

LIABILITY OF ONE SPOUSE FOR PRIVATE INVESTIGATOR FEES INCURRED BY THE OTHER SPOUSE DURING DIVORCE PROCEEDINGS

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For the reasons set forth in the main article appearing in this issue, the testimony of a private investigator is one of the most effective methods, short of an admission, for proving that the other spouse has committed adultery. Private investigators charge for their work, however, and in many cases the bill can be substantial. The purpose of this article is to explore briefly the possibility of making the other spouse pay part or all of the charges incurred.

Theories of Liability

Courts have found liability for private investigator fees under two different theories. The traditional theory was the common-law doctrine of necessities, the rule that holds one spouse liable directly to third parties for "necessaries" acquired by the other spouse during the marriage. Where private investigator fees are reasonably necessary to acquire proof of adultery, a number of cases hold that such fees constitute a "necessary." See, e.g., *Lanyon's Detective Agency v. Cochrane*, 240 N.Y. 274, 148 N.E. 520 (1925). See generally Annotation, *Husband's Liability for Expenses Incurred by Wife in Investigating His Marital Transgressions*, 99 A.L.R.2d 264 (1965 & Supp. 1999).

The modern cases do not rely upon the theory of necessities. When the parties are separated and the court has made a temporary support order, that order is intended to cover all of the expenses which are necessary for that recipient's support. To impose additional liability for necessities after separation and perhaps the filing of a divorce action, over and above the amount of court-ordered temporary support, is a questionable proposition. See, e.g., *Dorfman v. Dorfman*, 191 Misc. 227, 77 N.Y.S.2d 267, 268 (Sup. Ct. 1947) ("[T]he award of alimony fixed the measure of the wife's right to support and of her husband's obligation therefor," so that liability for necessities was limited to those incurred before the effective date of the alimony award).

The modern cases rely instead upon the doctrine of suit money. Under this doctrine, as codified by statute in many states, the court in a divorce action has discretion to order one spouse to pay all or a portion of fees incurred by the other to litigate the case. The rule is applied most frequently to attorney's fees, but it also applies to fees charged by non-attorneys whose expertise is necessary to the effective litigation of a divorce suit. Among these persons are not only expert witnesses, but also private investigators. The focus of this doctrine is not upon the need for support per se, but upon the need to equalize the resources which the parties can spend litigating the action so that the less wealthy spouse does not have an undue tactical advantage. Since inability to retain a private investigator can place a spouse at a distinct

tactical disadvantage, private investigators fall clearly within the category of persons whose fees can be covered by a suit money award.

Since Connecticut follows the common law of England in allowing counsel fees and expenses of litigation in divorce matters as an inherent power of the trial court, we hold that detective fees also may be awarded to a wife under appropriate circumstances at the judicial discretion of the trial court.

Stoner v. Stoner, 163 Conn. 345, 307 A.2d 146, 154 (1972).

Where such expenses are reasonably necessary to the institution or prosecution of a divorce suit, an award of private investigator fees chargeable against the husband to the same extent as counsel fees . . . is proper.

Sody v. Sody, 32 Md. App. 644, 363 A.2d 568, 578 (1976); see also *Hutchinson v. Hutchinson*, 223 Cal. App. 2d 494, 36 Cal. Rptr. 63 (1963); *Arnold v. Arnold*, 257 Iowa 429, 133 N.W.2d 53 (1965) (construing trial court's award of suit money to be directed at private investigator's fees, and extending that award to cover additional reasonable investigation expenses); *Brandi v. Brandi*, 302 S.C. 353, 396 S.E.2d 124 (Ct. App. 1990) (approving in summary fashion an award of suit money which included private investigator fees).

Need for Investigation

Regardless of whether the court follows the modern suit money theory or the traditional necessities theory, an award of private investigator fees is available only where the services of the investigator were reasonably necessary under the facts:

Such an award should not be considered a matter of right, but rather, should be determined on the particular facts of each case after a proper analysis of all relevant circumstances. Further, "such charges should not be allowed unless the . . . [court], in the exercise of . . . [its] discretion is fairly convinced by conclusive and satisfactory proof that it . . . [is] reasonably necessary for the wife to employ an investigator."

Stoner v. Stoner, 163 Conn. 345, 307 A.2d 146, 154 (1972) (quoting *Rubin v. Rubin*, 233 Md. 118, 195 A.2d 696, 702 (1963)).

To that end, the chancellor, among other factors, should give consideration to whether the wife, prior to employing the detective, had sought the advice of competent counsel as to her marital rights and necessity of employing an investigator to supplement the information and knowledge she then had of grounds for divorce. Furthermore, since a private detective or investigator employed by the wife would be an interested witness, the chancellor should also take into consideration whether his testimony was such as to require

undue caution and scrutiny.

Rubin v. Rubin, 233 Md. 118, 195 A.2d 696, 702 (1963).

Only a few cases apply the general standard of necessity to specific fact situations. In *Lanyon's Detective Agency v. Cochrane*, 240 N.Y. 274, 148 N.E. 520 (1925), the husband told the wife that he loved another woman and would no longer live with the wife. The wife then employed an investigator to uncover additional details of the husband's adultery. The court held that because the husband had openly admitted his misconduct, there was no reasonable need for the wife to employ the investigator. As long as the husband showed no signs of recanting his earlier admission, *Cochrane* seems to be a clear example of needless investigation.

In *Freese v. Freese*, 89 Md. App. 144, 597 A.2d 1007 (1991), the wife paid a private investigator \$12,650 to undertake extensive efforts on her behalf. "Despite the massive surveillance undertaken, no evidence of adultery was uncovered," although "[a]t trial, the husband admitted that he had committed adultery." 597 A.2d at 1012 & n.7. The court upheld a lower court decision finding the fee to be unnecessary.

The court in *Freese* was far too hasty in reaching its decision. If the wife had reason to believe that the husband had admitted or would admit adultery at trial, then the fees were unnecessary for the same reason as in *Cochrane*. It is possible, however, that the husband admitted adultery only because he feared that the private investigators had uncovered evidence of adultery. It is also possible that the wife, not knowing the husband would admit adultery, had a reasonable need to investigate the facts. The question of necessity required much more attention than was given to it by the *Freese* court.

Of course, even if some amount of investigation was necessary in *Freese*, it may well be that \$12,650 of investigation was excessive. The court's reference to "massive surveillance" and minimal results, *id.* at 1012, suggests that this was the case. In the context of attorney's fees, however, it is well settled that the remedy for excessive charges is to reduce the award, and not to deny it altogether. Brett R. Turner, *Compensating the Family Law Lawyer: Final Attorney's Fees Awards in Domestic Relations Cases*, 8 *Divorce Litigation* 201, 215-17 (1996). The *Freese* court may have let its understandable concerns about the excessiveness of the fee force an unduly hasty decision on a separate issue whether the wife was justified in retaining an investigator to begin with.

An even shorter and more questionable result was reached in *Ferguson v. Ferguson*, 300 S.C. 1, 386 S.E.2d 267 (Ct. App. 1989). There, the court held:

We find no abuse of discretion in the trial court's refusal to require the husband to pay private investigator fees. The court reasoned these fees

should not be paid by the husband because the "private investigator's testimony failed to prove wrongdoing on the part of the [husband] prior to the parties' separation. Thus, his testimony was, by statute, irrelevant." The sole purpose of the private investigator's testimony was to prove the husband committed adultery. Our review of the record sustains the court's conclusion the husband did not commit adultery. This aspect of the trial court's order is affirmed.

386 S.E.2d at 269-70.

The only conclusion that the objective reader can draw from Ferguson, and to a slightly lesser extent from Freese, is that private investigator fees are recoverable only if the investigator actually uncovers proof of adultery. In other words, unlike the fees of the attorneys and every other expert witness who testifies in the case, detective fees are payable only on a contingent fee basis. This should not be the law. With certain exceptions not here relevant, courts have held consistently for years that attorneys cannot charge a contingent fee for their services in a divorce case. Laura W. Morgan, *If It Walks Like a Duck, and Talks Like a Duck . . . : Contingency Fees and Results Bonuses in Divorce Practice*, 10 *Divorce Litigation* 138 (1998). The rationale is that attorneys who are paid only on a contingency basis will have a strong financial incentive to encourage divorce and discourage reconciliation. Precisely the same reasoning applies to private investigators. Investigators have an obvious opportunity to fabricate false evidence of divorce. In the context of credibility, as noted in the main article appearing in this issue, the law has traditionally been sensitive to that opportunity. By awarding private investigator fees only to the successful investigator, cases such as Ferguson and Freese give private investigators a significant incentive to fabricate evidence. The incentive is particularly strong when the innocent spouse is of modest means and may not be able to pay the investigator's entire fee without assistance. It is hard to understand why the courts are so sensitive to the dangers of attorney contingent fees and so unaware of the dangers of private investigator contingent fees.

A better approach is to look at all of the facts of the case, including, but not limited to, the success of the investigation, before determining whether private investigator fees were reasonably incurred. This was essentially the approach taken by the Rubin and Stoner cases cited at the beginning of this section; both cases anticipated a broad inquiry, which was not limited to consideration of whether the investigation actually revealed evidence of adultery.

The author of this article can easily imagine fact situations in which investigator fees were reasonably incurred even though they produced no direct evidence. Assume, for instance, that the wife has a reasonable basis for suspecting adultery but has no concrete proof. Upon advice of her divorce attorney, she retains an investigator. The investigator is unable to uncover evidence of adultery. Nevertheless, the husband, aware that he is being

investigated and fearful that the investigator has found relevant evidence, admits at trial that he committed adultery. In this scenario, the husband's admission was a direct result of the investigator's efforts, and the investigator's fee was reasonably incurred. Significantly, this hypothetical situation is consistent with every fact mentioned by the court in Freese a decision which concluded, without proper basis, that the fees were incurred unreasonably.

Under the broader approach suggested by this article, the court should determine reasonableness by looking at what the retaining spouse knew when the investigator was retained. If, at that time, the spouse already had sufficient evidence to prove adultery, the fees were not reasonable. Cochrane. If the spouse had no reason even to suspect adultery, then the investigation is a mere fishing expedition, and it is doubtful that the other spouse has any liability for the investigator's fee. If the spouse had good reason to suspect adultery, but did not have sufficient proof, then the decision to retain an investigator should normally be reasonable. Of course, the investigator must be reasonably competent, he or she must be given reasonable guidance from existing facts, and the amount of the fee must not be excessive. If these conditions are met, the investigator's services should be treated as reasonably necessary even if he or she finds no additional evidence of adultery. To rule otherwise, in a case where the initial decision to retain the investigator was reasonable, is to adopt a contingent fee system for compensating investigators, in violation of the general rule against contingent fees in divorce cases.

Amount of the Fee

None of the reported cases to date have focused on the amount of the investigator's fee. All of the decisions hold that the entire fee is either reasonable or unreasonable.

The number of reported decisions is very small, however, and questions of reasonableness have not been given much attention. It is settled law in the attorney's fees context that even where the services performed by the attorney are reasonably necessary, the award is still limited to a reasonable fee for those services. Brett R. Turner, *Compensating the Family Law Lawyer: Final Attorney's Fees Awards in Domestic Relations Cases*, 8 *Divorce Litigation* 201, 215-17 (1996). Stated conversely, the attorney cannot recover an unreasonably large fee for reasonably necessary services. A growing number of cases apply the same rule to expert witness fees. Brett R. Turner, *Equalizing Access to Expert Testimony: Expert's Fees Awards and Court-Appointed Experts*, 8 *Divorce Litigation* 13, 16 (1997).

There is no reason why the same rule should not apply in the context of private investigator fees. Thus, even where the services of an investigator are reasonably necessary, the amount of the award is still limited to a reasonable fee for the work actually done. To enable the court to determine

a reasonable fee, the spouse seeking the award should introduce an itemized bill from the investigator, similar to the sort of itemized bill which attorneys submit for themselves and for expert witnesses. The bill should state what services were performed by which investigators on which dates and at what hourly rates, in such a manner as to justify the total bill. Expenses should also be itemized in reasonable detail. In the absence of such an affidavit, the court is entirely justified in holding that part or all of the fee incurred was unreasonable.

Conclusion

Private investigators are an effective and important tool which attorneys can use to uncover evidence of adultery. Because investigators are so effective, it is important that their services be equally available to both parties, regardless of their respective wealth. Thus, like attorneys and expert witnesses, private investigators should be covered by the suit money doctrine. Bluntly put, the parties will not have equal access to justice unless they have equal access to the services of a professional investigator.

Private investigator fees should, of course, be subject to the same limitations as attorney and expert witness fees. They should be available only for reasonably necessary services, and the amount of the award should be limited to the reasonable cost of services actually provided. While success or failure should not be the sole factor in determining whether the services were reasonably necessary, there will be many fact situations in which employment of an investigator is not necessary. When the services of an investigator are reasonably necessary, however that is, when misconduct is reasonably suspected but not yet conclusively proven the court should have the power to order the wealthier spouse to pay a portion of the other spouse's private investigator fees.