NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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James Cottrell, Esquire
Amy Spain, Esquire
John Cottrell, Esquire
COTTRELL FLETCHER & COTTRELL, P.C.
5845 Richmond Highway, Suite 800
Alexandria, VA 22303
jcottrell@cottrellaw.com
Counsel for Plaintiff/Counter-Defendant Wife

Matthew Edwards, Esquire
Sarah Mancinelli, Esquire
AIN & BANK, P.C.
1900 M Street, N.W., Suite 600
Washington, D.C. 20036
medwards@ainbanklaw.com
Counsel for Defendant/Counter-Plaintiff Husband

Re: ***Lisa Dwoskin v. Albert Dwoskin***
Case No. CL–2019–3494

Dear Counsel:

In this divorce case, the issue before the Court is whether the Court should order either Husband or Wife to pay the other's attorney fees. If so, the issue is the reasonableness of the fees. The Court decides each party is to be responsible for his or her own attorney fees. It declines to shift fees from one party to the other. As a result, a determination as to reasonableness of the fees themselves is not necessary.

Awarding attorney fees in domestic relations cases is typically a routine, unremarkable judicial responsibility, albeit a very important one. However, there is little authority to guide trial courts in exercising their extremely broad discretion in this area. The Court heard from four of

Virginia's leading domestic relations practitioners—including two of whom the Court accepted as experts. None could point the Court to a single authority for this issue. To guide this Court's decision and to lead to fairer, more predictable rulings, it considered five non-exclusive factors to apply in fee-shifting for domestic relations cases. It also considered common erroneous reasons for shifting fees. It lists both herein so that the parties and future litigants can better understand how this Court exercises its fee-shifting discretion.

There are two distinct decisions a court must make in awarding attorney fees. First, whether to shift fees from one party to the other, and second, adjudging the reasonableness of the amount of any fees being shifted.

I. Circuit Courts Hold Broad Discretion in Awarding Attorney Fees.

Typically, litigants in Virginia hire their own lawyers and are responsible for paying them without contribution from the opposing side—even when they prevail. This is called the "American rule." "The 'American rule' provides that attorneys' fees are [ordinarily] not recoverable by a prevailing litigant in the absence of a specific contractual or statutory provision to the contrary." *Piney Meeting House Invs., Inc. v. Hart*, 284 Va. 187, 196 (2012) (brackets in original) (internal quotation and citation omitted). In the context of domestic relations, the legislature abrogated this general principle.

> In any suit for divorce, the court in which the suit is instituted or pending, when either party to the proceedings so requests, shall provide in its decree . . . counsel fees and other costs, if in the judgment of the court any or all . . . should be decreed.

VA. CODE ANN. § 20-79(b) (support actions); *see also* VA. CODE ANN. § 20-99(6) (divorce actions).[1]

An award of attorney's fees in a divorce suit is discretionary with the court upon consideration of the circumstances and equities of the entire case. *Gamer v. Gamer*, 16 Va. App. 335, 346 (1993). The key to a proper award of counsel fees is reasonableness under all the circumstances revealed by the record. *Budnick v. Budnick*, 42 Va. App. 823, 844 (2004).

Absent usual "abuse of discretion" grounds,[2] appellate courts rarely disturb a trial court's judgment as to whether to shift attorney fees from one party to the other in domestic relations

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[1] In some instances, fee shifting is mandatory unless "clearly inappropriate." *See* VA. CODE ANN. § 20-146.33 (mandating fee shifting in Uniform Child Custody Jurisdiction and Enforcement Act actions).

[2] An abuse of discretion occurs when reasonable jurists could not differ as to the proper decision. *Wynnycky v. Kozel*, 71 Va. App. 177, 193 (2019). The three principal ways a court abuses its discretion are "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." *Lambert v. Sea Oats Condo. Ass'n. Inc.*, 293 Va. 245, 252-53 (2017) (internal citation omitted).

cases. However, there are some exceptions. (1) A court fails to consider the relative financial positions of the parties. *Rowlee v. Rowlee*, 211 Va. 689 (1971); *Cirrito v. Cirrito*, 44 Va. App. 287, 300 (2004) ("[R]elative financial abilities and support issues should be considered as factors in weighing the equities. However, these factors are not exclusively determinative of whether an award should or should not be made."). (2) A court reflexively awards fees to the prevailing party. *O'Connor v. Shea*, 2020 WL 1262655, *10 (Va. Ct. App. Mar. 17, 2020). (3) A court uses fees to punish a litigant. *Alexander v. Flowers*, 51 Va. App. 404, 410 (2008). And, (4) a court criticizes a parties' inability to correctly predict the judge's ruling. *Richardson v. Richardson*, 30 Va. App. 341, 352 (1999).

The broad discretionary model is an intentional reflection of the fact that there is no statutory scheme in determining whether to award attorney's fees. *Taylor v. Taylor*, 27 Va. App. 209, 217 (1998) (internal citations and quotations omitted). "Given the unique equities of each case, [the Court of Appeals] appellate review steers clear of inflexible rules and focuses instead on 'reasonableness under all the circumstances.'" *Kane v. Szymczak*, 41 Va. App. 365, 375 (2003) (internal citation omitted). However, factors to consult merely for guidance in making reasonable rulings are helpful to both courts and litigants. *See, e.g.*, *Falkoff v. Falkoff*, 103 Va. Cir. 405 (Fairfax 2019) (enumerating factors to consider in determining whether to seal a court file); *Rudolph v. Commonwealth*, 100 Va. Cir. 481 (Fairfax 2017) (listing factors a court may consider in exercising discretion to restore firearm rights)[3]; *In re Scott*, 79 Va. Cir. 299 (Norfolk 2009) (identifying indicia of vexatiousness for use in determining litigation abuse). The Court herein attempts a compendium of non-exclusive factors any court may want to consider in exercising its broad discretion to award attorney fees. These are: (1) the financial positions of the parties; (2) whether a party unnecessarily increased the cost of litigation to the other; (3) fault in the dissolution of the marriage; (4) public policy considerations; and (5) any other factors necessary for a reasonableness ruling under all the circumstances revealed by the record.

A. The Financial Position of the Parties.

A prime reason for fee shifting in family law cases is to put the parties on equal footing. It is inequitable to have a wealthy spouse gain an advantage over a poorer spouse due only to access to resources. Money should not deny one party access to the court. *Via v. Via*, 14 Va. App. 868, 872 (1992) (where the parties have disparate abilities to access the judicial system, a complete denial of attorney's fees amounts to an abuse of discretion). "However, while 'relative financial abilities and support issues should be considered as factors in weighing the equities ... these factors are not exclusively determinative of whether an award should or should not be made.'" *Wills v. Wills*, 72 Va. App. 743, 767-68 (2021) (ellipses in original) (internal citation and quotation omitted).

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[3] Once identified, other courts can add to and explain application of the factors, as two courts recently did in the context of firearm rights restoration. *See Stoddart v. Commonwealth*, 2021 WL 80221 (Fairfax Cir. Ct. Jan. 8, 2021); *In re McGregor*, 100 Va. Cir. 352 (Fairfax 2018).

At one time it seemed an award of spousal support mandated an award of attorney fees to the payee spouse. *Thomas v. Thomas*, 217 Va. 502, 505 (1976). However, the Court of Appeals has long held that was not the intended rule. *Artis v. Artis*, 4 Va. App. 132, 138 (1987). Rather, it is simply a consideration.

B. Whether a Party Unnecessarily Increased the Cost of Litigation to the Other.

Parties may not unnecessarily increase the cost of litigation to the other and then expect reimbursement. *Cirrito*, 44 Va. App. at 301. Litigants can do this in many ways. Easy examples include repeated discovery violations,[4] refusal to meet and confer with the opposing side before asking for court intervention, and by rushing to the courthouse for the smallest of matters that are habitually resolved among counsel.

Harder examples include harassing motions practice. Of course, one lawyer's aggressive motions practice is another lawyer's harassment. It is not the place of courts to chill legitimate motions practice. However, some litigants cross the line and courts can recognize it when they see it. Similarly, there is no requirement that a party settle a dispute. However, a party's unwillingness to negotiate in good faith can be grounds for an attorney fees liability on the theory that this unnecessarily increased the cost of litigation.

This factor invites the risk that a court will erroneously shift attorney fees based baldly on the success or failure of one of the parties. While appellate courts take into consideration factors such as whether the party requesting fees prevailed, *see O'Loughlin v. O'Loughlin*, 23 Va. App. 690, 695 (1996), circuit courts do not have this authority. Trial courts may not reflexively award fees to the prevailing party. *Tyszcenko v. Donatelli*, 53 Va. App 209 (2008). "[*T*]*here is no prevailing-party entitlement* to fees under Code §§ 20–79(b) and [former] 20–99(5). . . . Instead, the trial court, in the exercise of its discretion, may award attorney's fees and costs to 'either party as equity and justice may require.'" *Mayer v. Corso-Mayer*, 62 Va. App. 713, 733 (2014) (quoting *Tyszcenko*, 53 Va. App. at 223) (emphasis in original) (internal citation and quotation omitted).

C. Fault in the Dissolution of the Marriage.

A court may consider a party's degree of fault in bringing about the dissolution of the marriage in awarding fees. *Gilman v. Gilman*, 32 Va. App. 104, 124 (2000); *Poliquin v.*

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[4] Va. Sup. Ct. R. 4:12(a)(4) provides that if a court grants a motion to compel discovery, it shall require the party whose conduct necessitated the motion to pay reasonable expenses, including attorney's fees. *Via*, 14 Va. App. at 872. The Court in this case finds "other circumstances make an award of expenses unjust." VA. SUP. CT. R. 4:12(a)(4). First, when the Court aggregates all the factors it considered in this case, it concludes an award for motions to compel are inequitable. Second, it notes that the November 19, 2020, Order is offset by the October 13, 2020, Order. The latter should have been originally submitted to Judge Alper, as the Court ruled. The June 16, 2020, Order granted relief to both sides to the degree that fee shifting would be unjust. The October 4, 2019, Order does not merit fees in the Court's opinion. Third, the Court did not award fees at the conclusion of any of the motions to compel, nor did its orders reserve the issues for trial.

Poliquin, 12 Va. App. 676, 682 (1991). However, this is not mandatory; a court may disregard fault if it otherwise considered the circumstances of the parties. *See, e.g.*, *West v. West*, 53 Va. App. 125, 136 (2008) (no fees assessed against wealthy, at-fault spouse); *D'Auria v. D'Auria*, 1 Va. App. 455, 461 (1986) (no fees assessed against at-fault spouse).

D. Public Policy Considerations.

All litigants are in control of their own legal fees because they hire the lawyers they want and have the right to condone the trial strategy. Most people make "cost-benefit" choices in the prosecution and defense of their cases when paying their own legal fees. Just because you can take a legal position or file a motion does not mean it is economically wise to do so. However, if someone feels the other party will ultimately pay the fees, then money is no object, and there is no reason to make any cost considerations. This is bad public policy. Courts have power under this factor to introduce economic reality.

E. Other Factors Necessary for a Reasonableness Ruling Under All the Circumstances Revealed by the Record.

Every case is different and balancing the equities necessitates a factor to reflect considerations outside the enumerated factors.

II. Courts Hold Broad Discretion in Determining Fee Reasonableness.

Once a court decides to shift fees, it must ensure the fees are reasonable. Since fee shifting disrupts the basic economic self-restraint of a party who believes the other will pay for his or her decisions, a court must protect the payor party from the ill-advised decision-making of the payee party. Factors for a court to consider for the exercise of its discretion in these regards are well-established.

> In determining whether a party has established a prima facie case of reasonableness, a fact finder may consider, inter alia, the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Chawla v. BurgerBusters, Inc., 255 Va. 616, 623 (1998) (citing *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship.*, 253 Va. 93, 97 (1997)).

In addition, Rule 1.5 of the Rules of Professional Conduct help define reasonable fees. The factors to consider include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

VA. R. S. CT. PT. 6 § 2 RPC Rule 1.5.

III. Applying These Attorney Fee Factors, the Court Declines to Shift Fees.

As to the first factor—the financial position of the parties—both parties are multi-millionaires after this Court's prior rulings. They each can clearly afford the fees without an unfair effect on their lifestyles. While Wife only has approximately $10 million versus Husband's $192 million in separate property, Husband must pay Wife $792,360 per year in ongoing spousal support. The Court fully considered the parties' relative financial positions and the spousal support award. It also considered the wealth to fee ratio as Wife's expert, David Masterman, suggested. The fees are a very small percentage of each party's wealth when one considers the scope of the resolution each sought in this trial. Under this factor, it is equitable for each party to bear his or her own fees.

Importantly, the Court highlights the fact that another judge of this Court, early in the case, ensured *pendente lite* that Wife had adequate resources to prosecute her case in the manner she wished. It awarded her $100,000 for attorney fees, plus $50,000 per month for ongoing attorney fees, plus $45,000 per month for spousal support. It did not leave her "cash-poor" but potentially "equitable distribution-rich." The Court effectively gave her an advance on her conceivable award.

To be clear, there is no rule that wealthy parties must always bear their own attorney fees, and the Court does not apply such a rule here. However, it is one factor the Court does weigh heavily in this unique case.

As to the second factor—whether either party unnecessarily increased the cost of litigation to the other—the Court witnessed acts by both parties to prolong the litigation. Husband's first act was almost 30 years in the making—he commissioned an antenuptial agreement from a lawyer whose practice did not really focus on family law in Virginia and who drafted a contract this Court found ambiguous. Had the antenuptial agreement been in a form such as the one Wife's counsel created himself, on the fly, while in the middle of one of the hearings, Wife's multiple attempts to attack it would have foundered.

In addition, the Court found Husband in contempt on July 10, 2020, for failure to pay Wife her court-ordered *pendente lite* support. He also filed a motion to modify the *pendente lite* support award. Both actions resulted in lengthy hearings that increased the legal fees for both sides. However, the Court ultimately found what Husband already knew—he could afford to pay the court-ordered support; he chose not to do so. The Court does not fault Husband for failure to predict the outcome of these two hearings, or for losing them. Rather, it points to the fact that Husband already knew what the Court could not until after the hearing—that he could afford to pay. A party can know his position is weak or factually wrong but still hold the other side to burdens of proof and weight of evidence. However, when the gambit fails, and the other party had to spend legal fees to address them, it creates a potential attorney fees liability.

On Wife's side of the ledger, she took Husband's effective invitation to challenge the antenuptial agreement with gusto. She challenged the validity of the contract twice and the interpretation of it once. These issues could have been the subject of a single hearing. Each challenge was an extensive evidentiary trial of its own. In each instance, Wife left no stone unturned. The Court kept an open mind throughout her challenges; however, it did not know what Wife knew—she agreed to the antenuptial agreement without duress, had time to understand the limitations on her right to Husband's businesses, and voluntarily forfeited Husband's pre-marital separate property and the marital growth of that property. She knew the purpose of the agreement was to avoid disruption of his businesses upon divorce. The parties were courting during Husband's second divorce, which disrupted his businesses. The parties intended the antenuptial agreement to avoid that disruption should Husband and Wife divorce. However, Wife's trial strategy tried every way possible to make ineffectual that plan. As with Husband on different topics, she held him to his burden of proof and weight of evidence, increasing the cost of litigation for both sides. Wife correctly points out that, with so much money at stake, her efforts to try everything are understandable. However, the issue before the Court now is, who should pay for her exacting trial strategy?

As to the third factor—a party's fault in the dissolution of the marriage—this case was, happily, not one of abuse, adultery, abandonment, or any other fault-based ground.[5] The Court previously found:

> This marriage failed for a very pedestrian reason—Husband lost interest in Wife. Wife came to embrace alternative medicine and became very active in vaccine safety research and advocacy. He found her to be zealous in her beliefs and discussions of it and disagreed. He also disdained Wife's new political views. He stopped talking with her and began spending time with others. When he began socializing with his masseuse, Wife became alarmed. He left his second wife for a receptionist (Wife), so her fears were not baseless. However, there was no evidence of adultery. Husband and Wife participated in marital counselling—

[5] A court may award attorney fees in separation-based divorces. *See Nuckols v. Nuckols*, 1991 WL 831804 (Va. Ct. App. Apr. 2, 1991); *Rife v. (Bowling) Rife*, 1986 WL 400477 *2 (Va. Ct. App. Dec. 4, 1986). The Court cites the lack of fault-based divorce grounds merely for emphasis.

> obviously, unsuccessfully. Wife offered to make changes and genuinely wished to remain married to Husband, but Husband showed by his actions he was done.

Op. Ltr., Dec. 30, 2020. The Court did not intend for this paragraph to read as one-sided as it does. Balanced against Husband's contributions to the dissolution of the marriage, Wife contributed to the dissolution when she so dramatically changed her politics. Political ideology was a shared pillar of the parties' marriage. It was no small matter in their life. They were extremely active politically, with close relationships with top leaders in state and federal government. However, the political views of Husband and Wife diverged. This is not really "fault"; it is life. People can and do change over time, and sometimes those changes create separations between couples. These changes do not have to be "wrong." The Court makes no opinion of either of the parties' political choices. Rather, it notes that not everyone can maintain a James Carville-Mary Matalin marriage—especially if the marriage did not start out that way. Marital fault was not a persuasive part of this case.

As to the fourth factor—public policy—each party chose the lawyers and trial strategy each desired. It became a very expensive, complex case. Where, as here, both parties had the motivation and resources to prosecute and defend the case to the degree they did, equity suggests a ruling that each pay their own way.

Finally, the Court considered the fifth factor—a consideration of any other factors necessary for an equitable ruling. The Court has been involved with the parties' divorce for over two years, so it knows the parties and this case unusually well.[6] This single case spawned three Opinion Letters and one detailed Memorandum Order. The Court is in the unique position to conclude equity counsels a ruling wherein each party pay his or her own fees. Each party picked outstanding lawyers who truly impressed this Court with their unusual skill and who added significant value to each party in different ways that they may or may not have internalized.

Having considered all the equities, guided by the factors already discussed, the Court concludes that each party should pay his or her own attorney fees. Because of this Court's decision denying either party an award of attorney fees, a granular analysis of the reasonableness of the fees themselves is unnecessary.

IV. CONCLUSION.

The Court declines each party's invitation to shift attorney fees to the other. It reaches this decision by considering the circumstances and equities of the entire case, using the factors identified herein as a guide to help it make that decision.

Counsel for Wife shall please include the results of this ruling in the sketch order he is preparing for the final order. If the parties submit a fully endorsed sketch order, with any objections, prior to March 12, 2021, this matter may be removed from the docket for that day.

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[6] This judge handled the case almost exclusively for 9 months.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

OPINION LETTER