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DISTRICT IV

May 15, 2014

To:

Hon. David T. Flanagan III
Circuit Court Judge
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Madison, WI 53703

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You are hereby notified that the Court has entered the following opinion and order:

2013AP2071

In re the marriage of Maria R. Marineau v. Michael J. Marineau:
Michael J. Marineau v. Michael J. Collins (L.C. # 2012FA120)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Michael Marineau appeals an order requiring him to pay his ex-wife's attorney, Michael Collins, \$3,084.59 for services rendered during the Marineaus' divorce case and subsequent collection efforts. Marineau claims: (1) the circuit court erroneously exercised its discretion by failing to adequately explain the basis for the attorney fee award and for arbitrarily apportioning counsel's bill; (2) Marineau was entitled to a hearing on his objections to counsel's affidavit setting forth the amount of attorney fees; and (3) the circuit court erred in its determination of the amount of attorney fees due. After reviewing the briefs and record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. Rule 809.21 (2011-12).¹
We affirm in part and reverse in part.

Basis For Award

A circuit court has broad authority to award attorney fees in a family action based upon consideration of each party's need and ability to pay under WIS. STAT. § 767.241, or upon a finding of overtrial, *Ondrasek v. Ondrasek*, 126 Wis. 2d 469, 484, 377 N.W.2d 190 (Ct. App. 1985). Overtrial refers to a party's unreasonable approach to litigation that results in unnecessary proceedings or unnecessarily protracted proceedings, together with attendant preparation time. *Zhang v. Yu*, 2001 WI App 267, ¶13, 248 Wis. 2d 913, 637 N.W.2d 754. Whether excessive litigation occurred and the appropriate amount of an attorney fee award are both matters committed to the discretion of the circuit court. *See Zhang*, 248 Wis. 2d 913, ¶11 (overtrial determination); *Bisone v. Bisone*, 165 Wis. 2d 114, 123-24, 477 N.W.2d 59 (Ct. App. 1991) (amount of award).

Marineau first complains that the circuit court neither discussed the parties' respective needs and abilities to pay nor made an explicit finding of overtrial as the basis for its award of attorney fees. However, although it did not use the term "overtrial," it is plain from the transcript of the final divorce hearing that the circuit court was responding to a request for a contribution to attorney fees because Marineau had unreasonably refused to sign a marital settlement agreement or a partial marital settlement agreement—even though the parties were in essential agreement as to placement, child support, maintenance, and most of the property division. This, in turn,

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

required counsel to prepare for trial on numerous undisputed issues and more than doubled counsel's anticipated fees for the case. We are satisfied from the circuit court's questioning of both Marineau and Collins during the hearing, and the court's findings that "a lot of time and effort went into this case that didn't need to happen," that the circuit court did, in fact, base its award on a finding of overtrial.

Marineau next contends that the attorney fee award was arbitrary because the circuit court did not explain either the basis for its apportionment of responsibility for the attorney fees (60% for Marineau and 40% for his ex-wife) or the date after which it determined that excessive fees were being unreasonably incurred. Again, the record refutes Marineau's claim. The starting date of the award aligns with when counsel sent Marineau a draft of a partial marital settlement agreement, and the 60% figure is explained by the circuit court's determination that Marineau "contributed more than half to that problem [of overtrial]." In sum, we are satisfied that the circuit court acted well within its discretion both in ordering and in apportioning Marineau's contribution to his ex-wife's attorney fees.

Hearing

Marineau contends that he had a due process right to an additional hearing on his objections to the amount of the attorney fees Collins set forth in an affidavit following entry of the judgment of divorce. We disagree. The circuit court afforded Marineau an opportunity to be heard on the matter of attorney fees both at the final divorce hearing and in a written response to the itemization subsequently provided by counsel.

Marineau did not claim in his written response that Collins' hourly rate was unreasonable or that Collins did not expend the number of hours claimed on the itemized matters, and he does

not do so on this appeal. Rather, Marineau offered four specific objections to the amount of attorney fees claimed in counsel's affidavit: (1) the circuit court's award is arbitrary and not supported by evidence that Marineau intended to run up attorney fees with unnecessary litigation; (2) the term "attorney fees" should not include disbursements for actual costs; (3) the award should not include fees incurred on matters such as preparing the Findings of Fact and Conclusions of Law, that Collins would have needed to do anyway, or conferences between Collins and Marineau's ex-wife that had "no logical bearing on Mr. Marineau"; and (4) the award should not have included attorney fees that were incurred attempting to collect from Marineau after the judgment of divorce had been entered but before counsel filed his affidavit and requested the amount of fees approved. None of these objections rests upon disputed facts; they all present legal questions regarding the validity and proper interpretation of the attorney fee award. Therefore, the circuit court had no reason to schedule an additional evidentiary hearing on the objections.

Calculation Of Award

Collins' affidavit claimed that Marineau owed him 60% of \$3,123.04 (*i.e.*, \$1,873.82) for work performed and costs incurred between July 12, 2012, and November 30, 2012, in relation to the divorce, plus 100% of another \$1,210.77 that Collins incurred attempting to collect payment from Marineau. The circuit court stated that it had received Collins' affidavit and accompanying billing statements, as well as Marineau's objections, and found all of the requested attorney fees to be reasonable. The court then entered an order for judgment in the amount of \$3,084.59.

Marineau's challenge on this appeal to the calculation of the amount of the attorney fee award touches upon each of the four objections he raised in the circuit court, although he has not delineated them all as separate issues. We address each objection in turn.

First, we have already explained why the circuit court's award of attorney fees, memorialized in the divorce judgment, represented a reasonable exercise of discretion. The circuit court was not required to revisit its prior rulings on overtrial and apportionment when subsequently reviewing counsel's calculation of the actual amount of the award.

Second, Marineau offers no legal authority for the proposition that an award of attorney fees cannot include actual costs or disbursements made on a client's behalf.

Third, the fact that the itemization of counsel's work included matters that counsel would have worked on even without overtrial—such as preparing the Findings of Fact and Conclusions of Law—is entirely consistent with the circuit court's determination that Marineau was responsible for only 60%, not 100%, of the attorney fees incurred. Moreover, the inclusion of time for things like conferences with Marineau's ex-wife and other matters not directly related to correspondence or negotiations with Marineau is consistent with the purpose of the award to compensate for trial preparation that would not have been needed had Marineau not unreasonably refused to narrow the issues for trial because he would not sign a partial marital settlement agreement.

Finally, we agree with Marineau that the award of attorney fees erroneously included amounts incurred attempting to collect the award before the actual amount of the award had been approved by the circuit court, that is, before the award was finalized. Significantly, Collins does not explain why he was entitled to collect the award before the amount was set forth in a final

order. Therefore, the \$1,210.77 attributed to collection efforts should have been disallowed, and the approved amount of Marineau's contribution to his ex-wife's attorney fees should have been entered as \$1,873.82.

Accordingly,

IT IS ORDERED that the order awarding attorney fees is affirmed in part and reversed in part. *See* WIS. STAT. Rule 809.21(1). The clerk of the circuit court shall enter an amended order setting the amount of attorney fees Marineau owes to Collins under the divorce judgment at \$1,873.82.

Diane M. Fremgen
Clerk of Court of Appeals