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The effect of *In re: the Marriage of Earlywine* on Section 5/501(c-1) of the Illinois Marriage and Dissolution of Marriage Act and the Practice of Divorce Law

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The Illinois Supreme Court has accepted the case of *In Re: the Marriage of Earlywine, 972 N.E.2d 1248, 362 Ill.Dec. 215 (2012),* as a case of first impression regarding the disgorgement of an attorney's retainer in a divorce action. The Supreme Court's ruling in *Earlywine* has the potential to set an important precedent. If the Supreme Court upholds the Appellate Court's decision, it will have a dramatic effect on the practice of divorce law.

Not only has the Supreme Court agreed to hear the *Earlywine* case, but it has also taken the extraordinary step of allowing an amicus brief to be filed by private counsel since the divorce bar has a strong interest in the outcome of the case. The Supreme Court heard oral argument on *Earlywine* on March 19, 2013.

While the Court's decision could have a significant effect on the practice of divorce law, the facts of *Earlywine* are simple. The husband entered into an attorney-client agreement with his attorney, agreeing to pay an advance payment retainer. The husband's mother and her fiancé, as well as, husband's father and his wife, funded the retainer. Additionally, evidence was offered which established the husband was working only intermittently and the wife was unemployed; thereby, leaving both parties with insufficient funds available to them to pay attorneys' fees.

Pursuant to 750 ILCS 5/501 (c-1) of the Illinois Marriage and Dissolution of Marriage Act, the wife's attorney filed a petition for an award of $4,000 in interim attorney's fees. The wife's attorney asked the court, if necessary, to order the husband's attorney to disgorge funds already paid to him under 750 ILCS 5/501 (c-1) (3).

The Trial Court granted the wife's motion, finding the wife was unable to pay her attorney's fees and an interim award was appropriate under the circumstances. The husband's attorney filed a motion to reconsider, arguing that the attorney-client agreement was an "advance payment retainer" and therefore the funds had become the attorney's property at the moment of payment and accordingly were not subject to disgorgement.

The Trial Court denied husband's motion to reconsider, holding that the public policy in favor of "leveling the playing field," or placing the parties to a divorce in substantial parity, overrode any issue regarding the nature of the retainer. Husband's attorney refused to disgorge, asking instead that the Trial Court hold him in friendly contempt to facilitate an appeal.

The Second District of the Appellate Court affirmed the Trial Court's ruling. The Appellate Court began its assessment by distinguishing between a "true, classic or general retainer", which is typically used to ensure an attorney's availability for a specific matter or during a specific time period, from a "security retainer". A "true" retainer becomes the attorney's property immediately, whereas a "security" retainer continues to be the client's property until earned by the attorney. In the end, even after its above analysis was made, the Appellate Court held the distinction between the types of retainer didn't make a difference or apply to the case.

An "advance payment retainer", a form of "true" retainer, was first recognized in Illinois in *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007). It is to be used sparingly and only to accomplish a specific purpose for the client, a purpose which a security retainer could not accomplish. The Appellate Court held that permitting an advance payment retainer to defeat a claim for interim fees would frustrate the primary purpose of Section 5/501(c-1), which is to ensure the parties are in substantial financial parity during a divorce proceeding.

There are several issues which the Supreme Court needs to consider in reviewing *Earlywine*. The first issue to address is the conflict between the allowance of "advance payment retainers" as allowed in both *Dowling* and Rule 1.15 of the Illinois Rules of Professional Conduct (which is part of the Illinois Supreme Court Rules and was amended to recognize advance payment retainers after the Court's decision in *Dowling)*, and Section 5/501(c-1) of the Illinois Marriage and Dissolution of Marriage Act. In other words, the Court must address the conflict between the lawyer's immediate ownership of the funds under an advance payment retainer versus Section 5/501(c-1) allowing retainers to be disgorged to provide for substantial parity between the parties.

Pursuant to the Separation of Powers Doctrine (no branch of government shall exercise powers belonging to another branch) specified in the Illinois Constitution, the Court should resolve this conflict to give primacy to Rule 1.15, as Section 5/501(c-1) directly and irreconcilably conflicts with a Rule of the Supreme Court. In *Earlywine* the legislative enactment (Section 501 (c-1)) infringes upon the inherent powers of the judiciary in that it conflicts directly with a Supreme Court Rule. Therefore, Supreme Court Rule 1.15 must prevail against the legislative statute of Section 5/501 (c-1).

The effect of resolving this conflict, as it relates to the set of facts presented in *Earlywine,* is if the husband signed the advanced retainer in compliance with requirements of Rule 1.15, then ownership of the retainer immediately transferred to the attorney. At that point, the retainer becomes the property of the attorney, not the client. In other words, allowing a disgorgement of an advanced payment retainer under Section 5/501(c-1) is actually disgorging funds from the attorney, not the client.

Another issue which needs to be considered, but which the Supreme Court may not address, is the failure of the Appellate Court to consider the words "available funds" under Section 501(c-1)(3) as they apply to a disgorgement situation. The amicus brief which the Supreme Court allowed to be filed, dealt with this issue at length. However, it is possible, since

the Appellate Court did not address the issue of "available funds" that the Supreme Court will not weigh in on the issue. If the Supreme Court does not address the meaning of "available funds" in its opinion, it may be necessary for the legislature to consider amending Section 5/501 (c-1)(3).

There is no evidence, in its opinion, the Appellate Court considered whether the advanced payment retainer had been earned by the Husband's attorney. In construing the meaning of a statute, Illinois case law holds, the Court must ascertain and give effect to the intention of the legislature. The intent of the legislature is examined by reviewing the language of the statue and giving it the most ordinary or common meaning, as well as, providing for the broadest interpretation of the language. The legislature's use of the adjective "available" in Section 5/501(c-1)(3) to describe "funds" in a disgorgement situation rationally suggests it intended that "funds" exist which can be described as "available", or capable of being disgorged, as opposed to "funds" which can be described as "unavailable", or not able to be disgorged. *Earlywine* presents the Supreme Court with the opportunity to interpret these distinctions in section 501(c-1)(3).

Hopefully, the Supreme Court in its evaluation of *Earlywine*, will consider the vagueness of the statute and determine the only reasonable distinction between funds which are "available" for disgorgement and funds which are "not available" for disgorgement are fees which are "earned" or "unearned". It appears this view of Section 5/501(c-1)(3) would be in conformity with the provisions of *Dowling* and Rule 1.15, as it is only when an advanced payment retainer is unearned that the attorney must return funds to a client. If not, and earned fees are deemed "available," then it seems that a disgorgement order could be considered unconstitutional. Under these facts, there is a complete lack of procedure, or due process, allowed the attorney, therefore making the legislation, as carried out, unconstitutional.

The purpose of Section 5/501(c-1) is to level the playing field by equalizing the parties' access to resources for litigation, not reallocating the attorney's earned property to another. If the attorney has performed the work, earned the fee and received compensation for the work performed, then those funds should no longer be "available" to be used by the parties' for litigation. The converse would have a chilling effect on the practice of family law. It places divorce attorneys in an environment where they are required to pay themselves at their own peril. Attorneys will be put in the position of being forced to either hold on to the funds (which are the attorney's property to do with as they choose) until such time as the funds can no longer be disgorged, or risk spending the money on overhead costs, client development or personal use and being forced to disgorge it at a later date.

The latter creates an environment where the attorney must either budget for future potential disgorgements, or be faced with the inability to pay a disgorgement order and face contempt of court. A contempt finding could lead to an attorney having a judgment, or even several judgments, levied against them thereby opening the attorney to liens on their property or other debt collection proceedings. This will have a dramatic effect on an attorney attempting to operate a legal practice and could also lead to the necessity of attorneys being forced to turn down cases for fear of being stuck footing the bill with their own earned property.

This cannot be what the legislature envisioned when drafting Section 501(c-1)(3) or what the Appellate Court intended when affirming the lower court in *Earlywine*. However, even with a reversal by the Supreme Court in *Earlywine*, if the issue of "earned" and "unearned" fees as it relates to "available funds" for the purposes of disgorgement under Section 5/501(c-1)(3) is not addressed, it is inevitable that this will continue to be a potentially dangerous situation for divorce attorneys. In order to avoid these issues in the future, it appears to be necessary for the legislature to consider revisions to Section 5/501(c-1)(3).