



DISCHELL | BARTLE | YANOFF | DOOLEY  
R E S U L T S M A T T E R

FAMILY LAW  
APRIL 1, 2010

**Supreme Court Finds That Reasonableness Must be Implied When Determining an Award of Contractual Counsel Fees in McMullen v. Kutz, 985 A.2d 769 (Pa. 2009)\***

The Supreme Court, in a matter of first impression, granted Wife's appeal to determine whether a court could imply a reasonableness requirement into a contract provision that did not contain such a qualification. Wife, the non-breaching party to a Marital Settlement Agreement, argued that the term "reasonable" could not be inserted into the Agreement's enforcement provision which provided that a non-breaching party should be awarded *all* counsel fees incurred as a result of the other party's breach of the Agreement. In a decision that has been met with much dissention, the Supreme Court determined that, as a matter of public policy, reasonableness must be implied when determining an award of counsel fees under a contract.

**Facts and Trial Court Decision**

The facts of the case are as follows: On July 7, 2000, Marjorie McMullen ("Wife") and Ronald Kutz ("Husband") entered into a Marriage and Property Settlement Agreement ("Agreement") to resolve their pending economic and support claims. The Agreement further provided that if either party breaches any of its' provisions, he or she will be responsible for any counsel fees and costs incurred by the non-breaching party to enforce the Agreement. The Agreement's enforcement provision specifically stated as follows:

If either party breaches any provision of this Agreement, the other party shall have the right, at his or her election, to sue for damages for such breach or seek such other remedies or relief as may be available to his or her, and the party breaches this contract shall be responsible for payment of legal fees and costs incurred by the other in enforcing their rights under this agreement.

McMullen v. Kutz, 985 A.2d at 771.

In 2005, Wife filed a Petition to Enforce the Agreement alleging that Husband had breached two of its' provisions. First, Wife alleged that Husband had stopped paying child support before the defined emancipation date for their eldest son. Second, Wife alleged that Husband had failed to forward to Wife her full share of his military pension.

Husband responded in opposition to Wife's Petition, arguing that he had not breached the Agreement. The Trial Court found for Wife on both issues.

After finding that Husband had breached the Agreement, Judge Edward E. Guido of Cumberland County addressed the issue of Wife's counsel fees. Wife claimed that she incurred approximately \$3,000.00 in counsel fees as a result of Husband's breach and that she, as the non-breaching party, was entitled to that entire amount pursuant to the Agreement's enforcement provision. However, the Trial Court, who did not hold a hearing on the issue of counsel fees, rejected Wife's claim for \$3,000.00, stating that such fees were unreasonable. Rather, the Trial Court awarded Wife \$1,200.00, finding that such an amount was reasonable in light of the gravity of Husband's breach.<sup>1</sup> In determining the appropriate award, the Trial Court placed great emphasis on the fact that Wife's counsel made no effort to settle this matter prior to filing the Petition to Enforce the Agreement.

### **Superior Court Decision**

Wife appealed the Trial Court's decision regarding the award of counsel fees to the Superior Court. In her appeal, Wife argued that the Trial Court erred in considering the reasonableness of the counsel fees incurred when the Agreement, contemplated and executed by both parties, did not contain such a condition. In its opinion, Judges Todd, Bender, and Colville of the Superior Court framed the issue as follows: Is a reasonableness requirement implicit in a contract where such criterion is not explicitly stated? The Superior Court answered its own question in the affirmative.

In making the determination that reasonableness is implicit in any contract, the Superior Court primarily relied on its 1981 decision of Duffy v. Gerst, 429 A.2d 645, 650 (Pa. Super. 1981). In Duffy, the Superior Court explicitly held that, "It may be assumed that implicit in this provision is the condition that the attorney's fee must be a reasonable fee." Duffy, 429 A.2d at 650. Judge Robert E. Colville dissented from the majority opinion, finding that although he agreed that reasonableness could be implied into the enforcement provision, he emphasized that a Trial court did not have the authority to make a *sua sponte* determination of what is reasonable. Rather, the breaching party must make a specific objection to the fees claimed.

### **Supreme Court Decision**

Following the Superior Court's decision, Wife filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court granted review of Wife's first alleged error: Wife argued that the lower Courts erroneously implied a reasonableness requirement into the Agreement when the "plain language" of the enforcement provision states that the breaching party will be responsible for *all* counsel fees and costs incurred by the non-breaching party to enforce his or her rights under the Agreement. In her Petition, Wife had also alleged that if the Supreme Court determined that the lower courts appropriately implied the term reasonableness into the Agreement, then the Trial Court erred in failing to conduct a hearing regarding whether

the fees incurred by Wife were, in fact, reasonable. However, the Supreme Court declined to address Wife's second issue in its Opinion.

The Supreme Court determined that reasonableness is an implicit requirement in any contract. In making this determination, the Supreme Court first examined Wife's argument that the plain language of the Agreement controls and, thus, a reasonableness requirement could not be inserted therein. In support of her position, Wife cited two Superior Court decisions, *Creeks v. Creeks*, 619 A.2d 754 (Pa. Super. 1993) and *Profit Wize Marketing v. Wiest*, 812 A.2d 1270 (Pa. Super. 2002). Wife argued that both decisions stand for the proposition that a Court may not imply reasonableness into a contract because the plain language of the contract is the "best indication of the parties' intent." *Id.* at 773 (*quoting Creeks*, 619 A.2d at 756). Wife further explained that as the "plain language" of the enforcement provision provides that the breaching party is responsible for *all* counsel fees incurred by the non-breaching party, then whether those fees are reasonable is not for the court's determination. In short, the breaching party must pay all fees incurred, whatever the amount.

The Supreme Court, per Justice Baer, who accomplished an extraordinarily detailed analysis of the nations' rulings regarding the counsel fee issue, determined that Wife's reliance on the *Creeks* and *Profit\_Wize Marketing* decisions was misplaced. The Supreme Court explained that these cases only provide support to the general proposition that the plain language of a contract is paramount when determining the parties' motives for executing such an Agreement. Rather, these cases do not support Wife's narrower position that reasonableness can not be implied into a contract. In fact, the central dispute in both *Creeks* and *Profit Wize Marketing* was not the reasonableness of the non-breaching party's counsel fees, but whether the alleged breaching party had violated the Agreement at all. The Court also noted that, unlike the instant Agreement, reasonableness was, in fact, a stated criterion in the *Creeks* contract. Thus the Supreme Court found both the *Creeks* and *Profit Wize Marketing* decisions to be, "neither inconsistent nor relevant to the issues in this case." *Id.* at 775.

After finding that *Creeks* and *Profit Wize Marketing* were not applicable to the instant matter, the Supreme Court turned to the central questions at bar: Can a court find that a contractual provision regarding counsel fees require that the claimed fees be reasonable when the contract does not contain such criterion? And, if the answer to this first question is in the affirmative, does a court have the authority and/or obligation to question the reasonableness of those fees?

As the Superior Court had done, the Supreme Court also answered its own questions in the affirmative. The Supreme Court held as follows:

The dispute in this case concerns the trial Court's authority to address the reasonableness of the attorney fees claimed. Wife, and a minority of courts across the country, would read the plain language of the contract to require any and all fees incurred by the non-breaching party to be payable by the breaching party. We cannot accept this reading, however, because the potential for abuse is too high. If we were to forbid a reasonableness inquiry by a Trial court, there would be no safety valve and courts would

be required to award attorney fees even when such fees are clearly excessive. Instead, we join the majority of our sister states in finding that parties may contract to provide for the breaching party to pay the attorney fees of the prevailing party in a breach of contract case, but that the Trial court may consider whether the fees claimed to have been incurred are reasonable, and to reduce the fees claimed if appropriate.

*Id.* at 776-77 (footnotes omitted). After finding that the term reasonableness must be implied when evaluating a claim for counsel fees, the Supreme Court declined to address the issue of whether the fees claimed in this case were reasonable. However, the Court did acknowledge that its decision inadvertently resulted in the affirmation of the Trial Court's award of \$1,200.00 to Wife.

Justice Todd did not participate in the consideration or decision of this case. Justices Eakin and McCaffrey joined Justice Baer in the majority opinion. Justice Saylor concurred in the result but dissented with regards to the opinion's sweeping rule. Justice Castille also dissented, making the decision four to two in favor of making this holding the rule in Pennsylvania.

#### **CASE NOTE AUTHOR'S EDITORIAL COMMENTS:**

The majority of the Pennsylvania Supreme Court has made its opinion indelibly clear: the concept of reasonableness is implied in all counsel fee provisions of matrimonial agreements. If the parties had intended different they would have written "all counsel fees, cost and expenses, not just reasonable counsel fees, costs and expenses." Justice Baer's majority opinion and Chief Justice Castille's dissenting opinion both provided professorial analyses of the opinions throughout the country. The Pennsylvania Supreme Court has sided with the majority of the states in its ruling.

\*This article was original published in the March 2010 Issue of the Pennsylvania Family Lawyer, Volume 32, Issue No. 1, pg. 18.

---

<sup>i</sup> The Trial Court determined that Husband owed Wife a total of \$792.12 in unpaid pension benefits and child support. Wife did not appeal this decision.

This article is published by Dischell Bartle Yanoff & Dooley, P.C. It does not, and is not intended to, constitute legal advice. Your receipt of this publication does not create or constitute an attorney-client relationship. You should not consider this publication to be an invitation for an attorney-client relationship, you should not rely on the information provided in this publication without first obtaining separate legal advice, and you should always seek the advice of competent legal counsel in your own state. This publication should not be viewed as an offer to perform legal services in any jurisdiction other than those in which DBYD's attorneys are licensed to practice. DO NOT send DBYD any information concerning a potential legal representation until you have spoken with one of DBYD's attorneys and obtained authorization to send that information.