

Opinion 2001-A: Contingent Fees in Domestic Relations Matters
Approved by BBA Council 7/10/01

SUMMARY: *After a divorce decree has become final, an attorney may properly enter into a contingent fee agreement to collect previously awarded child support.*

FACTS: An attorney inquires whether it is proper to enter into a contingent fee agreement with a client to collect child support previously awarded for a child between 18 and 20 years of age, for whom support was ordered because the child is attending college. The parties' divorce has become final.

DISCUSSION: Massachusetts Rules of Professional Conduct Rule 1.5(d) (S.J.C. Rule 3:07) provides:

A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce, or upon the amount of alimony or support, or property settlement in lieu thereof

The purpose of this rule, and its predecessor, SJC Rule 3:05(3)(b), is to

protect the interests of clients and the public [T]he prohibition is designed primarily to encourage reconciliation by removing any incentive to the attorney to press forward with the divorce and, secondarily, to assure that the Court will be able to make a fully informed, equitable property settlement.

Guenard v. Burke, 387 Mass. 802, 806 (1982).

In Guenard, the Supreme Judicial Court held that counsel could recover the fair value of services rendered to a client through a contingent fee agreement entered into after a final divorce decree had been entered to litigate a dispute over a property settlement. Where the divorce has become final and child support has already been awarded, the purpose for the prohibition in the rule does not apply. In such a case, the Court will have been fully informed concerning any equitable property settlement, and reconciliation obviously will have failed. It appears to the Committee, therefore, that Rule 1.5(d) does not prohibit the contemplated contingent fee. *Cf. Fletcher v. Fletcher*, 591 N.E.2d 91, 93 (Ill. App. 1992) (construing Illinois Rule 1.5(d)(1), which provides that its prohibition "shall not extend to representation in matters subsequent to final judgment in such cases"). *See also* Massachusetts Bar Association Ethics Op. 94-4 (SJC Rule 3:05(3) construed to permit contingent fee agreement to collect delinquent child support payments). The fact that the person for whom support is sought is between 18 and 21 years of age does not have any bearing on the issue. ¹

We also note that failure to pay court-ordered child support usually results in a contempt proceeding pursuant to G.L. c. 215, §34A, which provides, in relevant part, that:

[i]n entering a judgment of contempt for failure to comply with an order or judgment for monetary payment, there shall be a presumption that the plaintiff is entitled to receive from the defendant, in addition to the judgment on monetary arrears, all of his reasonable attorney's fees and expenses relating to the attempted resolution, initiation and prosecution of the complaint for contempt. The contempt judgment so entered shall include reasonable attorney's fees and expenses unless the probate judge enters specific findings that such attorney's fees and expenses shall not be paid by the defendant.

The Appellate Division has held that an award of fees pursuant to this statute does not preclude, on grounds of res judicata, the attorney from seeking to enforce a fee agreement. Berke v. Gorone, 1994 Mass. App. Div. 202, 204 ("The assessment of reasonable attorney's fees as a statutory sanction is not the equivalent of a determination of attorney's fees due under a attorney-client fee agreement for services rendered. ... G.L. c. 215, §34A reasonable attorney's fees are awarded on 'strictly conservative principles' because they are assessed against the contemnor, who is not the attorney's client and who did not receive the attorney's services.").

For these reasons we conclude that an attorney in the circumstances discussed in this opinion may properly request and enforce a contingent fee agreement in a domestic relations matter.

¹ Effective November 2, 2000, the Supreme Judicial Court amended Mass. R. Prof. C. 1.5(c)(5) and (f)(4) to provide, in substance, that where an attorney has a contingent fee agreement in a case in which a fee may be awarded by statute or rule, the lawyer "shall be entitled to the greater of (i) the amount of any attorney's fees awarded by the court or included in the settlement, or (ii) the percentage or other formula applied to the recovery amount, not including such attorney's fees" Comment 8 to Mass. R. Prof. C. 1.5 (also adopted effective November 2, 2000) explains that:

When attorney's fees are awarded by a court or included in a settlement, a question arises as to the proper method of calculating a contingent fee. Rule 1.5(c)(5) and paragraph 4 of the form agreement contained in Rule 1.5(f) state the default rule that the parties may agree on a different basis for such calculation, such as applying the percentage to the total recovery, including attorney's fees.