PRACTICE FOCUS / FAMILY LAW

Trend in Fourth DCA discourages unnecessary divorce litigation

Commentary by Christopher R. Bruce

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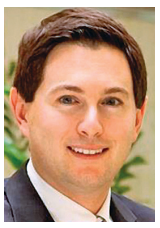
Lovers tanned by the tropics after tying the knot — on their second or third marriages after protecting their wealth through complex premarital agreements, of course — are common to coastal South Florida. Our area is also home to an abundant population of high wage earners. These demographics encourage an obstacle to settling divorce court litigation uncommon to many other parts of the country: payment of attorney fees.



Bruce

Why settle your divorce case at mediation for less than desired if your spouse will fund the six-figure tab required to ask for more money at trial? How does a cost-benefit analysis of further litigation even matter when the dollars required to pay your lawyer do not come from your own pocket?

Over the past year, the Fourth District Court of Appeal has addressed these conundrums by sending the message that the days of wealthy spouses being required to foot the tab for unrealistic divorce court litigation are over in South Florida. The court's recent mandates make clear that an impecunious spouse entitlement to attorney fees under Florida Statute 61.16 can be limited — or even eliminated — when reasonable settlements are rejected and unnecessary or unrealistic litigation ensues.

Under section 61.16, a divorce court judge "may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney fees . . . to the other party". In most cases, application of section 61.16 results in each spouse paying the cost of their divorce lawyer. This changes, though, in cases where one spouse has vastly superior income or assets available to pay the other spouse's divorce lawyer.

Practically, the spouse leaving the marriage with exceptionally higher income or assets was usually required to pay for their spouse's lawyer unless egregious conduct occurred during the divorce. This was true until February 2012 when the Fourth DCA decided *Hallac v. Hallac*.

In *Hallac*, the financial affidavits filed in the case revealed the husband earned over $500,000 a year in an investment management business while the wife had no income. Five months into the divorce litigation the husband offered his wife a settlement that included $439,000 in assets and an additional $20,000 towards attorney fees. The wife rejected her husband's offer. At trial, the divorce court judge awarded the wife roughly $200,000 less than the settlement previously offered by her husband.

After trial, the wife moved to recover an award of attorney fees pursuant to section 61.16, alleging the husband had the greater ability to pay her fees. The trial court concluded the wife had no reason to continue to litigate after the husband's last settlement offer and therefore denied her request for attorney fees incurred after receiving the offer. On appeal, the *Hallac* court determined the divorce judge did not abuse her discretion in denying the wife attorney fees because the results the wife obtained at trial fell far short of her husband's reasonable offer.

More recently, in *Hoff v. Hoff*, the Fourth DCA approved of a divorce judge's decision to deny an award of temporary attorney fees to a wife who was essentially litigating a "case about nothing". In *Hoff*, the wife was unemployed and the husband's assets exceeded hers by a factor of 20:1. The divorce judge denied the wife's request for temporary attorney fees from her husband and the wife appealed.

On appeal, the wife argued the divorce judge erred in denying her temporary attorney fees when she demonstrated she was unemployed and in a significantly inferior financial position compared to her husband. The *Hoff* court determined it was not an abuse of discretion for the trial court to deny wife's request for temporary attorney fees despite the disparity in financial positions. The court noted evidence supported the divorce judge's implicit finding that the wife's request for future fees was unreasonable based on the lack of complexity of the case. If the wife wanted to keep litigating she would need to pay her own way.

Hallac and *Hoff* should work as a tool for knocking down the "leverage effect" that payment of attorney fees hold in matrimonial settlement negotiations. Previously, it was not unusual for impecunious but nefarious spouses to take seemingly extortionist positions in settlement discussions. In effect, their negotiation stance was "Settle for my demands or experience the pain of paying both your lawyer and mine to go further." Many rational spouses would avoid "the pain" of paying two experienced matrimonial lawyers to litigate by increasing what was already a reasonable offer.

Time may pass before the matrimonial bar wakes up to *Hallac* and *Hoff* and other appellate courts adopt the Fourth DCA's reasoning. In the meantime, in most circumstances attorneys should begin memorializing the rejection of reasonable settlement offers to preserve future arguments for reducing or eliminating permanent or temporary fee awards based on *Hallac* and *Hoff*.

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