A Road Map to Attorney Fees in Domestic Relations Actions

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In Michigan, the appellate courts review a trial court's decision to award attorney fees and its determination of the reasonableness of the fees under an abuse of discretion standard.[i] Sanction awards (which can entail an award of attorney fees), premised upon the filing of frivolous documents are reviewed under a clearly erroneous standard.[ii] Therefore, given an apparent influx of remanded cases relative to a (i) determination of the basis for an award and/or (ii) reasonableness of the fees, one might conclude that we, as attorneys, are not doing a sufficient job of providing the trial judge with an adequate road map to sustain the fees we're seeking on behalf of our clients.[iii] While this article will discuss the premise under which an attorney fee might be awarded, the focus is on the "reasonableness" requirements related to such awards.

Michigan follows what is commonly referred to as the "American rule" with regard to awards of attorney fees. As a result, attorney fees are generally only recoverable as provided by specific statute, court rule, common-law exception, or contract.[iv]

In family law cases, the following statutes, court rules and common-law exceptions might provide a basis, where applicable and appropriate, for such an award:

MCL 552.13(1) & MCR 3.206(C)

In divorce or separate maintenance actions, MCL 552.13(1) provides in pertinent part that:

> "…the court may require either party …. to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency. It may award costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered…"

Most family law practitioners are familiar with MCR 3.206(C), which while significantly broader in application that MCL 552.13(1) is still limited in application to those domestic relations action referenced under MCR 3.201. MCR 3.206(C) provides that:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
> (2) A party who requests attorney fees and expenses **must allege facts sufficient to show** that
> (a) the party is **unable to bear the expense** of the action, **and** the other party is able to pay, or

(b) the attorney fees and expenses were **incurred because the other party refused to comply with a previous court order, despite having the ability to comply.**

(Emphasis added).

When a party seeks an award because of misconduct or a violation of a court order, the award must be for attorney fees that were incurred because of the misconduct.[v] The party requesting attorney fees must prove that they were incurred and that they **are reasonable**.[vi] Further, "[w]hen requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the **reasonableness** of those services."[vii] A court may not award attorney fees solely on the basis of what it perceives to be fair or on equitable principles.[viii]

Attorney fees in divorce actions are not recoverable as a matter of right, but may be awarded where necessary to preserve the receiving party's ability to maintain or defend the action. [ix]

There has been much reliance on *Maake v Maake,* 200 Mich App 184, 189 (1993) and *Gates v Gates,* 256 Mich App 420, 438 (2003) for the proposition that "[i]t is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support". This tends to be an overly generalized statement that requires specific analysis of the facts and circumstances presented on a case by case basis. A review of the types of facts and circumstances that would give to a claim under MCR 3.0206(C)(2) is beyond the scope of this article. However, it may be important to note that at least one recent case has held that even where need was demonstrated, when the party in need's misconduct gave rise to the exorbitant fees she incurred a denial of a request for contribution to such fees may be appropriate.[x]

When reviewing the availability of an award under MCR 3.206(C), it may be noteworthy that the Staff Comment with regard to the 2003 amendment to MCR 3.206 states, in pertinent part, as follows:

> …amendment of MCR 3.206(C) … was suggested by the Michigan Judges Association to (1) reduce the number of hearings that occur because of a litigant's vindictive or wrongful behavior, (2) shift the costs associated with wrongful conduct to the party engaging in the improper behavior, (3) remove the ability of a vindictive litigant to apply financial pressure to the opposing party, (4) create a financial incentive for attorneys to accept a wronged party as a client, and (5) foster respect for court orders.

Common Law Exception to the American Rule

One common-law exception to the American Rule is where "the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of litigation."[xi] Therefore, this exception potentially opens to the door to fees resulting from "bad" conduct beyond those provided for under MCR 3.206(C)(2)(b). To avail oneself of this "exception", a causal connection must be shown between the misconduct and the fees incurred.[xii] The recognition of this common-law exception was acknowledged in the context of divorce in *Hawkins v. Murphy,* 222 Mich App 664, 669 (1997).

MCR 2.114(E) and (F)

MCR 2.114(E) provides that:

> If a document is signed in violation of [MCR 2.114], the court …..**shall impose** upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, **including reasonable attorney fees**. The court may not assess punitive damages.
>
> (Emphasis added).

MCR 2.114(F) goes on to provide that:

> In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

MCL 600.2591(1) and (2) taxed under MCR 2.625(A)(2)

Dovetailing on MCR 2.114(F), MCL 600.2591(3) provides that an action or defense is "frivolous" when at least 1 of the following conditions is met:

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
(iii) The party's legal position was devoid of arguable legal merit.

If a trial court finds that an action or defense is frivolous, MCL 600.2591(1) and (2) provide that the court **shall** award to the prevailing party the amount of costs and fees **actually incurred, which includes "reasonable fees"**.[xiii] But note, it isn't sufficient for the trier of fact to simply find that a pleading or position is frivolous. It must also articulate an explanation of why it was frivolous and also provide an analysis of why the fee was reasonable.[xiv]

Discovery Sanctions

Attorney fees may also be awarded under various court rules as a sanction for discovery violations and/or due to a failure to admit. As a result attorney fees may be awarded as a remedy for:

1. A failure to preserve electronically stored information – MCR 2.302(B)(5);
2. A failure to supplement discovery responses when mandated under the court rules-MCR 2.302(E)(2) as provided in MCR 2.313(B);
3. In relation to the signature implications of discovery requests and responses – MCR 2.302(G)(4);
4. Other failures relating to discovery – MCR 2.313.

Pursuant to Contract

A negotiated settlement and/or a judgment of divorce containing negotiated terms (as opposed as a result of a trial) represent contracts that are subject to contract law principals.[xv]

"Clear, unambiguous, and definite contract language must be enforced as written and courts may not write a different contract for the parties…."[xvi] "[A] contractual clause providing that in the event of a dispute the prevailing party is entitled to recover attorney fees is valid."[xvii] Therefore, if the terms of the settlement or consent judgment authorize the award of attorney fees, an award under such circumstances may not only be permitted, but may be mandated, depending upon the terms and conditions set forth in the instrument. The party seeking fees pursuant to such an instrument must establish the terms and conditions of the contract that support the award of fees requested.[xviii] But even under such circumstances, a party seeking attorney fees pursuant to "contract" must still provide evidence of the reasonableness of the same.[xix] "[W]hen a contract specifies that a breaching party is required to pay the other side's attorney fees, only reasonable, not actual attorney fees should be awarded[.]"[xx]

At its crux, and as a common thread to all basis for attorney fee awards, is the requirement that the attorney fees awarded be reasonable. Therefore, it isn't sufficient to merely set forth a basis for an award, but one must also establish the reasonableness of the fees and expenses sought.

Establishing Reasonableness

It is important to remember that the party requesting attorney fees bears the burden to prove that the fees are reasonable.[xxi] An evidentiary hearing may be required to determine the reasonableness of the fees if they are disputed.[xxii] But, if the parties create a sufficient record to enable review, then the trail court need not hold an evidentiary hearing.[xxiii]

There is no precise formula by which a court may assess the reasonableness of an attorney fee.[xxiv] However, how the court goes about determining reasonable attorney fees has been the subject of several recent appellate court decisions. In *Smith v Khouri*,[xxv] the Michigan Supreme Court fine-tuned the multi-factor approach of determining a "reasonable attorney fee" as set forth in prior appellate decisions, finding the courts should begin its analysis by:

> 1. determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a); and
> 2. then multiply this fee by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood [v Detroit Automobile Inter-Ins Exch*, 413 Mich. 573, 321N.W.2d 653 (1982)].[xxvi]

This analytical approach was recently re-affirmed.[xxvii] The number produced by this calculation is the starting point for calculating a reasonable attorney fee.[xxviii] "The reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work" and the "market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question."[xxix]

Smith offered the following guidance with regard to determining the hourly rate customarily charged:

> The reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work. "The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question. We emphasize that "the burden is on the fee applicant to produce satisfactory

> evidence – in addition to the attorney's own affidavit – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. The fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports. But we caution that the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality. Both the parties and the trial courts of this state should avail themselves of the most relevant available data. [xxx]
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> (Internal citations omitted).

Boiled down to its basics, with respect to the first prong of the analysis – "the fee customarily charged in the locality for similar legal services"– the courts are instructed to "use reliable surveys or other credible evidence of the legal market." [xxxi] Trial courts have routinely relied on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan.[xxxii] "An award of a reasonable fee, i.e., a fee similar to that customarily charged in the locality for similar legal services, which, of course, may differ from the actual fee charged or the highest rate the attorney might otherwise command."[xxxiii] "Reasonable fees are not equivalent to actual fees charged."[xxxiv] Importantly, "reasonable fees 'are different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region'."[xxxv] Additionally, if more than one attorney for the party seeking fees expended time on the matter, the market rate for each such attorney must be separately determined.[xxxvi] It isn't sufficient that the attorney simply establish what their contracted or standard hourly rate entails. At least one court has held that it was error for a trial court to conclude that it could not second guess an attorney's hourly fee.[xxxvii] This is because an attorney's standard hourly rate is not necessarily a "reasonable hourly rate".[xxxviii]

In considering the second prong of the *Smith* analysis – "the hours expended"– time and labor involved (factor 1 under MRPC 1.5 [a] and factor 2 under *Wood*), the Court in *Smith* directs the courts to "determine the reasonable number of hours expended by each attorney." [xxxix] To do so, the fee applicant must provide satisfactory evidence in support of the hours being claimed. Generally speaking, detailed billing records coupled with the attorney's affidavit attesting to the charges for legal services rendered in defense (or prosecution) of the matter should be enough for the reviewing court to satisfy itself of the reasonableness of the hours being claimed.[xl] If sufficient information is provided upon which the court can determine a reasonable fee, an evidentiary hearing may not be required.[xli] However, bills which lack specificity, despite indicating the hours spent, may preclude genuine inquiry into the reasonableness of the charges and/or the purpose for such charge.[xlii] Consequently, if one believes that fees may be sought from the other party, it might be important to make sure billing records are sufficiently detailed so that a determination can be made of whether the services billed were reasonable or necessary or otherwise subject to challenge.[xliii] This is because 'reasonableness of an attorney-fee claim cannot be assessed in a vacuum."[xliv]

The resulting "baseline" reasonable fee may then be adjusted upward or downward according to the factors in *Wood* and MRPC 1.5(a) [hereinafter "Wood Factors"] which should be briefly discussed by the court in its review of these factors.[xlv] The Wood Factors are:

> (1) the professional standing and experience of the attorney;
> (2) the skill, time and labor involved;
> (3) the amount in question and the results achieved;
> (4) the difficulty of the case;
> (5) the expenses incurred; and

(6) the nature and length of the professional relationship with the client.[xlvi]

A court's failure to permit counsel to make an adequate record in support of the Wood Factors may, itself, constitute an abuse of discretion.[xlvii]

Therefore, not only is important for counsel to sufficiently analyze and set forth the basis for an award, but could must also provide a sufficient factual basis addressing each of the Woods Factors which it believes will support the fees requested.[xlviii] It is then incumbent upon the court to specify, in its findings and opinion, the premise for the award and its own analysis of the Woods Factors which it believes justifies the award. If the record is insufficient and/or the trial court fails to provide a sufficient indication of how it reached its decision, remand (and increased cost and expense to the parties) will be the likely result.

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[i] *In re Temple Marital Trust,* 278 Mich App 122, 128 (2008). Also see, *Reed v Reed,* 265 Mich App 131, 164 (2005).
[ii] *Guerrero v Smith,* 280 Mich App 647, 677 (2008).
[iii] The issue of fees on appeal are beyond the scope of this article and have, therefore, not been addressed.
[iv] *Dessart v Burak,* 470 Mich 37, 42 (2004).
[v] *Reed v. Reed,* 265 Mich App 131, 165 (2005).
[vi] *Id.,* at 165-166.
[vii] *Id.,* at 166.
[viii] *Id.*
[ix] *Stoudemire v Stoudemire,* 248 Mich App 325, 344 (2001).
[x] *Gusmano v Gusmano, per curiam* unpublished Mich App opinion 310954, 315908 (1/14/14).
[xi] *Reed, supra* at 164-165 (quotation omitted).
[xii] *Id.,* at 165.
[xiii] *In re Attorney Fees & Costs,* 233 Mich App 694, 705 (1999).
[xiv] See, *LaFave v. LaFave, per curiam* unpublished Mich App opinion 301955, 302207 (2/23/12).
[xv] *Gramer v Gramer,* 207 Mich App 123, 125 (1994). Also see *Rose v Rose,* 289 Mich App 45, 49 (2010).
[xvi] *Wausau Underwriters Ins Co v Ajax Paving Indus, Inc.,* 256 Mich App 646, 650 (2003).
[xvii] *Fleet Business credit, LLC v Krapohl Ford Lincoln Mercury Co,* 274 Mich App 584, 589 (2007).
[xviii] *Roberts v Saffell, per curiam* unpublished Mich App opinion 295500 (6/28/11).
[xix] *Zeeland Farm Servs, Inc v JBL Enterprises, Inc.,* 219 Mich App 190, 196 (1996).
[xx] *Papo v Aglo Restaurants of San Jose, Inc.,* 149 Mich App 285, 299 (1986).
[xxi] *Smith v Khouri*, 481 Mich 519, 526 (2008)
[xxii] *Miller v Meijer, Inc,* 219 Mich App 476, 479 (1996)
[xxiii] *Head v Phillips Camper Sales & Rental Inc,* 234 Mich App 94, 113 (1999)
[xxiv] *In re Temple Marital Trust, supra* at 138.
[xxv] *Smith, supra.*
[xxvi] *Id.,* at 530-531
[xxvii] By way of example, and without limitation, see: *Adair v Michigan (on Fourth Remand),* 301Mich App 547 (2013) and *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust,* _____Mich App ____ (2014)
[xxviii] *Smith, supra,* at 531.

[xxix] *Id.,* citing to *Eddleman v. Switchcraft, Inc*., 965 F.2d 422, 424 (C.A.7, 1992).
[xxx] *Smith, supra* at 531-532 (Taylor, C.J. plurality opinion).
[xxxi] *Id.,* at 530-531
[xxxii] See, e.g., *Zdrojewski v Murphy*, 254 Mich App 50, 73 (2002); *Temple v Kelel Distributing Co. Inc*., 183 Mich App 326, 333, (1990).
[xxxiii] *Smith, supra* at 519 (Taylor, C.J., plurality opinion).
[xxxiv] *Zdrojewski*, supra at 72.
[xxxv] *Smith, supra* at 528, quoting *Coulter v Tennessee,* 805 F2d 146, 148 (CA 6, 1986).
[xxxvi] *Id.,* at 534. See also, *Augustine v Allstate Ins Co,* 292 Mich App 408, 439 (2011) and *Adair, supra.*
[xxxvii] *In re Mary V. Martindale Trust, per curiam* unpublished Mich App opinion 32978 & 303478 (5/23/13).
[xxxviii] *Zdrojewski, supra* at 72-73.
[xxxix] *Smith, supra.,* at 532.
[xl] *Id.,* at 532.
[xli] *John J. Fannon Co v. Fannon Products, LLC,* 269 Mich App 162, 172 (2005).
[xlii] *VC, Inc v. Kraft Foods Global, per curiam* unpublished Mich App opinion 304506,309678 (12/26/13).
[xliii] *Id.*
[xliv] *Id.* It may also be noteworthy, that the trial court's use of heavily redacted billings was found to be an abuse of discretion in awarding reasonable attorney fees.
[xlv] *Smith, supra,* at 531.
[xlvi] *Id.,* at 588.
[xlvii] *Ferreira v. Ferreira, per curiam* unpublished Mich App opinion 305640 (1/21/14).
[xlviii] See *Ewald v Ewald,* 292 Mich App 706, 726 (2011).