

New Rebuttable Presumption of Attorney's Fees

Another of the changes effective on October 12, 2010 concerns awards of attorney's fees in actions for divorce, maintenance, child support, custody, visitation or enforcement.

Under the old law, the standard rule for attorney's fees is that each party pays their own, unless it is authorized by statute or prior agreement between the parties. The law directed courts to award attorney's fees "in the court's discretion" to allow the spouse "to carry on or defendant action or proceeding" based upon the circumstances of the case. Under that standard, attorney fee awards were not always granted, but were often awarded when there was a significant difference in income between the parties, as a penalty for nasty litigation tactics, failing to comply with statutes and so on.

Now, however, the law provides that "there shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse." This means that the Court must award attorney's fees to the less monied spouse unless there is a good reason against doing so. The practical effect is that the "less monied spouse" will be receiving some contribution toward attorney's fees from their spouse.

There are a couple concepts here, namely how to identify the "less monied spouse" and what to do with the "rebuttable presumption."

Ordinarily, a stay-at-home parent will be the less monied spouse where the other spouse works outside the home, but other circumstances, such as relative assets of the parties, underemployment, debts of the parties and so on may make an award of attorney's fees to the spouse who earns less money unfair. That's where the rebuttable part of the presumption kicks in: it will be important to let the Court know about the unique circumstances of each case so the Court can determine whether an award of attorney's fees is appropriate.

Please read my articles on other laws recently passed affecting divorce situations, including [new no-fault grounds for divorce](#), [calculation of temporary maintenance payments \(formerly called alimony\)](#), and [child support](#).