California Western Law Review

Volume 38 | Number 1 Article 9

2001

Winning By Financial Attrition: A Study of Attorney Fees Under California Family Code Sections 2030 and 2032

Jan Maiden

WINNING BY FINANCIAL ATTRITION: A STUDY OF ATTORNEY FEES UNDER CALIFORNIA FAMILY CODE SECTIONS 2030 AND 2032*

Jan Maiden[**]

INTRODUCTION

"It is a fact of life that attorneys representing clients in family law cases frequently do not receive payment of full and adequate compensation for the services they perform."[1]

Paula Ruisi has been involved in a long, drawn-out and contentious custody battle with Kip Thieriot, the father of her son.[2] Kip is extremely wealthy, but the actual amount of his assets is unknown, as he "stipulated that he has the ability to pay any and all attorney fees incurred by Paula."[3] On the other hand, "Paula is a single, self-employed mother, with virtually no assets and only a very modest income."[4]

Paula had primary physical custody of the couple's minor child, and in 1993 she filed a motion to relocate with the child to Rhode Island.[5] The court denied the motion because it determined Paula had not proved the move was necessary under existing law. The court also granted Kip joint physical custody.[6] Paula appealed, and while that appeal was pending, the law regarding move-away cases changed with the California Supreme Court's decision in

---

* The author wishes to thank Professor Janet Bowermaster for suggesting this topic, as well as for her permission to use the phrase "Winning by Financial Attrition" from her amicus letter to the California Supreme Court regarding *Ruisi v. Thieriot*.

** J.D. Candidate December 2001, California Western School of Law. M.S.W., San Diego State University, 1978. B.A., University of California, Santa Cruz, 1975. This Comment was inspired by my experiences working for both Janice Pohl, C.F.L.S. and Robert Wood, C.F.L.S. In several cases, after the trial court failed to award adequate attorney fees, both of these attorneys continued to represent the clients, knowing that the client would never be able to pay their fees.

1. *In re* Marriage of Hatch, 215 Cal. Rptr. 789, 791 (Cal. App. 1985).
2. Appellant's Petition for Review at 5, Ruisi v. Thieriot, 2000 Cal. LEXIS 4121 (Cal. 2000) (No. A084897) (en banc), *rev. denied* [hereinafter Appellant's Petition in Ruisi].
3. *Id.*
4. *Id.*
5. Ruisi v. Thieriot, 62 Cal. Rptr. 2d 766, 768 (Cal. App. 1997).
6. *Id.*

In re Marriage of Burgess.[7] As a result, the appellate court reversed and remanded the matter for a trial de novo.[8]

From 1993 to 1995, Paula had to represent herself *in propria persona*, whereas from 1995 through 1997, she could afford only limited counsel.[9] Her first attorney withdrew when the trial court repeatedly "deferred her requests for interim fee awards."[10] The trial court eventually awarded $15,000 to Paula to retain an attorney at trial.[11] Later, when Paula again requested fees to pay her first attorney the fees and costs still owed, as well as to pay her second attorney, the trial judge did not grant the full amount, claiming that to do so would be "unfair and unreasonable."[12] This was in spite of Kip's stipulation "that the fees sought were reasonable and that he had the ability to pay them in full."[13] Paula's second attorney then withdrew, and Paula's two requests that year (1996) for fees to retain counsel were denied.[14]

Paula encountered great difficulty in finding representation, as most attorneys were not willing to take her case because she did not have the financial resources to pay their fees and because the court refused to award adequate attorney fees.[15] Finally, Paula found a firm willing to represent her if the trial court would award her advances for attorney fees, which the court did in the amount requested of $20,000.[16] One year later, the firm determined that the case was more complex than it had originally anticipated and that fees would be greater than expected.[17] "Sixty two percent (62%) of the unplanned and unestimated charges . . . was incurred in response to motions and actions taken by Kip."[18] Therefore, Paula filed another motion for an interim fee award, detailing the 614 hours expended by her counsel and the 762 hours expended by Kip's counsel.[19] Again, "despite Paula's complete lack of resources and Kip's stipulated ability to pay, the trial court awarded her only $44,963.34 in fees and costs out of the total of $115,663.42 requested."[20] This amount was only thirty-nine percent of the actual fees and costs incurred by Paula's attorneys, or a payment the equivalent of only $65

7. 913 P.2d 473 (Cal. 1996). *Burgess* changed the standard for deciding whether a parent with custody of a child could relocate. The moving parent does not have the burden to prove that the move is "necessary." *Id.* at 479.

8. *Ruisi*, 62 Cal. Rptr. 2d at 769 (Cal. App. 1997).

9. Appellant's Petition in *Ruisi*, *supra* note 2, at 6.

10. *Id.* at 8.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 8-9.

16. *Id.* at 9.

17. *Id.*

18. *Id.* at 10.

19. *Id.*

20. *Id.* at 11.

per hour.[21] In comparison, Kip paid his attorneys $167,000, an average hourly rate of $219 per hour.[22]

The trial judge awarded Paula these inadequate attorney fees only three months prior to trial—too late for Paula's attorneys to resign, even though they could not afford to continue to represent her.[23] The attorneys recognized, however, that no other attorney would take the case, given the judge's history of fee awards.[24] Paula's former counsel filed a declaration on behalf of her current firm's attempt to receive additional attorney fees for trial, noting:

> In my opinion, Ms. Ruisi would not be able to find competent counsel to represent her subsequent to this order. The standard used by Judge Mellon as well as the way he applied this standard, would discourage any attorney with common sense from entering the case given Ms. Ruisi's lack of economic resources and Mr. Theriot's [sic] vast economic resources. In discussing with [current counsel] his desire to withdraw for financial reasons, I informed him of this opinion.[25]

When Paula appealed the attorney fee award, the Court of Appeal held the trial judge did not abuse his discretion in his award of a "reasonable fee," even though "the amount was clearly inadequate to compensate Paula's counsel for their effort at prevailing hourly rates."[26]

When the court awarded Paula attorney fees, it engaged in fee shifting: "shifting the costs of the action to the adverse party."[27] Fee shifting is an exception to the general American Rule that each party to a lawsuit is responsible for its own fees.[28] At common law, a husband was responsible for all of his wife's expenses, including legal fees, because he had control of the marital assets.[29] Today, when laws must be gender-neutral, the rationale is to "level the playing field"[30] by placing the spouses on an "equal footing".[31] All

---

21. *Id.*
22. *Id.* at 12.
23. *Id.*
24. *Id.*
25. *Id.* at 13.
26. *Id.*
27. Stewart Douglas Hendrix, *"Better You Than Me:" Shifting Attorney's Fees in Divorce Actions*, 34 U. LOUISVILLE J. FAM. L. 671 (1995-96).
28. Gaetano Ferro, *Attorney's Fees in Dissolution of Marriage Cases—Is it Time For a Change?* 7 J. AM. ACAD. MATRIM. LAW 1, 4 (1991); Hendrix, *supra* note 27, at 672; Edward M. Ginsburg, *Fee Shifting: How One Judge Views the Process*, 22 FAM. ADVOC. 29 (1994).
29. Hendrix, *supra* note 27, at 672. This rule, referred to as the "suit-money rule," "required the husband to provide [law]suit money to ensure the wife was able to litigate adequately her claim." *Id.*
30. Ginsburg, *supra* note 28, at 29.
31. Daniel F. Sullivan, *Amount of Allowance for Attorney's Fees in Domestic Relations Action*, *in* 45 AM. JUR. PROOF OF FACTS 2D 699, 706 (Supp. 2000).

fifty states in the United States now allow fee shifting awards, either by statute or case law.[32]

Although California law allows fee shifting in marital dissolution matters,[33] when the courts do not adequately compensate attorneys, the economically disadvantaged spouse is unable to afford legal representation. California Family Code Section 2032 provides criteria for judges to use in determining whether to award attorney fees in marital dissolutions.[34] In practice, however, judges have discretion is considering these factors when granting fees.[35] There are significant practice implications when the award is less than the fees incurred, as attorneys are unable to continue to represent their clients. As this pattern repeats, attorneys then become less and less willing to represent clients with limited means.[36] In turn, many women choose to settle out of court rather than face the risk of "inconsistent and unpredictable" awards.[37]

Part I of this Comment discusses the award of attorney fees in marital dissolutions, including public policy; the governing statutes and statutory history; and the basis for awards: the judge's discretion, and the factors to be considered. Part II examines the limitations of the current laws and their judicial interpretation, including gender bias by the courts, which results in the lack of adequate representation for the economically weaker spouse when the court fails to award attorneys adequate compensation; how need has become a conclusory concept affecting fee awards; and the problem with the appellate court's "abuse of discretion" standard of review for a trial court's fee awards. Part III discusses alternatives to the current system of fee awards. The Comment concludes by examining the consequences of the current provisions for fee awards in dissolution proceedings.

I. THE AWARD OF ATTORNEYS FEES

An analysis of the award of attorneys fees in dissolution proceedings requires an examination of the underlying public policy supporting the fee shifting; the statutes and the statutory history of the provisions; and the role of judicial discretion, as well as the factors considered in making a fee award.

---

32. Hendrix, *supra* note 27, at 671.

33. CAL. FAM. CODE § 2030 (West 2000).

34. CAL. FAM. CODE § 2032 (West 2000).

35. *See In Re* Marriage of Hatch, 215 Cal. Rptr. 789, 792 (Cal. App. 1985).

36. Lynn Hecht Schafran, *Gender Bias in Family Courts*, 17 FAM. ADVOC. 22, 26 (1994).

37. *Id.* at 26 (discussing awards for spousal support and the high costs of legal representation).

A. Public Policy

California's public policy is to encourage finality in marital dissolutions by "providing at the outset of litigation, consistent with the financial circumstances of the parties, a parity between spouses in their ability to obtain effective legal representation."[38] This policy recognizes the financial and emotional costs of divorce proceedings.[39] In addition, the policy ensures that the economically disadvantaged spouse has both adequate finances to pursue the matter and access to the courts: "primary cornerstones to the concept of fundamental fairness under the law."[40] Moreover, under California public policy, a spouse without sufficient funds should not be prevented from litigating when the other spouse is able to pay.[41]

While the general rule in civil cases is to award fees and costs to the prevailing party in civil suits,[42] the attorney fee award in domestic relations matters is not to "reward" [43] the party who may ultimately prevail. In fact, fees may even "be awarded *against* a prevailing party."[44] For example, the court affirmed an award of attorney fees to a wife that was based on need, even though the husband had been successful in his motion to reduce spousal support.[45]

B. Statutes

In addition to public policy rationales, statutes and their respective histories further enable one to understand the award of attorney fees in dissolution proceedings. Specifically, Sections 2030 and 2032 of the California Family Code govern the award of attorney fees during marital dissolution proceedings. Section 2030(a) states:

---

38. *Hatch*, 215 Cal. Rptr. at 790. *See also In re* Marriage of Kelso, 79 Cal. Rptr. 2d 39, 45 (Cal. App. 1998); *In re* Marriage of Mulhern, 106 Cal. Rptr. 78, 83 (Cal. App. 1973); Crook v. Crook, 7 Cal. Rptr. 892, 895 (Cal. App. 1960); *In re* Marriage of Aninger, 269 Cal. Rptr. 388, 396 (Cal. App. 1990); *In re* Marriage of Sullivan, 691 P.2d 1020, 1024 (Cal. 1984); *In re* Marriage of Ward, 4 Cal. Rptr. 2d 365, 368 (Cal. App. 1992); *In re* Marriage of Aufmuth, 152 Cal. Rptr. 668, 680 (Cal. App. 1979); *In re* Marriage of Janssen, 121 Cal. Rptr. 701, 703 (Cal. App. 1975); *In re* Marriage of Green, 261 Cal. Rptr. 294, 301 (Cal. App. 1989); *In re* Marriage of Barnert, 149 Cal. Rptr. 616, 625 (Cal. App. 1978); *In re* Marriage of Braud, 53 Cal. Rptr. 2d 179, 197 (Cal. App. 1996).

39. *Hatch*, 215 Cal. Rptr. at 793.

40. *Ward*, 4 Cal. Rptr. 2d 365, 368 (Cal. App. 1992) (citing *In re* Marriage of Swink, 807 P.2d 1245, 1247 (Colo. App. 1991)).

41. *In re* Marriage of Pollard, 158 Cal. Rptr. 849, 851 (Cal. App. 1979).

42. 33 CAL. JUR. 3d *Family Law* § 1270 (1994).

43. Perry v. Superior Court, 86 Cal. Rptr. 607, 611 (Cal. App. 1970).

44. *In re* Marriage of Hublou, 282 Cal. Rptr. 695, 700 (Cal. App. 1991) (citing WILLIAM P. HOGOBOOM & DONALD B. KING, CALIFORNIA PRACTICE GUIDE: FAMILY LAW 14:13 (1991)).

45. *Id.*

> [T]he court may, upon (1) determining an ability to pay and (2) consideration of the respective incomes and needs of the parties in order to ensure that each party has access to legal representation to preserve all of the party's rights, order any party, except a governmental entity, to pay the amount reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding.[46]

Furthermore, Section 2032 states:

> (a) The court may make an award of attorney's fees and costs under Section 2030 . . . where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties.
>
> (b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320.[47] The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.[48]

Prior to 1985, the court's discretion to award attorney fees to the party in need was "limited by the principle that a wife may not be required to impair the capital (as opposed to income) of her separate estate in order to defray litigation expenses."[49] This was seen as a "relic of the era" when the husband had management and control of the community property.[50] The law, then Civil Code § 4370.5,[51] was first revised in 1985, by adding subdivision (c), which provided that, "The court may order payment of the award from any type of property, whether community or separate, principal or income,"[52] thus overruling prior cases.[53]

---

46. CAL. FAM. CODE § 2030(a) (West 2000).

47. CAL. FAM. CODE § 4320 (West 2000) (requiring the court to consider the enumerated circumstances in determining the amount due for spousal support).

48. CAL. FAM. CODE § 2032(a), (b) (West 2000).

49. CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION RELATING TO LITIGATION EXPENSES IN FAMILY LAW PROCEEDINGS, 18 CAL. L. REVISION COMM'N REP. 355 (1986) [hereinafter CAL. L. REVISION].

50. *Id.*

51. This section later became California Family Code Section 2032. *In re* Marriage of O'Connor, 69 Cal. Rptr. 2d 480, 481 (Cal. App. 1997).

52. *In re* Marriage of Aninger, 269 Cal. Rptr. 388, 397 (Cal. App. 1997).

53. *Id.* (citing CAL. L. REVISION, *supra* note 49, at 357 (referring to *In re* Marriage of Jafeman, 29 Cal. App. 3d 244 (1972) *and In re* Marriage of Hopkins, 74 Cal. App. 3d 591 (1977))).

The courts began to interpret the new law in such a way as to severely disadvantage the spouse who was "in need" of an award of fees. In one case, the court held: "While it may seem unfair in the face of husband's vast wealth to require wife to exhaust her liquid assets to pay her attorney's fees," the wife did have her own funds and failed to prove need.[54] Another case held that the trial court abused its discretion in awarding the wife attorney's fees when she had sufficient liquid assets to pay the fees herself.[55]

In 1990, the same year that both cases were decided, the Legislature once again amended the attorney fee awards statute. It added the word "relative" to subdivision (a) so that it read, "just and reasonable under the relative circumstances of the respective parties."[56] The legislature also amended subdivision (b) at the same time by adding:

> The fact that the party requesting an award of attorneys' fees and costs has the resources from which he or she could pay his or her own attorneys' fees and costs is not itself a bar to an order that the other party pay part, or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.[57]

The factors in the statute, however, are not intended to be exhaustive: "[t]he court may consider any other proper factors, including the likelihood of collection, tax considerations, and other factors announced in the cases."[58]

In 1994, California Civil Code Section 4370.5 was incorporated into the California Family Code as Section 2032, without significant changes.[59]

C. Judicial Discretion and the Factors Considered in Fee Awards

The trial court judge has the discretion to determine an award of attorney's fees.[60] "Discretion must be exercised in a manner which is not capricious or arbitrary, but, rather, is impartial and guided by fixed legal principles."[61]

In exercising its discretion, the trial court is required to consider the statutory factors set forth in California Family Code Sections 2030 and

---

54. *In re* Marriage of Joseph, 266 Cal. Rptr. 548, 555 (Cal. App. 1990).
55. *Aninger*, 269 Cal. Rptr. at 397.
56. *O'Connor*, 69 Cal. Rptr. 2d at 482 (emphasis added).
57. *Id.* (citation omitted).
58. CAL. FAM. CODE § 2032 (West 2000).
59. *O'Connor*, 69 Cal. Rptr. 2d at 481.
60. *In re* Marriage of Sullivan, 691 P.2d 1020, 1024 (Cal. 1984); *In re* Marriage of Seaman, 2 Cal. Rptr. 2d 690, 695 (Cal. App. 1991); *In re* Marriage of Rosan, 101 Cal. Rptr. 295, 305 (Cal. App. 1972); *In re* Marriage of Cueva, 149 Cal. Rptr. 918, 921 (Cal. App. 1978); Line v. Line, 171 P.2d 733, 736 (Cal. 1946).
61. *In re* Marriage of Kerry, 158 Cal. App. 3d 456, 464 (1984) (citing Carroll v. Abbott Laboratories, Inc., 32 Cal. 3d 892, 898 (Cal. 1982)).

2032: there must be a need for the award and the obligor must have an ability to pay.[62]

Courts have taken a variety of approaches in determining need. For example, the trial court judge in one case stated:

> I never grant attorney fees around here, or virtually never, basically, because one of the main factors in determining attorney fees is the property that is awarded to the parties. And that is a factor which cannot be determined until the ultimate divorce . . . in the family law area an attorney ordinarily carries the client until the time of trial, if the lawyer has reason to suppose that he will be ultimately paid, you see, if there is property . . . No, I'm not going to rule on attorney fees. I can tell you that right now.[63]

In that case, the appellate court found that the trial court abused its discretion when it denied attorney's fees for the wife's attorney, when the wife had no income and could not pay fees or costs.[64] The appellate court noted that by denying the wife an award of attorney fees, when she had no income and received only $500 per month for child and spousal support, the trial court put her "in the position of being unable to retain counsel or, in all probability, of retaining either inexperienced or incompetent counsel to represent her."[65] The appellate court also stated that in determining the wife's need, the trial court should not have considered the child and spousal support payments she received as available income to pay her attorney fees.[66]

Another appellate court found an abuse of discretion when a trial court made a "need-based" award to wife's attorney of only $500, when actual fees and costs were $9,281.50.[67] The appellate court found that where the wife had minimal assets and her only income was child support, while the husband had a large income and substantial assets, "[t]here was no apparent reason for the trial court's decision to award fees so grossly disproportionate to those actually charged to the client."[68] Similarly, in another case where the wife "had more than $1,100 in monthly expenses and no way of supporting herself" the appellate court held that she "made a prima facie showing of need" and remanded the matter to the trial court to award her attorney fees for prosecuting the appeal.[69]

---

62. *Hatch*, 215 Cal. Rptr. at 793 (citing *In re* Marriage of Popenhager, 160 Cal. Rptr. 379, 385 (Cal. App. 1979)); *Kerry*, 204 Cal. Rptr. at 665; Hunter v. Hunter, 20 Cal. Rptr. 730, 734-35 (Cal. App. 1962); Pollard v. Pollard, 158 Cal. Rptr. 849, 851 (Cal. App. 1979); *In re* Marriage of Braud, 53 Cal. Rptr. 2d 179, 197 (Cal. App. 1996); *Sullivan*, 691 P.2d at 1024; Perry v. Superior Court, 86 Cal. Rptr. 607, 611 (Cal. App. 1970).

63. *Hatch*, 215 Cal. Rptr. at 791.

64. *Id.* at 790.

65. *Id.* at 793.

66. *Id.* (noting that an exception could be found if there were sufficient funds after the payment of living expenses to pay attorney fees).

67. *Braud*, 53 Cal. Rptr. 2d at 197.

68. *Id.* at 198.

69. *In re* Marriage of Melone, 238 Cal. Rptr. 510, 515 (Cal. App. 1987).

The trial court may find "need" by one of the spouses even though the spouse has adequate resources to pay attorney fees and costs, because the court considers the "relative circumstances" of the parties.[70] For example, in a case in which the husband was originally awarded $250,000 in attorney fees, and then received an additional $450,000, the wife appealed, arguing that the husband had no need.[71] The parties had incurred over $3 million in attorney fees and the husband still had $2 million in assets while the wife had at least $40 million.[72] The court rejected the wife's argument, based on the "unequivocal" language of the statute:[73] "[W]e find nothing . . . which would suggest that the Legislature intended to endorse any fixed measure of percentage as a way to demonstrate need or the lack thereof . . . [it] could not be more clear in eschewing any notion that a numerical standard should be applied."[74]

In addition to requiring proof of "need," the statute also requires the court to determine whether the spouse against whom the fee award may be made has the ability to pay the other spouse's requested attorney fees. In one case, the trial court found that the husband's "half-million dollar yearly income and seemingly extravagant expenditures permitted an inference that he could afford $6,220 for [the wife's] fees and costs."[75] In another case, the appellate court found that, "Despite [the husband's] claim of poverty" he was able to pay attorney fees, because he had liquid assets—property that was listed for sale at $900,000 and several horses."[76] Even where need is established, if the other spouse does not have the ability to pay, "it is an abuse of discretion for a court to impose such an obligation upon one of the destitute parties which will hang as a sword over the obligor. . . ."[77]

In addition to the statutory factors set forth in Section 2032, judges must also consider additional factors that have been set forth in case law[78] including:

> [T]he nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded . . .; the intricacies and

70. *See O'Connor*, 69 Cal. Rptr. 2d at 482-83.
71. *Id.* at 481.
72. *Id.* at 481-82.
73. *Id.* at 484.
74. *Id.*
75. *In re* Marriage of Janssen, 121 Cal. Rptr. 701, 703 (Cal. App. 1975).
76. *In re* Marriage of Melone, 238 Cal. Rptr. 510, 515 (Cal. App. 1987).
77. *In re* Marriage of Pollard, 158 Cal. Rptr. 849, 851-52 (Cal. App. 1979). The court also noted that, "[o]n inquiry, private counsel expressed his hopes that his services would not be of the pro bono nature despite the size of the dispute." *Id.* at 852 n.2.
78. *In re* Marriage of Braud, 53 Cal. Rptr. 2d 179, 198 n.30 (Cal. App. 1996).

> importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed.[79]

The "difficulty" of the litigation is often interpreted by the court as meaning one party's lack of cooperation in the proceedings. Sometimes this occurs when one party fails to accurately disclose information. In one case, the husband's income was initially presented as $50,000, but the wife's attorneys "developed statistics and so forth and had to pull it all out," and ascertained that his income exceeded $115,00.[80] The court held: "In light of the difficulty [the wife] and her attorneys encountered in determining [the husband's] actual income and their success in establishing its size, the award of attorneys' fees was well within the trial court's discretion."[81] In another case, in which there was "conflicting evidence regarding whether husband had 'stonewalled' [the wife] and been difficult during discovery," the court found no abuse of discretion in an attorney fees award of $80,000 to the wife.[82]

In a case in which the appellate court upheld an award of $750,000 in future attorney fees to the wife, where the wife had only requested $500,00, the court found that it was "a case of stunning complexity, occasioned, for the most part, by husband's intransigence."[83] The appellate court noted that when the wife originally filed for a divorce in Colorado, the husband evaded service for twenty-six months.[84] The wife's attorney also had to travel to the Isle of Jersey when husband filed a divorce action there, which the husband later withdrew.[85] After the wife finally filed for dissolution in California, where jurisdiction could be obtained, the husband continued to engage in acts that resulted in the wife incurring additional attorney fees, such as when the husband's attorney scheduled the wife's attorney's deposition but never appeared to take the deposition.[86]

In determining whether to award attorney fees, the courts have also considered the attorney's skill and expertise, which includes additional factors

---

79. *In re* Marriage of Cueva, 149 Cal. Rptr. 918, 921-22 (Cal. App. 1978) (quoting Berry v. Chaplin, 169 P.2d 442, 460 (Cal. App. 1946)).

80. *In re* Marriage of Wright, 131 Cal. Rptr. 870, 872 (Cal. App. 1976) (quoting the trial court).

81. *Id.*

82. *In re* Marriage of Kozen, 230 Cal. Rptr. 304, 307 (Cal. App. 1986). The husband appealed the trial court's fee award, arguing that "the evidence did not show wife needed the money or that he had the ability to pay, and . . . the amount of fees and costs were unreasonable." *Id.* The appellate court rejected husband's arguments but never addressed need and ability to pay, only whether the amount of wife's fees were unreasonable. *Id.* The court seemed to focus more of the factor of "difficulty"—the husband's lack of cooperation throughout the proceedings. *Id.*

83. *In re* Marriage of Dick, 18 Cal. Rptr. 2d 743, 756 (Cal. App. 1993).

84. *Id.*

85. *Id.*

86. *Id.*

such as "the responsibility undertaken"[87] and "whether counsel's skill and effort were wisely devoted to the expeditious disposition of the case."[88] In addition, one court held that there is not necessarily a direct relationship between the "reasonable value of an attorney's services" and the amount of time billed, noting, "One hour spent in negotiation might be more valuable than 10 hours spent in trial."[89]

An appellate court found that an award of $1,500 by a trial court was not an abuse of discretion because the amount was all that was "reasonably necessary" pursuant to the statute.[90] The request for attorney fees had been for $5,000, where the attorney had spent approximately 118 office hours, two half-days in court appearances and two and one-half days at trial.[91]

The trial court in another case awarded only $5,000 of the $15,345 in attorneys fees requested by wife's attorney, finding "the amount of time invested by wife's counsel was unreasonable and unnecessary."[92] The appellate court stated:

> Certainly a desirable objective of domestic litigation is prompt and equitable resolution of marital difficulties rather than their bitter prolongation. Conscientious and successful efforts by counsel to resolve as many areas of disagreement as possible without judicial intervention is entitled to serious consideration in awarding attorney's fees. Compensable professional legal skill is not limited to trial time or courtroom techniques alone.[93]

Finally, the court must award fees that are "reasonably necessary" to maintain or defend the action.[94] One appellate court affirmed the lower court's denial to award a substantial portion of the attorney fees requested by the wife's attorney because the trial court found the attorney fees were unreasonable and unnecessary.[95] The trial court judge stated:

> Attorneys' fees in this case, to establish a support order for a healthy lady, after [a] three-and-a-half-year marriage, are outrageous, in my judgment, for both sides. . . . The expenses for five professionals to evaluate everybody, to opine, to depose, to do what they did and testify here, is only as a consequence of the fact that Mr. Huntington has money. . . . I find this to be totally unreasonable in light of the length of the marriage and in light of the circumstances of the parties, what they had when they started the marriage and when they ended the marriage. . . . This case, presented, should have cost no more than $10,000 for attorney's fees on each side, and maybe [$]5,000 or [$]6,000 in professional fees. . . . But I sense that it has

87. *In re* Marriage of Munguia, 195 Cal. Rptr. 199, 204 (Cal. App. 1983) (citing Patten v. Pepper Hotel Co., 96 P. 296, 302 (Cal. 1908)).
88. *In re* Marriage of Lopez, 113 Cal. Rptr. 58, 71 (Cal. App. 1974).
89. *In re* Marriage of Cueva, 149 Cal. Rptr. 918, 926 (Cal. App. 1978).
90. *In re* Marriage of Rosan, 101 Cal. Rptr. 295, 305 (Cal. App. 1972).
91. *Id.*
92. *In re* Marriage of Lopez, 113 Cal. Rptr. 58, 70 (Cal. App. 1974).
93. *Id.* at 71.
94. CAL. FAM. CODE § 2030 (West 2000).
95. *In re* Marriage of Huntington, 14 Cal. Rptr. 2d 1, 7-8 (Cal. App. 1992).

> cost a great deal more, and the Declaration of [appellant's counsel] indicates that he believes he's worth $60,000 on this case, and I do not. I believe this case is a $10,000 attorney's fees case. . . . And if you gentlemen had checked my record from Orange County, which is a relatively affluent county, you would have found that I pay substantial attorney's fees for substantial and important work, and I pay little, if any, attorney's fees for inconsequential[,] inappropriate and unjustified work. . . . Therefore, on attorney's fees and costs, each party shall bear their own fees and costs. This case should never have been here.[96]

A final consideration in determining whether there has been an abuse of discretion is the trial court judge's knowledge and skills. "[T]he rule is that when the trial court is informed of the extent and nature of the services rendered, it may rely on its own experience and knowledge in determining their reasonable value."[97] For example, where the parties stipulated to a judge, who was the former supervising judge of the Family Law Department of the Los Angeles Superior Court, the appellate court upheld the award, finding that the trial judge was "particularly qualified to make a rational assessment" of the future attorney fees requested.[98]

A trial court's failure to consider the statutory factors for attorneys fee awards is an abuse of discretion. For instance, an appellate court held that the trial court abused its discretion when it "refused to consider the factors required by law, the respective incomes and needs of the parties" when the trial court stated that it did not make pendente lite awards of attorney fees.[99] In another case, the trial court made an award of $25,000, based "on nothing more that wife's secondhand comment (albeit in a declaration) about what her latest 'bill' stated, and on wife's counsel's unsworn representation that she was owed 'approximately $35,000.'"[100] In that case, the appellate court held that the trial court abused its discretion when it failed to consider the factors to be used in determining an award and did not inquire as to the reasonableness of the fees.[101]

"Domestic relations litigation, one of the most important and sensitive tasks a judge faces, too often is given the low-man-on-the-totem-pole treatment."[102] Therefore, while the trial court "may rely on its own experience and knowledge" in deciding a fee award,[103] not all family law judges have the

---

96. *Id.* (quoting trial court judge).

97. *In re* Marriage of Cueva, 149 Cal. Rptr. 918, 924 (Cal. App. 1978). *See also* Frank v. Frank, 28 Cal. Rptr. 687, 689 (Cal. App. 1963) (citations omitted).

98. *In re* Marriage of Dick, 18 Cal. Rptr. 2d 743, 756 (Cal. App. 1993).

99. *In re* Marriage of Hatch, 215 Cal. Rptr. 789, 793 (Cal. App. 1985).

100. *In re* Marriage of Keech, 89 Cal. Rptr. 2d 525, 531 (Cal. App. 1999).

101. *Id.* at 531-32.

102. *In re* Marriage of Brantner, 136 Cal. Rptr. 635, 638 (Cal. App. 1977). *See* Schafran, *supra* note 36, at 22 (noting that "some believe that 'real law' is commerce and crime whereas family law is a second-class assignment or punishment").

103. *Cueva*, 149 Cal. Rptr. at 924; *Frank*, 28 Cal. Rptr. at 689 (noting that while there was no specific evidence, the trial court judge "had sufficient evidence to determine what would constitute a reasonable fee under the circumstances").

requisite knowledge and experience about the practice of family law.[104] This in turn affects the trial judge's ability to assess the value of the hours spent by counsel as productive or unproductive as a basis for the award of attorneys fees.[105]

II. LIMITATIONS ON THE AWARD OF ATTORNEYS FEES

> *"Attorney fee statutes often turn out to be a blanket that never quite covers the bed, leaving a considerable number of clients and attorneys shivering in the cold."*[106]

In addition to judicial discretion, there are other factors that affect the award of attorney fees. Gender bias plays a major role in family law decisions as to how, when, and to whom attorney fee awards are made. Another factor is the concept of "need" and how it is interpreted by the courts. Finally, the current system of judicial review fails to correct abuses of trial court discretion in awarding fees.

A. Gender Bias Results in a Lack of Adequate Representation for Clients and a Lack of Adequate Compensation for Attorneys

"Family law matters are breeding grounds for bias."[107] Every judge brings his or her own deeply personal opinions about families and divorce to the bench, based on his or her experiences.[108] The gender bias in family law has been extensively documented.[109] Justice Rosalie Wahl, chair of the Minnesota gender bias task force stated: "[T]he judicial system into which . . . all women come—seeking justice as parties in dissolution, . . . in personal injury . . . in domestic abuse . . . discriminates—on the same basis and to the same degree as every other of our major societal institutions because of

---

104. JUDICIAL COUNCIL OF CALIFORNIA ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE CALIFORNIA COURTS: FINAL REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS 160 (1996) [hereinafter GENDER BIAS]. "The family law judge is often the newest judge on the court and usually has little or no experience in family law." *Id. Compare with In re* Marriage of Ward, 4 Cal. Rptr. 2d 365, 371 (Cal. App. 1992) (noting that the trial judge was "a former experienced family law practitioner").

105. *See Cueva*, 149 Cal. Rptr. at 926 (discussing the relationship between the reasonable value of legal representation and the productive and unproductive hours worked on a case).

106. Reba Graham Rasor, *The Contingent Fee and Domestic Law*, 7 J. AM. ACAD. MATRIM. LAW 43, 44-45 (1991).

107. GENDER BIAS, *supra* note 104, at 119.

108. Schafran, *supra* note 36, at 22; GENDER BIAS, *supra* note 104, at 120.

109. Schafran, *supra* note 36, at 22 (discussing how twenty-one states' task forces have issued reports on gender bias and its affect on women).

shared beliefs about the inferiority or difference of women. This . . . is 'Institutional Sexism'. . . ."[110]

As women generally have fewer financial resources, they often lack sufficient funds to retain counsel.[111] Moreover, working mothers earn less as a result of pregnancy, childbirth, and childcare responsibilities.[112] The spouse "[l]acking economic parity and access to liquid funds . . . may either have to retain inexperienced or incompetent counsel; find counsel or a lender willing to extend unlimited, unsecured credit; or appear in propria persona."[113] Moreover, even though California Family Code Sections 2030 and 2032 provide for an award of attorney's fees when "just and reasonable," the statutes do not guarantee that the spouse in need receives sufficient funds to ensure adequate representation.[114] Thus, the inability of low-income spouses, primarily female spouses with children, to obtain adequate legal counsel suggests systemic gender bias.[115] A study of gender bias in the California family law courts found:

> Inequities in the award of attorney's fees present serious obstacles to obtaining representation. These inequities include the denial of fees when they should be awarded according to case law and the granting of differential awards between male and female attorneys.
>
> . . . .
>
> These barriers to access to the courts have their most serious impact on the poor and on the primary caretakers of children, who are most often women in the context of the family law court.[116]

In a case that lasted nine and one-half years, the trial court made an award of only $1,500 in attorney fees when $11,855 was requested.[117] The same attorney represented the wife for the duration of the case, which included "fifteen pretrial court appearances, ten sets of written discovery, motions, briefs, preparation for seven aborted trial dates . . . and [an] appeal."[118] The wife's attorney testified that the wife had paid him $150 during those nine and one-half years, but that he had not billed her "because she could not

---

110. *Id.* at 23 (citing Minnesota Supreme Court Justice Rosalie E. Wahl, THE TASK FORCE ON GENDER BIAS IN THE COURTS: ESTABLISHING A FRAMEWORK FOR CHANGE, Second National Conference on Gender Bias in the Courts 6-7 (1993)).

111. Schafran, *supra* note 36, at 26.

112. *See generally* VICTOR FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY (1988).

113. Droeger v. Friedman, Sloan & Ross, 812 P.2d 931, 939 (Cal. 1991).

114. *Id.* at 940 n.11 (noting that the lower court awarded the wife only about twenty-five percent of the attorney fees she incurred).

115. Letter from Janet M. Bowermaster, Professor of Law, California Western School of Law, Letter Brief Amica Curiae In Support of Petition for Review, to The Honorable Ronald George, Chief Justice, and the Associate Justices, California Supreme Court (May 4, 2000) (on file with author) [hereinafter Bowermaster Amica Curiae Letter].

116. GENDER BIAS, *supra* note 104, at 188.

117. *In re* Marriage of Fransen, 190 Cal. Rptr. 885, 888 (Cal. App. 1983).

118. *Id.* at 889.

afford to pay anything."[119] The appellate court, in ordering a retrial, stated that, "No attorney should be paid a fee inconsistent with the work he has performed."[120]

Attorneys who represent low-income women find that although public policy favors providing financial parity between the parties, the reality is that the objective is often ignored by the courts.[121] An attorney with the San Diego Volunteer Lawyer program, Kate Yavenditti, said,

> I think that those of us who represent low income women come into court with a mark against us. . . . I mean, I've made comments to judges about it, . . . you know, I know what you're going to do to me because you know who I represent and they laugh it off. But it's not a laughing matter, it's an absolute reality. We come into court and we don't get attorney's fee orders, . . . or [we get] lower attorney's fee orders, or . . . the attorney's fees will be deferred.[122]

An attorney from Fresno further noted:

> I think there is a real problem when you have a woman who is forced on to welfare as a result of the family breakup, and the attorney goes into court and asks for attorney's fees, and it is postponed, deferred, postponed, deferred, and here is a poor woman who is trying to get representation to fight the bread-winner of the family who has all the money and she is penniless. And I will tell you that as an attorney, it is very difficult to represent these people when there is no money in the offing.[123]

An attorney is not likely to represent the economically disadvantaged spouse when the court fails to award adequate compensation, even though the purpose of the law is not to adequately compensate the attorney. "[I]t must be remembered that attorney's fees are granted to the wife for her benefit rather than that of her attorney."[124] Therefore, when retained by a client without financial assets, the attorney has to make choices in how to represent the client, knowing that there may not be an adequate fee award.[125] Another alternative is to withdraw from the case when the court fails to make an adequate award.[126] What the courts seemingly often fail to consider however, is that, as stated by Justice King, "Banks and finance companies are licensed for the purpose of lending money; lawyers are not."[127]

---

119. *Id.*

120. *Id.*

121. GENDER BIAS, *supra* note 104, at 193.

122. *Id.* (alteration in quoted source) (citing San Diego public hearing trascript, 142-43).

123. GENDER BIAS, supra note 104, at 193-94 (citation omitted).

124. *In re* Marriage of Gonzales, 124 Cal. Rptr. 278, 280 (Cal. App. 1975) (citation omitted).

125. Telephone interview with Richard M. Bryan, Senior Partner, Bryan, Hinshaw & Barnet (Mar. 23, 2001) (attorney for Paula Ruisi in Ruisi v. Thieriot, 62 Cal. Rptr. 766 (Cal. App. 1997)) [hereinafter Bryan Interview].

126. *Id.*

127. *In re* Marriage of Hatch, 215 Cal. Rptr. 789, 791 (Cal. App. 1985)

Women attorneys may also encounter bias. One attorney reported that when she and male attorneys requested attorney's fees, the judge told her, "You don't need as much as he does."[128] Thus, a female attorney representing a financially disadvantaged spouse may be even less likely to receive an adequate fee award.

B. Need as a Basis for Fee Awards

A wife in a dissolution action must "beg [the court], piecemeal, for a few dollars, which she must prove is 'needed' to prosecute her action or defense. . . ."[129] In awarding attorney fees, the statutes require that the court consider the "respective incomes and needs of the parties."[130] While the statute includes objective criteria for determining income, it provides no such criteria for determining need. Indeed, need is a conclusory concept.[131] In the context of alimony,

> [e]ven the definition of 'need' . . . is hopelessly confused. Is the wife 'in need' only when she is unable to support herself at a subsistence level? A moderate middle class level? The level to which she was accustomed in the marriage, no matter how high? The courts have used all of these approaches. Without an articulated theory, we cannot argue that any of these definitions is correct.[132]

Similarly, there is no definition of need as a basis for attorney awards. The only assistance the statute provides is that the court may find that a party with his or her own resources is still in "need" of attorneys fees.[133] Therefore, it becomes a matter of the judges' discretion to determine if need exists, whether the party in need has no assets and no means, or has substantial wealth. This may provide the courts with flexibility, but it provides clients and their counsel with no consistency or predictability. An attorney may work assiduously to zealously represent his or her client, only to have the court find that the client's "need" does not justify a fee award commensurate with the fees and costs incurred.

Finally, although the court has total discretion to award fees to the spouse in need to "level the playing field," the result is that the field is not always leveled. Rather, it may slope, for as noted in many of the above cases, the fee award is not always sufficient to pay the actual attorney fees and the spouse in need may not have adequate assets to pay the balance. Fur-

---

128. GENDER BIAS, *supra* note 104, at 194 (citation omitted).

129. Schafran, *supra* note 36, at 26 (citing NEVADA SUPREME COURT GENDER BIAS TASK FORCE, JUSTICE FOR WOMEN 17-18 (1989)) (alteration in quoted source).

130. CAL. FAM. CODE § 2030 (West 2000).

131. IRA MARK ELLMAN, ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 388 (3d ed. 1998) (discussing the concept of the need in the context of alimony awards).

132. Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 4 (1989).

133. *See* CAL. FAM. CODE § 2032 (West 2000).

thermore, the spouse in need is frequently the one with greater fees because she or he must conduct extensive discovery to determine community assets and other relevant information. In addition, one spouse may use the court system to "punish" the other spouse, in "a deliberate attempt to exhaust her [or him] financially and emotionally and deny her [or him] effective counsel."[134] This problem has been described as where:

> [T]he "economically advantaged spouse" uses his or her greater control of income or assets as a litigation tool, particularly in terms of making it extremely difficult for the "disadvantaged spouse" to retain appropriate counsel or to otherwise adequately participate in litigation. The problems in this area appear to be common and do not appear to be unique to upper-income litigants; instead . . . the problems exist all too frequently whenever there is significant inequality in terms of access to financial resources during the pendency of a case.[135]

On the other hand, the obligor spouse's attorneys fees are not reviewed by the court as part of the process of determining a fee award. What often results is that the attorneys receiving the fee award are paid only a percentage of their fees while the attorneys representing the obligor are paid in full.

C. Judicial Review of the Trial Court's Discretion

As long as the standard for the appellate courts' review of the trial courts' discretion is an "abuse of discretion" there will be inadequate awards of attorney fees.[136] The test used by the appellate court is that "discretion is abused whenever in the exercise of its discretion the court exceeds the

---

134. *See In re* Marriage of Green, 261 Cal. Rptr. 294, 302 n.9 (Cal. App. 1989). The husband, a lawyer who represented himself, appealed the court's holdings regarding the date for valuation of his law practice, the denial of his claims for reimbursement, the division of community property, the award of sole physical custody to his wife without ordering additional mediation, the denial of his request for a new trial, and the award of attorney fees to his wife. *Id.* at 295-96. Justice King wrote in the decision "[t]here is an old adage that a lawyer who represents himself has a fool for a client. Whether that adage applies to [the husband], who has primarily acted as his own attorney at trial and on appeal, we leave to the reader to decide." *Id.* at 296. The appellate court stated further that the husband "consistently attempted to frustrate the policy of [California Family Code Section] 4370.5 [now Cal. Fam. Code Sec. 2032] to promote settlement of litigation, reduce costs, and encourage cooperation between the parties." *Id.* at 302.

135. The Domestic Relations Subcommittee of the Chicago Bar Association Circuit Court Liaison Committee, *A General Explanation of the "Leveling of the Playing Field" In Divorce Litigation Amendments*, 11 C.B.A. REC. 32 (1997) (citing the Domestic Relations Subcommittee of the Chicago Bar Association Circuit Court Liaison Committee Second Interim Report 3 (1996)).

136. *See* Letter from Michael Willemsen, Senior Partner, Tanke & Willemsen, to the California Supreme Court (Apr. 8, 2000) (on file with the author) [hereinafter Willemsen Amicus Letter]. Mr. Willemsen was the appellate attorney for Paula Ruisi for her unsuccessful appeal of the first child custody order and for a writ of mandate seeking removal of the trial judge. *Id.*

bounds of reason, all of the circumstances before it being considered."[137] In marital dissolution cases, a motion for attorney fees "is left open to the sound discretion of the trial court; in the absence of a clear showing of abuse, its determination will not be disturbed on appeal."[138]

Trial courts refuse to award the entire amount of the fees requested, based on vague standards such as "unreasonableness" and "over-litigation."[139] Moreover, the appellate court may not revise the trial court's judgment in the absence of a clear abuse of discretion,[140] even if the appellate court thinks it would have decided the matter differently "had the matter been submitted to its judgment in the first instance."[141] For example, one appellate court found no abuse of discretion with the trial court's award of only one-third of the amount of fees requested, stating that, "A reviewing court is not authorized to revise the lower court's judgment even if it should be of the opinion that it would have made a different award had the matter been submitted to its judgment in the first instance."[142] Moreover, the court stated that "we are constrained . . . by the application of an 'abuse of discretion standard' and thus [the affirmance of the trial court's award] should not be taken . . . as tacit approval of adequacy . . . ."[143]

III. ALTERNATIVES

There are several alternative approaches to the current system of awarding attorney fees. The California courts, however, have rejected fee awards that are based on anything other than the required factors. Nevertheless, some modifications of the system would allow for more equitable awards resulting in increased representation for economically disadvantaged spouses.

An award based on the other party's fees is not allowed. For example, the court held that where the trial court "require[d] [the] husband to pay at least as much for [the] wife's attorney fees as he did for his own" it failed to consider the appropriate factors.[144]

Attorney fee awards in marital dissolution cases may not be based on a percentage of the community property, in contrast to probate cases, in which the attorney fees are based on a percentage of the estate.[145] One court held that an attorney fee award was not excessive when "the total fee allowed [the

137. Berry v. Chaplin, 169 P.2d 453, 456 (Cal. App. 1946) (citing Makzoume v. Makzoume, 123 P.2d 72, 73 (Cal. App. 1942)).

138. *Id.*

139. *Id.*

140. Howard v. Howard, 275 P.2d 93, 95 (Cal. App. 1954) (citing Wilder v. Wilder, 7 P.2d 1032, 1033 (Cal. 1932)).

141. *Wilder*, 7 P.2d at 1033.

142. *In re* Marriage of Lopez, 113 Cal. Rptr. 58, 70-71 (Cal. App. 1974) (citing Smith v. Smith, 82 Cal. Rptr. 282, 286 (Cal. App. 1969)).

143. *Lopez*, 113 Cal. Rptr. at 71.

144. *In re* Marriage of Keech, 89 Cal. Rptr. 2d 525, 531-32 (Cal. App. 1999).

145. CAL. PROB. CODE § 10810 (West 2000).

wife] . . . is only three per cent of the total community property of the parties."[146] A later case disagreed, holding "[T]here is no rule of law in this state that an attorney's fee in a dissolution action is reasonable if it does not exceed three percent of the value of the community property estate irrespective of the nature and extent of the services conducted."[147] The court acknowledged that while the value of the community estate may be relevant to demonstrate "an ability to pay . . . the complexity and difficulty of the case and skill and effort required of the attorney," an award must be based on the requisite factors. [148] Furthermore, the issue in many family law cases, such as Paula Ruisi's, is custody and visitation, and thus the value of community property would not be a relevant basis for an attorneys fee award.

One suggestion to improve the current system is to ensure that "[t]he same standards and [the] same level of scrutiny should apply to [each spouse's] fees. Only then will the statutory goal of equal access to the courts, and gender equality in the courts, be achieved."[149] This would address the problem of the trial court judge deciding whether, in effect, one attorney "earned" his or her fees, while totally disregarding the fees incurred by the other attorney. Currently, the courts employ a double standard:

> [The w]ife can be penalized if the court thinks she has been unreasonable in her settlement position, has made excessive discovery demands, made unnecessary motions, or, in general, 'over-litigated' the case, or spent time that 'fails to contribute to a just resolution of the case.' [The h]usband faces no such danger. His attorneys are free to go 'all-out', taking actions which a judge might consider unnecessary but which are effective in applying pressure in a contested case; [the] wife cannot reply in kind.[150]

One California attorney has devised a variation on the traditional fee-shifting approach.[151] At the outset of the case, he requests a fee award of tentative fees.[152] The attorney then takes his advances in increments, while submitting his bills to opposing counsel.[153] If opposing counsel disapproves of any line items, the matter then goes to court.[154] This allows the attorney to obtain funds without constantly making requests of the court. In turn, the court does not have to make a decision every time the attorney needs additional funds.

---

146. Lipka v. Lipka, 386 P.2d 671, 676 (Cal. 1963).

147. *In re* Marriage of Cueva, 149 Cal. Rptr. 918, 922 (Cal. App. 1978).

148. *Id.* at 923. *But see* Ferro, *supra* note 28, at 21 (arguing that the traditional hourly billing should be replaced by value-based billing and suggesting a starting of a percentage of the gross assets).

149. Willemsen Amicus Letter, *supra* note 136.

150. *Id.*

151. Bryan Interview, *supra* note 125.

152. *Id.*

153. *Id.*

154. *Id.*

Another alternative is to make a fundamental change in the method of setting attorney fees.[155] While hourly billing is the most commonly accepted means of determining fees, it has a number of limitations.[156] For example, there is a conflict between the client's interest in resolving the matter as quickly as possible and the attorney's interest in maximizing the number of hours worked.[157] In addition, hourly billing does not reflect technological advances, such as computers and facsimile machines; it gives equal value to all tasks; and it uses arbitrary units of time, e.g. one sixth of an hour.[158] Therefore, value billing has been proposed as alternative that addresses the conflicting needs of client and attorney.[159] "Value billing encompasses the subjective concept of a fee based on both the client's and the lawyer's perception of value in a given matter at any given stage."[160] This could include contingent fees, flat fees and result fees.[161] The proponents of this approach recognize that all the methods of billing have flaws, but that family law attorneys should have the "opportunity to be creative in structuring fees to meet the needs of their clients."[162] Because most of the suggested alternatives address attorney-client issues, it is unlikely that such alternative methods of billing would have a major impact on the problems with fee awards by the courts.

A fee award at the commencement of the case would encourage the parties to settle quickly, and would thus result in lower fees:

> The duration of a case would be drastically reduced if the nonmonied spouse were compelled to pay opposing counsel's fees at the outset of the action and at regular intervals. Forced to confront the unpleasant reality of such an obligation, a party would be much less inclined to prolong the litigation.[163]

Moreover, because the dependent spouse lacks available funds at the start of the proceedings, he or she may be unable even to retain counsel.[164] Not every attorney is willing to take on a client and file all the pleadings and go to court with a mere expectation of the court making a fee award.

---

155. *See* Linda J. Ravdin & Kelly J. Capps, *Alternative Pricing of Legal Services in a Domestic Relations Practice: Choices and Ethical Considerations*, 33 FAM. L.Q. 387 (1999); Barbara A. Stark, *Value Billing—Matrimonial Attorney Fees in the 90's*, 7 J. AM. ACAD. MATRIM. LAW. 79 (1991); Ferro, *supra* note 28.

156. Ravdin & Capps, *supra* note 155, at 388-91.

157. *Id.* at 389; Ferro, *supra* note 28, at 1-2.

158. Ravdin & Capps, *supra* note 155, at 89-90; Ferro, *supra* note 28, at 2.

159. Stark, *supra* note 155, at 86.

160. Ravdin & Capps, *supra* note 155, at 392.

161. *Id.* at 416-17; Stark, *supra* note 155, at 88.

162. Ravdin & Capps, *supra* note 155, at 418.

163. Letter from Karen Winner, Author of *Divorced from Justice*, to the California Supreme Court (April 27, 2000) (on file with the author) (quoting the 1993 Report issued by the New York Committee to Examine Lawyer Conduct in Matrimonial Actions).

164. Ravdin & Capps, *supra* note 155, at 409 (stating that the economically disadvantaged spouse may be deprived "the means to hire the attorney of [his or her] choice").

In contrast to the statutory fee-shifting in marital dissolutions, the California Supreme Court has adopted an hourly rate fee system for appointed criminal defense counsel, thus eliminating the trial court's discretion in fee awards.[165] Rather than relying on the court's weighing of the subjective factors, the attorney is paid at an hourly rate that is multiplied by the number of "allowable hours."[166] Attorneys may submit bills to the court every ninety days.[167] If system of payments were implemented in marital dissolution matters, it would reduce the unpredictability that family law attorneys face when their fees are dependent on the court's discretion.

In a family law case in Florida, the State Supreme Court recently held, "The lodestar, which is produced by multiplying the number of hours reasonably expended by a reasonable hourly rate, may be used as a starting point in determining a reasonable attorney's fee."[168] While the respective financial positions of the parties are a primary factor, the court must also consider other relevant circumstances, "[S]uch as the scope and history of the litigation; the duration of the litigation; the merits of the respective positions; whether the litigation is brought or maintained primarily to harass . . . ; and the existence and course of prior or pending litigation."[169] The "lodestar" method provides a more objective basis for fee awards, although the Florida Supreme Court did note that trial judges have "wide leeway to work equity."[170]

CONCLUSION

> *"Given the complexity of modern day family law litigation and the significance of this litigation to our society, courts should be doing everything they can to encourage, not discourage, able attorneys to handle family law cases."*[171]

The current system of fee awards discourages attorneys from representing the financially disadvantaged spouse. The awards are often inadequate. Consequently, the spouse without means, usually the woman, is unable to retain counsel.[172] When there is a large disparity between the spouses' incomes, such as between Paula Ruisi and Kip Thieriot, this results in the

165. California Supreme Court, Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants IIA ("Payment Guidelines") (revised Sept. 19, 1990, and Dec. 22, 1993).
166. *Id.*
167. *Id.*
168. Rosen v. Rosen, 696 So.2d 697, 701 (Fla. 1997).
169. *Id.* at 700.
170. *Id.*
171. *In re* Marriage of Hatch, 215 Cal. Rptr. 789, 791 (Cal. App. 1985).
172. GENDER BIAS, *supra* note 104, at 194.

higher income spouse having a tactical advantage.[173] If the courts want to encourage attorneys to represent family law litigants with limited financial resources, then they need to provide adequate fee awards.

The reasons for the inadequate awards include judicial discretion in awarding fees, gender bias, an unclear definition of the concept of "need" as a basis for a fee award, and the "abuse of discretion" standard of review. Thus, it is clear that the failure of the courts to follow the factors set forth in the law may result in spouses being unable to obtain and retain representation and attorneys being unable to carry the financial burden of representing clients who do not have sufficient assets. Certainly, the fee awards to Paula Ruisi were insufficient to allow her to obtain and maintain adequate representation.

The current fee-shifting system is failing to serve its purpose of providing parity of legal representation between spouses in marital dissolution cases. Although the law allows for fee awards, there is no certainty that they will be made. Attorneys need to know that they will be paid for the work that they have done and "that their good faith professional decisions about the issues to be pursued and the time spent developing the case will not be readily second guessed."[174] Financially disadvantaged parties needs to know that they are able to retain counsel to litigate their cases.

While judicial discretion is well established in our legal system and provides needed flexibility, it has also resulted in inadequate attorney fees and thus, inadequate representation. Currently, there is too much flexibility, without sufficient controls. If the "abuse of discretion" standard does not allow appellate courts to provide the necessary restraints on judicial discretion, then perhaps it is time for the legislature to intervene. Among the options would be to revise the "abuse of discretion" standard, provide weights to the factors the trial court must consider, or revise the basis for fee awards to a market rate.

Furthermore, the Judicial Council of California must continue its efforts to address the ongoing problem of gender bias in the award of attorney fees to women spouses and their female lawyers. This could include continuing education, guidelines for judges, and monitoring and review of the fee awards made.

Thus, to remedy the problem of inadequate attorneys fee awards, changes must come from the legislature, from the court system, and from practicing attorneys. But until the changes are made, the public policy, as set forth in the statutes allowing fee-shifting, is in conflict with reality. The playing field is not level and the party with the money will continue to win by financial attrition.

---

173. Bowermaster Amica Curiae Letter, *supra* note 115.
174. *Id.*