

**Litigating in a Manner to Maximize (or Minimize) an Attorney Fee Application Based on *Yueh v. Yueh*, 329 N.J. Super. 447 (2000) and *J.E.V. v K.V.*, 426 N.J. Super. 475 (2012)**

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In family law cases, including post-judgment cases, it is typically less expensive for a client if the case is settled rather than proceeding to a trial or a hearing. While the alternative dispute resolution methods (mediation, collaborative and arbitration) can help to reduce attorney's fees, whenever proceeding forward in litigation, attorneys and their clients should be mindful of the potential for one party to have to contribute to the attorney's fees of the other party. As set forth below, I recommend attorneys be aware of and make their clients aware of the factors used in an attorney fee application (in particular the need for contribution, ability to pay, and reasonableness). This is a discussion that counsel and their client should have early in the case, not only to set expectations, but also to put the client in a proper mindset to litigate in a reasonable manner.

**Some Things We Can Learn From the Appellate Division in Regard to Attorney's Fees**

There are many published and unpublished cases addressing attorney's fees. Reviewing two of these cases, the Appellate Division decisions in *Yueh v. Yueh*, 329 N.J. Super. 447 (2000) and *J.E.V. v K.V.*, 426 N.J. Super. 475 (2012) can help us in addressing attorney fee applications. In these cases, the trial courts awarded attorney's fees to one party. Although both appellate panels provided a similar analysis, in *Yueh*, the Appellate Division reversed the trial court decision in part and remanded back to the trial court, while in *J.E.V.*, the trial judge's decision was affirmed. Both cases are worth reading (or rereading), particularly for the analysis of an attorney fee application.

In *Yueh v. Yueh*, 329 N.J. Super. 447 (2000) the underlying action was a post-judgment motion to terminate alimony that was filed by the payor spouse (ex-husband) who was the plaintiff. The ex-husband claimed he had only a pension (a portion of which was divided in the divorce) and any "earned income" he had plus the "excess" pension from his additional service (post-divorce) combined was less than \$20,000.<sup>1</sup> The question became whether the ex-husband had any additional income (above the \$20,000) and the court entered an order which set forth "if plaintiff had additional income, he was to pay defendant's counsel fees, but if it was established that he did not, then his ex-wife would pay his attorney's fees." Id. at 452. The trial court appeared to rely on this language in regard to the attorney fees ultimately awarded. The Appellate Division questioned why such a provision was necessary when the judge could resolve any fee issues at the appropriate time, and the provision could chill reasonable inquiry. Id. (footnote omitted).

Ultimately, the court granted the ex-husband summary judgment terminating his alimony obligation. *Yueh* at 456-457. The ex-husband requested attorney's fees of \$174,319.64. The trial court awarded ex-husband \$131,442.45 in attorney's fees with the reduction of \$42,877.19 being

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<sup>1</sup> Language in the parties' settlement agreement noted that if husband's income from employment and the portion of his pension benefits not subject to distribution is \$20,000 per year, or less, alimony will terminate.

attributed to ex-husband's avoidance of reasonable discovery. The ex-wife filed an appeal of the counsel fee award. The Appellate Division noted that it was obvious from the record that the post-judgment discovery aspect of the case was entirely out of control with the ex-husband filing motion after motion over the course of nearly 2 years.<sup>2</sup> Id. at 460.

The Appellate Division noted that the ex-wife did not exhibit bad faith in requesting discovery. Id. at 459. They also noted it was surprising the trial judge did not consider ex-husband's actions to be in bad faith when the record indicates there was constant disregard by the ex-husband with court orders and discovery rules. Id. at 460. The trial judge did not make findings of reasonableness or the necessity for the fees or ex-husband's ability to pay his own counsel fees. The Appellate Court considered the counsel fee award "patently outrageous and unduly punitive to the defendant" considering the record reflected the defendant (ex-wife) acted in relative good faith and the plaintiff (ex-husband) acted in relative bad faith with his "recalcitrance and excessive delaying tactics". Id. at 460.

In regard to an attorney fee application, the trial court must first determine the lodestar, which is the number of hours reasonably expended multiplied by a reasonable hourly rate. Id. at 464 (citing Rendine v. Pantzer, 141 N.J. 292, 334-335 (1995)). The Supreme Court in Rendine directed trial courts to "exclude hours that are not reasonably expended." Rendine at 335. (citations omitted). By way of example, the court could subtract the hours "spent litigating claims on which the party did not succeed and that were distinct in all respects from claims on which the party did succeed." Id. at 465. (quoting Institutionalized Juveniles v. Secretary Pub. Welfare, 758 F 2d 897, 919 (3rd Cir. 1985)). "Fees should not be awarded against a party for time expended by an obstructing party, especially where the obstructed party may as a result fail to succeed in establishing his or her position." Id.

The Appellate Division was concerned about the reasonableness of the amount of hours expended on the matter, noting a good portion was taken up in the motion practice which they viewed as unnecessary and counterproductive. Id. at 467-468. A remand was necessary because the trial court did not take into account factors such as reasonableness, ability of the parties to bear their own fees, and that the defendant (ex-wife) prevailed on almost all of the applications to the court for orders enforcing discovery. The Appellate Division specifically noted that the remand should not be taken as any direction that the plaintiff (ex-husband) is necessarily entitled to an award of counsel fees in any amount or at all as the judge is free to decide that each side should bear their own legal fees. Id. at 470. The Appellate Division clearly was signaling that each party should pay their own legal fees based on the analysis of the claim, specifically, the reasons related to the ex-wife seeking reasonable discovery (to which she was entitled) and the ex-husband spending an inordinate amount of time and effort to prevent disclosure of relevant discovery. The Appellate Division appeared to be annoyed at the number of hours spent and the number of motions on a post-judgment application to terminate alimony.

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<sup>2</sup> Defendant (ex-wife) alleged evidence of plaintiff's (ex-husband's) bad faith included the plaintiff filing 7 total motions and 28 certifications as well a motion for leave to file an appeal which was denied. Ex-husband refused to provide discovery despite court orders and he filed numerous motions to thwart ex-wife's ability to discover his true earnings.

In J.E.V. v K.V., 426 N.J. Super. 475 (2012), the wife (defendant) sought an award of permanent alimony at the time of trial. The trial court judge awarded limited duration alimony and also awarded the wife \$69,362 in counsel and expert fees out of the requested amount of \$227,710.18. The wife appealed the judge's decision with regard to the duration of alimony and the amount of attorney fees.

Although the wife was not successful on the claim for permanent alimony, the Appellate Division noted the court could award attorney fees as "success in the litigation or the parties' dispute is not a prerequisite for an award of counsel fees." J.E.V. at 492. (citing, Guglielmo v. Guglielmo, 253 N.J. Super. 531, 545 (App. Div. 1992)). Applications for counsel fees must address Rule 4:42-9(b) which requires an affidavit of service addressing R.P.C. 1.5(a), the amount of allowance applied for, and an itemization of disbursements for which reimbursement is sought. Id. 492-493. The Appellate Court noted that applications must also address the factors set forth in R.P.C. 1.5(a),<sup>3</sup> and the factors set forth in Rule 5:3-5(c):

- (1) Financial circumstances of the parties
- (2) The ability of the parties to pay their own fees or contribute to the fees of the other party
- (3) The reasonableness and good faith of the positions advanced by the parties
- (4) The extent of the fees incurred by both parties
- (5) Any fees previously awarded
- (6) The amount of fees previously paid to counsel by each party
- (7) The results obtained
- (8) The degree to which fees were incurred to enforce existing Orders to compel discovery
- (9) Any other factor bearing on the fairness of an award

Id. at 493 (citing Rule 5:3-5(c)). The party requesting the fees must have the financial need. The party paying the fees must have the financial ability to pay. The party requesting the fees must have acted in good faith in the litigation. J.E.V. at 493 (citing Guglielmo v. Guglielmo, at 545). While the court noted that fees are often awarded with unequal financial positions to allow litigation on equal footing, bad faith is also a consideration. Attorney fee awards may be used to prevent a maliciously motivated party from inflicting economic damage on an opposing party by forcing expenditures for counsel fees. Id.

In this case, Judge Jacobson concluded that the lodestar for wife's fees was \$396,085 which she divided into \$224,007 for counsel fees and costs and \$172,078 for expert fees and costs. Id. at 493-494. Husband offered to pay \$65,000 to defray these costs in addition to the amount paid through advances of equitable distribution. The judge ordered husband to pay \$69,362 which represented one-third of wife's outstanding counsel and expert fees and costs. Id. The judge

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<sup>3</sup> R.P.C. 1.5(a) (1) The Retainer Agreement; Nature and Length of Relationship with client; 2) Hourly Non-Contingent Fee; (3) Imposition of Time Limitations; (4) Likelihood that Representation Precluded Other Employment; (5) Customary Fees in Locale; Experience, Reputation and Ability of Counsel; (6) Time and Labor Required; and (7) Results obtained

deducted \$5,625 from the counsel fees because there were two attorneys present when only one was warranted. Judge Jacobson also deducted \$14,000 in counsel fees related to a pendente lite motion because the motion resulted in less net income to wife than husband had previously agreed to pay. Id. at 494. While the judge found no bad faith by either party, there was a question as to whether the wife could have participated more fully in settlement negotiations. The judge noted some of the defendant's positions such as the request for permanent alimony were unreasonable. J.E.V. at 495. The Appellate Division affirmed the trial judge's decision with regard to attorney fees.

In both Yueh v. Yueh, 329 N.J. Super. 447 (2000) and J.E.V. v K.V., 426 N.J. Super. 475 (2012), the Appellate Division noted that when a judge follows the analytical framework and makes appropriate findings of fact, a fee award is accorded substantial deference and will be disturbed only in the clearest case of abuse of discretion. Therefore, it is important for attorneys to provide the court with the "roadmap" and the appropriate information to analyze an attorney fee application.

While success in the litigation is not a prerequisite for an award of counsel fees, the reasonableness of each parties' position is a significant consideration. Although often times attorney's fees are awarded based upon an unequal financial position, litigating in a reasonable manner can help to maximize fees when you represent the dependent party and can minimize fees when representing a spouse in a superior financial position.

By taking an obstructionist position and wasting time filing unnecessary motions, a party may prevent themselves from receiving attorney's fees (or having to pay more attorney's fees). In addition, taking unreasonable positions on motions and/or a trial can also result in receiving less in attorney's fees than requested or having to pay more than anticipated. In both of these cases, the party's actions and positions during litigation clearly impacted the award of attorney's fees.

### **Litigation Tips Regarding an Attorney Fee Application**

Based upon the court rules, the case law and in particular the analysis from the Appellate Division in Yueh v. Yueh and J.E.V. v. K.V., I recommend the following tips to attorneys:

1. Review the language in Rule 4:42-9 (b), the factors in R.P.C. 1.5(a) and especially the factors in Rule 5:3-5(c). Think about these factors as you start and continue to litigate a case.
2. Properly advise your client as to the potential to obtain attorney's fees or the possibility of having to pay attorney's fees, for motions, hearings and trials.
3. Explain to your client the importance of being reasonable when litigating the case for both credibility purposes with the court and for counsel fee awards.
4. When you represent the spouse with the greater income and potential exposure for attorney's fees, convince them to contribute before being ordered to pay attorney's fees. Utilize joint assets whenever possible to pay both parties' attorney's fees.
5. When representing the supported spouse or the party in need of financial support, follow the court rules in preparing a fee application with every motion. These fee applications can help you prepare a fee application at the time of trial.

6. Scrutinize your own attorney certification to verify there are no excessive hours or duplication of services.
7. Always try to work out discovery issues prior to filing motions, because a) if you resolve the discovery issues, it costs your client less than filing a motion; and b) it demonstrates to the court your client's reasonableness and attempts to resolve the issues.
8. Convince your client to take a reasonable position in trying to resolve issues. You are more likely to resolve issues by taking a reasonable position. Even if the issue is not settled, the decision to take a reasonable position can result in obtaining more attorney's fees or paying less of the other parties' attorney's fees depending on which side you are representing. The court considers each side's positions and expects each side to be reasonable.
9. Convince your client to take a reasonable position at trial. While it may be tempting to take a longshot position because the client wants to "shoot for the moon" that position could be considered unreasonable by the court and could impact the attorney's fees.
10. Even if you settle all issues except for an attorney fee contribution, the court may allow you to submit the application/opposition on the papers to avoid additional costs for a trial.