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Matrimonial/Family/Adoption Law

Divorce, Death and the Dilemma of Collecting Counsel Fees

The method by which an attorney representing the less-monied spouse may collect interim counsel fees in a matrimonial action from the monied-spouse has been set forth in Domestic Relations Law (DRL) § 237(a) which provides that there "shall be a rebuttable presumption that counsel fees shall be awarded to the less-monied spouse." Established case law has interpreted DRL § 237(a) to mean that "courts should not defer requests for interim counsel fees to the trial court and should normally exercise their discretion to grant such a request made by the non-monied spouse, in the absence of good cause ...." [1]

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However, the more daunting challenge, legally and practically, is collecting counsel fees after the conclusion of the matrimonial matter, whether that conclusion be by settlement, death of the non-monied spouse or discharge of the attorney without cause. The traditional approaches to collection, i.e., mandatory fee arbitration, if applicable, and/or a plenary action for fees owed against the client, or his or her estate in the case of the death, will likely provide counsel, whose client was the non-monied spouse, with only an unenforceable money judgment. Those approaches are often not effective, nor are they efficient; there are better ways.

Death of a Client

When a party to a divorce action dies prior to the entry of a final judgment of divorce, the divorce action necessarily abates, the marital relationship no longer existing.[2] With the limited authority to grant counsel fees pursuant to DRL § 237, courts hear applications for counsel fees in actions or proceedings before the court.[3] After an untimely death of a client, not only is the attorney that was representing the now deceased client faced with an abrupt end to the case, he or she may also be left holding an account stated for services rendered reflecting a substantial outstanding balance. Although not obvious, an attorney whose client has died may seek to recover fees by commencing a plenary action against the surviving, former adversarial spouse under the common law doctrine of necessaries.

The common law doctrine of necessaries, as interpreted by the courts today, asserts that a spouse may be required to support a non-monied spouse "in conformity with [the monied spouse's] means, and to provide the [non-monied spouse] with such necessaries as food, clothing, shelter and medical care."[4] As it turns out, legal fees incurred by a non-monied spouse have long been construed by the NY courts to be deemed necessaries and counsel has a common law right to bring a plenary action against the monied-spouse for the reasonable value thereof.[5]

It follows that obtaining and executing a judgment based upon legal fees owed against the monied-spouse is likely to be more effective than executing one that may be obtained against the deceased client's estate if, in fact, there even is an estate. If the client passed away without a will and without much in the way of assets that pass by way of the laws of intestacy, then it is probable that no one will seek to be appointed administrator of the estate, essentially leaving counsel without a remedy.

Settlement

It is noted that a settlement between divorcing parties does not, in and of itself, preclude an application for counsel fees made within the settling action. In *Sadofsky v. Sadofsky*,[6] the parties placed a settlement on the record. The attorney for the wife made an application for fees as against the husband for fees owed by the wife. The wife's attorney's fee application was opposed by a new attorney retained by the husband and wife who defended the application for both parties. The Second Department in *Sadofsky* held that "it had jurisdiction and could properly entertain the [attorney's fees] application despite the fact that subdivision (a) of section 237 of the Domestic Relations Law states that such awards are 'to enable the wife to carry on or defend the action,"[7] that is, DRL § 237 allows applications for counsel fees to be made by an attorney in his or her own name in the same proceeding.

Further, an attorney who is discharged, without cause, is not barred from seeking counsel fees against the non-client spouse by a provision in a settlement agreement containing terms that each party would bear his or her own fees, where the discharged attorney was not a signatory to that agreement.[8] However, where counsel participates in the settlement which includes the client's waiver to seek attorney's fees from the other party, it is imperative that counsel, to preserve his or her right to seek fees, informs both parties of counsel's intention to make a fee application prior to finalizing the settlement.[9]

While there is some conflict in existing case law, it appears that the safest course for counsel to take if counsel actively participates in a settlement of an action that includes the client's waiver of her right to seek fees from the other spouse, counsel should inform the parties of counsel's

intention to seek fees prior to finalizing the settlement in order to preserve that right.[10]

Discharged Without Cause

While it seems clear that, pursuant to DRL § 237(a), a lawyer who represents a non-monied spouse may seek counsel fees from the monied-spouse in the parties' divorce action, it is not made clear in the statute that an attorney may do so after being discharged by her client without cause. In *Frankel v. Frankel,*[11] the Court of Appeals held that an attorney for the non-monied spouse who has been discharged without cause may seek an award of counsel fees from the monied-spouse, holding that DRL § 237 is not limited to applications by the current attorney of record. The Court of Appeals reasoned that if attorneys who are terminated without cause lose their right to apply to the court for a fee award from an adversary spouse, the non-monied spouse would suffer as the non-monied spouse would be hard-pressed to find a lawyer willing to risk rendering services, without options to obtain payment if discharged without cause.[12]

Where an attorney is discharged by a client without cause, the attorney, if interested in seeking an award of fees against the adversary spouse, should immediately apply for such an award upon being discharged. Failure to act promptly may result in the attorney's losing the ability to so move if the former client's newly retained counsel pursues an application for an award in his or her favor.[13]

While a discharged attorney may seek to recoup fees owed by a non-monied spouse by asserting a charging lien, assertion of such lien may not be as effective as a swift court application under DRL § 237 by the discharged attorney to recoup fees owed. First, it is well-settled that, as a matter of public policy, a "charging lien does not attach to an award of alimony [or] maintenance."[14] Additionally, New York courts have equally held that, as a matter of public policy, "an attorney's charging lien cannot attach to an award of child support." [15] Thus, counsel is left to consider only the equitable distribution of marital assets when asserting a charging lien.

While the client may have a strong equitable distribution claim, collection against the lien will be available only at the conclusion of the underlying matrimonial action, which may endure for months, if not years. There are other limitations. It is well-settled that a charging lien will be available to attach to an award of equitable distribution only "to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interests already held by the client."[16] Thus, "[w]here the attorney's services do not create any proceeds, but consist solely of defending a title or interest already held by the client, there is no lien to be had on that title or interest."[17]

In *Charnow,*[18] pursuant to the parties' stipulation of settlement, the defendant was to pay to plaintiff's counsel $150,000. When the defendant failed to pay those fees, plaintiff's counsel moved to enforce a charging lien for the amount owed. The Appellate Division, Second Department held:

the plaintiff and the defendant already owned the marital residence jointly as tenants by the entirety. Thus, the parties' settlement agreement merely permitted the plaintiff to retain her existing interest in the marital residence. 'Although the nature of the property was converted from realty into dollars, her interest remained the same. Thus, no equitable distribution fund to which a charging lien can attach was created by the efforts of the [plaintiff's] attorney.'[19]

Further, it has been held that a charging lien may not attach to the client's share of an IRA, which had been funded through a rollover of the share of the other spouse's IRA, because the rollover did not create proceeds for the client.[20]

Finally, given the legislature's recent elimination of awards of an equitable share of the enhanced earnings generated by a license or degree obtained during the marriage, there are not many assets remaining to which a charging lien may attach in many matrimonial cases. [21]

Conclusion

Thus, although an attorney's representation ends based on settlement, death or discharge, his or her remedies to collect outstanding legal fees owed by the non-monied client do not. Counsel for the less-monied spouse may efficiently and effectively secure against the monied spouse a collectible award of fees owed to counsel by the non-monied spouse if counsel acts promptly, asserts the claim properly and, when necessary, gives the parties notice as soon as possible of counsel's intention to pursue such a fee award.

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1. *Prichep v. Prichep*, 52 A.D.3d 61 (2d Dept. 2008).
2. *Matter of Forgione*, 237 A.D.2d 438, (2d Dept. 1997); *Forgione v. Forgione*, 231 A.D.2d 603 (2d Dept. 1996); *Matter of Alfieri*, 203 A.D.2d 562 (2d Dept. 1994); *Sperber v. Schwartz*, 139 A.D.2d 640 (2d Dept. (1988); *Briggs v. Briggs*, 181 Misc.2d 197 (Sup. Ct., Erie Co. 1999).
3. *Musso v. Butera*, 64 Misc. 2d 604 (Sup. Ct., Kings Co. 1970); and see *Farnham v Farnham*, 227 N.Y. 155 (1919).
4. *Medical Bus. Assocs. v. Steiner,* 183 A.D.2d 86 (2d Dept. 1992).
5. *Goldberg v. Keller*, 236 A.D. 541 (2d Dept. 1932); *Horn v. Schmalholz*, 150 A.D. 333 (2d Dept. 1912); *Schwartz v. Aberbach*, 66 Misc.2d 246 (Civil Ct., Bronx Co. 1971); (*Sassower v. Barone*, 85 A.D.2d 81 (2d Dept. 1982); see also *Jones, LLP v. Sitomer* 139 A.D.3d 805 (2d Dept. 2016); *Jordan v. Jordan* 226 A.D.2d (2d Dept. 1996); *Fernandes v. Rucker* 186 A.D.2d 171 (2d Dept. 1992).
6. *Sadofsky v. Sadofsky*, 78 A.D.2d 520, (2d Dept. 1980).
7. *Id.* at 521.
8. *Gregory v. Gregory*, 109 A.D.3d 616 (2d Dept. 2013); *Maher v. Maher*, 47 Misc.3d 228 (Sup. Ct. Rockland Co. 2014).
9. *Gilmore v. Gilmore*, 138 A.D.2d 347 (2d Dept. 1988).
10. *L.P. v. R.P.*, 47 Misc.3d 1037 (Sup. Ct. Westchester Co. 2015).
11. *Frankel v. Frankel*, 2 N.Y.3d 601 (2004).
12. *Id.*
13. *Upbin v. Upbin*, 213 A.D.2d 629 (2d Dept. 1995).
14. *Theroux v. Theroux*, 145 AD2d 625 (2d Dept. 1995).
15. CPLR 5205[d][3]; *Haser v. Haser*, 271 A.D.2d 253 (1st Dept. 2000).
16. *Moody v. Sorokina*, 50 A.D.3d 1522 (4th Dept. 2008).
17. *Theroux v. Theroux*, 145 A.D.2d 625 (2d Dept. 1995) citing *Charnow v. Charnow*, 134 A.D.3d 875(2d Dept. 2015).
18. 134 AD3d 875, 876 (2d Dept 2015).
19. *Id.* at 876.
20. *J.K.C. v. T.W.C.,* 39 Misc.3d 899 (Sup. Ct. Monroe Co. 2013); Dolores Gebhardt, Charging Liens in Matrimonial Actions: A Vanishing Right, New York Law Journal, August 24, 2017.
21. Dolores Gebhardt, Charging Liens in Matrimonial Actions: A Vanishing Right, New York Law Journal, August 24, 2017.