

1983 S.C. Op. Atty. Gen. 129 (S.C.A.G.), 1983 S.C. Op. Atty. Gen. No. 83-80, 1983 WL 142749

Office of the Attorney General

State of South Carolina

Opinion No. 83-80

October 10, 1983

***1 SUBJECT: Attorney's fees and costs to Solicitor's Office, County Attorney's Office or county in actions brought under the Uniform Reciprocal Enforcement of Support Act.**

The Family Court does not have jurisdiction to order a Respondent to pay the fees or costs incurred by the Solicitor's Office, County Attorney's Office, or county in actions brought under the Uniform Reciprocal Enforcement of Support Act absent statutory authority or a common fund.

TO: Robert J. Harte
Solicitor
Second Judicial Circuit

QUESTION:

Under the Uniform Reciprocal Enforcement of Support Act, does the Family Court have the authority to order a Respondent to pay attorney's fees or costs incurred by the Solicitor's Office or the County Attorney's Office and the costs incurred by the county for service and filing?

DISCUSSION.

The Family Courts of South Carolina are courts of limited jurisdiction, owing existence to creation by statute rather than the [Constitution, Article V, Section 1](#), of the [Constitution of the State of South Carolina](#); [Section 20-7-1460 of the 1976 South Carolina Code](#), as amended. As such, the Family Court can exercise only such powers as are directly conferred upon it by statute and such as may be incidentally necessary to the execution of the powers expressly granted. [McCullough v. McCullough](#), 242 S.C. 108, 130 S.E.2d 77 (1963); [Richland County Department of Public Welfare v. Mickens](#), 246 S.C. 133, 142 S.E.2d 737; (1965), 21 C.J.S. [Courts](#) § 244, 249; 1980 Op. Atty. Gen., No. 80-23, pp. 48-50; [Greenfield v. Greenfield](#), 245 S.C. 604, 141 S.E.2d 920 (1965).

The right to recover attorney's fees or costs does not exist at common law. [Scott v. Alexander](#), 27 S.C. 15, 2 S.E. 706 (1887), 20 Am.Jur. 2d [Costs](#) § 72, p. 58. Neither attorney's fees nor costs are ordinarily recoverable without statutory authority. [Snider v. Butler](#), 278 S.C. 231, 294 S.E.2d 246 (1982); [S.C.D.S.S. v. Hyatt](#), 277 S.C. 152, 283 S.E.2d 445 (1981); [Hegler v. Gulf Insurance Co.](#), 270 S.C. 548, 243 S.E.2d 443 (1978); [State v. Wilder](#), 198 S.C. 390, 18 S.E.2d 324 (1941); [Setzer v. Odom](#), 174 S.C. 56, 176 S.E. 869 (1934). See also cases cited in West's South Carolina Digest, Costs, Key Number 2, 3, 172; 20 Am.Jur.2d [Costs](#) §§ 2, 3, 5, 72, pp. 6, 8, 58; 20 C.J.S. [Costs](#) §§ 1, 2, 218, pp. 259, 261, 456. Jurisdictional authority for the Family Court to award attorney's fees is provided by [South Carolina Code Ann. Section 20-7-420\(2\)](#) (Cum.Supp. 1982) and pertains to marital litigation matters. See also, [South Carolina Code Ann. Section 20-3-120](#) (Cum.Supp. 1982) and [South Carolina Code Ann. Section 20-3-140](#) (Cum.Supp. 1982). However, a Uniform Reciprocal Enforcement of Support Act (hereinafter URESA) action cannot be classified as marital litigation within the meaning of [South Carolina Code Ann. Section 20-7-420\(2\)](#) (Cum.Supp. 1982). URESA provides a separate and distinct remedy in addition to those mentioned in [South Carolina Code Ann. Section 20-7-420\(2\)](#) (Cum.Supp. 1982). [South Carolina Code Ann. Section 20-7-1000](#) (Cum.Supp. 1982); [Ray v. Pentlicki](#), 375 So.2d 875 (Fla.App. 1979); [Olson v. Olson](#), *supra*; [Gardner v. Gardner](#), 253 S.C. 296, 170 S.E.2d 372 (1969); [Figliozzi v. Figliozzi](#), 173

A.2d 904 (D.C.Mun.App. 1961); [Thompson v. Thompson](#), 93 So.2d 90 (Fla.App. 1957). It has no relationship to changing the marital status of the parties, [Ray v. Pentlicki](#), *supra*; [Hoover v. Hoover](#), 271 S.C. 177, 246 S.E.2d 179 (1978); [Pifer v. Pifer](#), 31 N.C.App. 817, 229 S.E.2d 700 (1976); [Thibadeau v. Thibadeau](#), 133 Ga.App. 154, 210 S.E.2d 340 (1974); [Schwartz v. Buder](#), 315 S.W.2d 867 (Mo.App. 1958), as it neither modifies previous divorce or separate maintenance provisions, [South Carolina Code Ann. Section 20-7-1140](#) (Cum.Supp. 1982); [Ray v. Ray](#), 247 Ga. 467, 277 S.E.2d 495 (1981), nor bars later actions for divorce or separate maintenance. [Wilson v. Wilson](#), 274 S.C. 516, 266 S.E.2d 65, [Olson v. Olson](#), *supra*; [Figlio v. Figlio](#), *supra*. Additionally, [South Carolina Code Ann. Section 20-7-420](#) provides a separate subsection to grant the Family Court jurisdiction to hear and determine URESA matters. The URESA subsection does not include authority to award attorney's fees or costs. [South Carolina Code Ann. Section 20-7-420\(1\)](#). It is necessary, then, to determine if there is other statutory authority, either express or incidental, vesting power in the Family Court to award attorney's fees and costs in actions brought under the Uniform Reciprocal Enforcement of Support Act.

***2** [South Carolina Code Ann. Section 20-7-1200](#) (Cum.Supp. 1982) is directly concerned with fees and costs in actions brought under URESA. It provides that the Family Court may direct the county to pay any part of or all fees and costs incurred in the state in URESA actions. The 1950, (as amended in 1952 and 1958), and 1968 Model Act for URESA provides that the court may direct the obligor (respondent) or the county, city, municipality, state or other political subdivision thereof to pay fees and costs in URESA actions. 9A U.L.A. [Reciprocal Enforcement of Support Act](#) § 15, pp. 690, 775. In adopting URESA, the South Carolina Legislature chose not to require the respondent to pay the fees or costs of the action. The South Carolina version of URESA excludes a respondent from that duty which was expressly included in the Model Act. The omission leaves the South Carolina Family Court without jurisdiction to require a respondent to pay the fees or costs of a URESA action in this state. See [Wilson v. Wilson](#), 274 S.C. 516, 266 S.E.2d 65 (1980); [Olson v. Olson](#), 534 S.W.2d 526 at 532 (Mo.App. 1976). Although courts in other jurisdictions have allowed attorney's fees and costs to court-appointed, [Britt v. Britt](#), 153 A.2d 644 (D.C.App. 1959); [Prager v. Smith](#), 195 A.2d 257 (D.C.App. 1963), and private attorneys, [Dean v. Dodge](#), 220 Ark. 853, 250 S.W.2d 731 (1952), the authority was based on express URESA statutory provisions allowing the fees.

In addition to the statutorily created exceptions to the general rule that an attorney must look to his client for compensation, a court of equity, under appropriate circumstances, may allow an attorney's fee to a party who, at his own expense, has maintained an action for the creation, recovery, preservation, protection, or increase of a common fund or common property. [Snider v. Butler](#), 278 S.C. 231, 294 S.E.2d 246 (1982); [Caughman v. Caughman](#), 247 S.C. 104, 146 S.E.2d 93 (1965); [Petition of Crum](#), 196 S.C. 528, 14 S.E.2d 21 (1941). In order to determine whether attorney's fees may be awarded in URESA actions under this rule of equity, it is necessary to establish whether or not a common fund exists in actions handled by the Solicitor's Office or County Attorney's Office.

A common fund is described as a fund or property created or preserved by one party, at his own expense, in which others of his class are entitled to share. [Caughman v. Caughman](#), *supra*, at 110; [Petition of Crum](#), *supra*, at 531. The court may allow a reasonable attorney's fee from the common fund created or preserved in which his client and others benefited are entitled to share. (emphasis added) [Petition of Crum](#), *supra*, at 531. 'The rule is founded upon the just principle that one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses.' [Petition of Crum](#), *supra*, at 532.

As set out in [Petition of Crum](#), *supra*, at 532-533, certain criteria must be met prior to allowing an attorney compensation from the common fund. These include:

- *3** (1) The services of the attorney must have aided in creating or protecting the fund;
- (2) The services must prove fruitful for a general class; and
- (3) There must be a contract of employment, either expressly made or superinduced by the law, between the attorney and those entitled to compensation from the common fund.

URESAs brought by the Solicitor's Office or County Attorney's Office do not fit within the common fund exception. The services provided do not create, preserve, or protect a common fund from which a class is entitled to share within the meaning of the rule. Further, in URESAs the Solicitor and County Attorney serve the individual petitioner-spouse, ex-spouse, or custodial parent. Their efforts confer no benefit upon members of a general class and certainly not upon the Respondent from whom they wish to recover fees. In fact, the parties are adversaries in these actions. No facts are present upon which the law can raise an implication of representation of the Respondent by the Solicitor or County Attorney. Caughman v. Caughman, supra, at 111.

CONCLUSION:

Family Courts of South Carolina are statutory courts of limited jurisdiction. The Family Courts can exercise only such powers as are directly conferred by statute or such as may be incidentally necessary to the execution of those powers. It is the opinion of this office that the Family Court does not have power to order a Respondent to pay fees or costs incurred by the Solicitor's Office, the County Attorney's Office, or the county in actions brought under URESA when the actions cannot be classified as marital litigation and when the South Carolina version of URESA excludes a respondent from that obligation, a duty expressly included in the Model Act for URESA.

It is further the opinion of this office that, although courts of equity may allow attorney's fees under the common fund rule, URESAs brought by the Solicitor's Office or County Attorney's Office do not fit within that equitable doctrine.

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Staff Attorney

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