Neither party has the financial resources to pay the amounts requested. Their earnings are not sufficient, nor do they have assets available to them.

Their circumstances are outlined in greater detail throughout this opinion.

(2) The ability of the parties to pay their own fees or to contribute to the fees of the other party;

Given the large amount of fees, both have insufficient funds to pay their own attorneys, let alone those of their former spouse.

(3) The reasonableness and good faith of the positions advanced by the parties;

As outlined extensively in the opinion, the court finds that both parties took unreasonable positions, some of them in response to what they considered unsupported or legally deficient positions proffered by the other side. This does not necessarily mean bad faith.

In *Kelly v. Kelly*, 262 N.J. Super. 303 (Ch. Div. 1992), the court outlined the effect of bad faith and unreasonableness in considering an award of counsel fees:

[W]here one party acts in bad faith, the relative economic position of the parties has little relevance. The purpose of the award is to **protect the "innocent" party** from unnecessary costs and to punish the 'guilty' party. The court should afford protection and impose punishment regardless of the assets available to the innocent party.

Accordingly, the need to produce economic information lessens as the 'bad faith' of the party against whom fees are sought increases; conversely the court may not award fees in the absence of disclosure demonstrating economic disparity unless the moving party shows 'bad faith'.

Id. at 307. (emphasis added [by trial judge]).

Under this theory, neither Mr. nor Mrs. McGreevey acted "innocently." Consequently, there is no need to protect them from economic harm. Each party took positions which prolonged this litigation. Mr. McGreevey refused to negotiate on any financial issues until the custody case was resolved. Clearly [sic], the financial issues (other than child support) could have been addressed and hopefully resolved, saving both parties the cost of this litigation. Mrs. McGreevey was alleged to have been intractable in her position on custody up until the last minute, when that portion of the case settled. Mr. Haller [one of husband's attorneys] provides details in his certification of numerous situations that required motions to be filed to address his client's concerns. In addition, both attorneys point out that the other party failed to provide complete discovery. They argue this hampered their ability to prepare for trial. If the attorneys wish to be awarded fees based upon incomplete discovery, their position is unreasonable, as it was not raised as an issue before the litigation.

The fact that each party took positions that were in response to what they perceived were unsupported allegations by the other party, created unreasonable negotiating tactics at times making each party blameworthy. *Kelly* distinguishes between a “mistaken or frivolous position,” which will not warrant an award of fees” and a “maliciously motivated position,” which will warrant such an award. *Id.* at 309.

....

Although during these proceedings things have become contentious at times and both parties have taken positions that have been unsuccessful, their conduct has not escalated to bad faith nor reached the level of malice demonstrated by these cases to constitute bad faith. Neither party has misrepresented facts or intentionally defied a court order. The parties have filed Orders to Show Cause, motions, and made what the court determined to be unsuccessful arguments which could have been resolved by communication, bringing the issues to the parenting coordinator, or other forms of negotiations. Accordingly, neither party should be awarded counsel fees under a theory of unreasonableness. *Ibid.* at pages 40-43.

At the time of trial, Husband had spent \$498,000 on attorney's fees and wife had spent \$526,469 on attorney's fees. *Ibid.* at page 43.

Finally, the trial judge concluded:

Considering the factors listed above, neither party will be awarded counsel fees. The financial circumstances of both parties are insufficient to pay fees of this magnitude. Ms. Matos was earning \$82,000 per year, and the court has imputed annual income to Mr. McGreevey of \$175,000. Though each party is obligated to pay their own counsel fees, the fees incurred are so great that both parties will have difficulty using their own resources to fully pay their own attorney, let alone, be able to pay for the other's counsel fees. For the aforementioned reasons the requests for counsel fees for both parties are denied.

Ibid. at page 44.

Note that — ignoring the time value of money and assuming that each spouse needs \$40,000/year for living expenses — it will take wife more than 12 years to pay her attorney's fees and it would take husband approximately 4 years at his imputed income to pay his attorney's fees. Recall that the marriage lasted less than 5 years. The parties will be paying their attorneys instead of saving for their daughter's college education or instead of saving for the parties' retirement.

My View

Because of the importance of permitting attorneys to argue for new law, I believe judges should *not* sanction attorneys who engage in a good-faith attempt to make new law.

Instead, I suggest that the burden of controlling litigation be placed on the litigants themselves. This is reasonable, because an attorney is an agent of the client, and therefore the attorney must generally follow the directions of the client. If the attorney encourages or insists on avoidable litigation, then I suggest that the client should discharge that attorney and find a new attorney.

Furthermore, if, for example, H insists on spending \$10,000 in attorney's fees to litigate the disposition of an asset that is worth \$100, then the judge ought to recognize such litigation as unreasonable and grant W's motion to have H reimburse W for W's attorney's fees spent on that unreasonable issue. In this way, H is entitled to waste his money on unnecessary litigation, provided that he reimburses any innocent party — here W — for the injury caused by H's waste.

Malpractice litigation is unlikely to be a cure for avoidable or futile divorce litigation. There are three obvious possibilities of malpractice by an attorney:

1. the attorney misinforms a client about the existing law, and the client relies on that advice when choosing to engage in futile litigation.
2. the attorney substantially exaggerates the probability of prevailing during litigation, and the client relies on that advice when choosing to engage in futile litigation.
3. the attorney encouraged litigation primarily because of the attorney's desire for large legal fees for a litigated divorce, which is a breach of the attorney's fiduciary duty.

In practice, it will be difficult for a client to successfully sue an attorney for malpractice in a divorce case:

1. the statutory law for equitable distribution of marital property has a long list of factors to consider,¹⁸ but no guidance about the relative importance of each factor. Therefore, there is no unique "correct answer" on which all judges can agree, or which an attorney can calculate in advance of a trial. One can not rely on predictions about equitable distribution.
2. an experienced attorney avoids giving a probability of prevailing during litigation, because (a) that attorney knows that a client is rarely completely honest with the attorney; (b) that attorney knows that surprises can occur during a hearing or trial that alter the expected outcome; and (c) that attorney recognizes that there are good legal arguments for why each party should prevail. These three reasons make it difficult to predict the judge's decision.
3. It is difficult to prove in court that an attorney had an impermissible motivation in giving advice to the client.

It is easy to blame attorneys for futile litigation, but the reality is that many divorce clients *want* to fight in court.

¹⁸ See, for example, Florida Statute § 61.075, which lists nine factors plus the catchall: "any other factors necessary to do equity and justice between the parties."

judicial overload

Since the introduction of so-called no fault divorce, in which a divorce is granted if either party requests it, there is no longer any need to show a good reason for divorce. Instead, the plaintiff in a divorce action alleges “irreconcilable differences” and lives a separate life from the other spouse for at least the time mentioned in the divorce statute, and then the plaintiff is entitled to a divorce. As a result of such easy-to-obtain divorces, there has been an epidemic of divorces in the USA. The number of family court judges has not increased in proportion to the number of divorces, so the judicial workload has exploded to unmanageable levels. There are three effects of this judicial overload in divorce courts.

First, judges in divorce courts are strongly encouraging lawyers to settle divorce cases, instead of litigating the divorces. Not only do litigated divorces, with their long series of motions, dissipate a party’s assets on attorney’s fees, but they also burden the judge with more decisions.

Second, because judges in divorce court are greatly overburdened by a large number of cases, judges must dispose of cases in the easiest and quickest possible manner. That means that cases are mechanically decided on an assembly-line basis, with minimal judicial thought. A litigant’s attempt to change the often anachronistic common law in the area of divorce is often doomed to failure, because judges do not have the time to carefully consider the arguments of counsel.

Third, when litigants demand that a judge spend more time than a judge has available, a judge is likely to appoint a master to conduct a hearing and make recommendations. A master is an experienced local divorce attorney, but *not* a judge. The master makes a written report with recommendations to the judge. The judge nearly always accepts the master’s recommendations, to minimize the judge’s workload and to discourage litigants from making exceptions to the master’s findings of facts and the master’s recommendations.

State governments *should* hire more judges, and build more courtrooms, so that litigants can receive a genuine and thoughtful hearing on their arguments for a change in the law. In this way, the legal system can preserve citizens’ rights to a fair hearing before a judge.

Conclusion

In my search of the Westlaw database on 18 June 2008 for reported state court decisions in all fifty states, neither *Katz*, *Wrona*, nor *Dralus* have been cited in reported cases outside Florida. This suggests that Florida has *not* solved the problem of unnecessary divorce litigation, because, if Florida had solved such an important problem, surely other states would take notice.

In addition to minimizing attorney's fees and avoiding delay in courts, there is an important advantage to settling a divorce case instead of asking the judge to decide their case: the settlement can be according to the values that the parties themselves hold, instead of having society (through a judge) impose values on the parties.

Fundamentally, the responsibility for large attorney's fees in a litigated divorce belongs to the party(ies) who refuse to reach an amicable settlement. If one or both of the parties is intransigent, a litigated divorce seems inevitable. If the fault is with an attorney who encourages litigation, the party who hired that attorney should dismiss that attorney and find another attorney who will pursue good-faith negotiation, because an attorney is an agent of the client. As suggested in *Wrona*, the trial judge should order that the party who caused needless litigation to pay not only all of their own attorney's fees, but also to reimburse the attorney's fees for the other party. Such a remedy follows tort law for waste, by making those responsible for waste (i.e., unnecessary litigation) pay for the damage they did to innocent parties.

If both parties agree on a division of marital property and prepare a written draft of a settlement agreement, they can hire attorneys¹⁹ to put the settlement agreement in good legal form and present it to a judge. Such an uncontested divorce can have minimal legal fees and be relatively painless. Recently, a new style of divorce attorney has appeared, called "collaborative divorce", in which the written contract between attorney and client specifically prohibits litigation, and which removes any economic incentive for the attorney to litigate.²⁰

¹⁹ An attorney can represent only one party, so each spouse should have their own attorney.

²⁰ During a collaborative divorce, if one or both of the spouses wish to litigate, then each spouse needs to hire a new attorney to represent them.

This document is at **www.rbs2.com/waste.pdf**

My most recent search for court cases on this topic was in June 2008.

first posted 6 July 2008, revised 29 Aug 2008

Go to my essay on the history of prenuptial and postnuptial contract law in the USA at <http://www.rbs2.com/dcontract.pdf> . In the April 2004 version of that essay, page 28 cites several long-running divorce cases and pages 32-33 mention the lack of precise calculation by judges.

return to my homepage at <http://www.rbs2.com/>