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## Attorney Fees

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## ATTORNEY FEES

*Garrick v. Weaver*, 888 F.2d 687

Author: Judge Tacha

Plaintiff, Garrick, and her attorneys, Melton and Key, appealed an order of the magistrate approving a settlement and apportioning a fund. They alleged that the magistrate abused his discretion in reviewing and revising attorneys' fees under two contingency fee contracts. In addition, Garrick challenged the magistrate's order directing that the funds apportioned to the minor Garrick children be placed in a trust. Garrick claimed that this violated New Mexico law, and violated the family's right to freedom of religion.

First, the Tenth Circuit held that the magistrate did not abuse his discretion by awarding attorneys' fees on a quantum meruit rather than on a contingency basis. Melton was subsequently removed for cause. The court found that no fee agreement existed between Key and Garrick. Second, the court failed to consider Garrick's objections regarding the placement of her children's funds in a trust. The court reasoned that the guardian ad litem, not Garrick, was the only party with standing to represent the children's interests. Furthermore, Garrick's assertions regarding violation of the family's freedom of religion were held to be premature and not ripe for adjudication. Third, the court found the magistrate did not err in placing the settlement funds in the registry of the court during post trial motions and during pendency of appeal. Also, the magistrate did not err in holding he was without jurisdiction to order disbursement of funds in the registry of the court where his order concerning the disposition and apportionment of those funds was on appeal.

*Headlee v. Bowen*, 869 F.2d 548

Author: Judge Barrett

Plaintiff, Headlee, appealed a denial of a cost of living adjustment to attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) ("EAJA"). Headlee argued that the district court abused its discretion in not granting the cost of living increase because courts in other circuits had granted the increase. Defendant, Bowen, responded that the courts are split on the issue. In addition, Congress did not find a need when recently reenacting 28 U.S.C. § 2412(d) to increase the standard rate.

The Tenth Circuit ruled that the award of EAJA attorneys' fees was clearly within the district court's discretion. This discretion was appropriate because the district court was the most familiar with the case and prevailing attorneys' fees. The court affirmed the award of attorneys' fees at the standard rate.

*Morris v. Peterson*, 871 F.2d 948

Author: Chief Judge Holloway

Defendants moved for an award of appellate attorney fees and costs in a legal malpractice action. The federal district court in Kansas entered an order awarding fees and costs for the appeal in the previous Colorado litigation, and plaintiffs appealed.

The Tenth Circuit found that the federal district court does not have authority to award attorney's fees, either pursuant to 28 U.S.C. § 1927, or under the inherent equitable power of the court for bad faith and vexatious conduct. The court held that the determination of the right to such sanctions against attorneys for conduct on appeal is not within the authority of the district courts. Rather, the authority is reserved to the court in which the conduct occurred.

*Research-Planning, Inc. v. Segal*, 872 F.2d 335

Per Curiam

Plaintiff, Research-Planning, appealed from an order of the district court affirming the bankruptcy court's dismissal of its complaint. Funds, which were originally held in trust by First Capital Mortgage Loan Corporation ("First Capital"), pending a real estate transaction between Research-Planning and a third party, were placed in First Capital's general account in violation of an escrow agreement with Research-Planning. The funds were then used to cover pre-existing debts, before First Capital declared bankruptcy. Defendant, Segal, trustee in bankruptcy for the estate of First Capital, recovered a portion of these funds, which were placed in First Capital's estate under the bankruptcy laws.

The Tenth Circuit held that the bankruptcy and district courts' disposition of the case was in error. The court found that the district court erred in assuming that a metamorphosis occurred as possession of the funds was transferred. Research-Planning was not divested of ownership of the funds simply because the funds were transferred to cover pre-existing debts. The court stated that the trustee in bankruptcy held the funds not as part of the estate but for the benefit of Research-Planning.

*Sheet Metal Workers Trust Fund v. Big D Co.*, 876 F.2d 852

Per Curiam

Plaintiff, Sheet Metal Workers Trust Fund ("Sheet Metal"), commenced a district court action to collect delinquent payments owed to it by defendant, Big D Service Company ("Big D"). The district court entered garnishment judgments against Big D's successor, H-VAC, and against Kirkman, an employer of Big D. The district court awarded attorneys' fees for garnishment proceedings against H-VAC, but refused to grant attorneys' fees against Kirkman.

The Tenth Circuit held that 29 U.S.C. § 1132(g)(2)(D), applied to an award of attorneys' fees against employer Kirkman in garnishment proceedings. The court found that Congress enacted the statute to en-

courage enforcement of employer contributions and to protect employee funds from collection expenses. Moreover, the court stated that the Kirkman garnishment was an integral part of the post-judgment collection effort against Big D. The court remanded and ordered the district court to determine reasonable attorneys' fees for the Kirkman action, and for the prosecution of the appeal.

*TakeCare Corp. v. TAKECARE of Oklahoma, Inc.*, 889 F.2d 955

Author: Judge Moore

Plaintiff, TakeCare Corp., successfully brought suit against defendant, TAKECARE of Oklahoma, Inc. ("TAKECARE"), for infringement of its trademarked name. The district court sanctioned TAKECARE under the Lanham Act, which permits a prevailing party to recover attorney's fees "in exceptional cases." 15 U.S.C. § 1117(a). The district court held that TAKECARE's continued use of the mark without explanation after notice from the plaintiff amounted to a willful and deliberate infringement, and thus an exceptional case meriting an award of attorney's fees. TAKECARE appealed, claiming that its reliance on the advice of counsel removes its otherwise willful conduct from section 1117(a) sanction.

The Tenth Circuit noted that under certain circumstances a party's reasonable reliance on the advice of counsel may defuse otherwise willful conduct. However, the court refused to exculpate TAKECARE from the sanctions because no evidence was offered at trial as to what TAKECARE's attorney had advised. Thus, TAKECARE failed to prove reasonable reliance. The court held that TAKECARE could not introduce new evidence on appeal to show that the district court abused its discretion. The district court's decision was affirmed.

