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## Court can't disgorge fees already paid

### Panel: Past payments to lawyers no longer 'available' to court

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A divided state appeals panel on Wednesday ruled that a court cannot force a divorce attorney to disgorge already-earned money to an adversary when neither of the litigating parties can afford to pay the case's legal expenses.

Under the state's divorce law, a court can order a cash-strapped party to cover some of the other side's expenses using "available funds." It's a provision meant to prevent a wealthier spouse from using his or her greater control of money as a way to hinder the disadvantaged party's ability to litigate the case.

In the divorce case of Heather Altman and Jeffrey Block, a Cook County judge in July 2014 determined that "available funds" included a \$16,000 sum Block had paid to his former divorce attorney, Steven D. Gerage, for services he had rendered.

Gerage objected, refusing to pay the \$16,000 to his former client's ex-spouse, and he was found in contempt by Cook County Associate Judge David E. Haracz in September 2014.

He appealed the contempt order. The 1st District Appellate Court sided with Gerage, finding the court cannot disgorge him of funds that he has earned and then used.

The opinion is at odds with a 2015 ruling from the Elgin-based 2nd District Appellate Court, *In re Marriage of Squire*, 2015 IL App (2d) 150271, which found that language in the Illinois Marriage and Dissolution of Marriage Act does allow the court to disgorge attorney's fees for services rendered.

The current case drew the attention of the Illinois chapter of the American Academy of Matrimonial Lawyers, which entered the case with an amicus curiae brief.

With no guarantee the Supreme Court will take the case and decide the law's meaning, Wednesday's ruling may offer some assurances to lawyers handling divorce cases in Cook County.

"It's a significant development for the matrimonial bar," said Lake, Toback partner Michael G. DiDomenico, Gerage's attorney.

Attorneys on both sides of the case and the 1st District justices acknowledged that allowing the court to disgorge attorneys after money has been paid, complicates a firm's ability to spend that money.

"It is not speculation to predict that some lawyers, particularly solo practitioners and those in small law firms, may be unable to comply with orders to disgorge funds that they have earned over several months and that have been transferred into (and out of) their operating accounts, at least not without serious financial hardship," Justice Mary Anne Mason wrote in the 17-page majority order.

Both lawyers involved also expressed doubt the Altman-Block divorce proceedings will lead to a Supreme Court ruling.

For one, Gerage was unopposed in appealing his contempt order. Neither Altman or Block filed appellate briefs as a result of their lack of funds, Mason wrote.

Block's attorney, Masah Renwick of Homewood-based Lakeside Law Group LLP said they would not appeal and praised the panel's finding.

Altman's attorney, Derek J. Bradford, a partner at Bradford & Gordon LLC, said it is very unlikely they will file an appeal to the high court because his client cannot afford it and tied up with other proceedings. If he does file

it, it would be "on his own."

The lawyer who represented the Illinois chapter of the American Academy of Matrimonial Lawyers in its amicus curiae brief said it's not an obvious case the high court would readily take.

"I can't really say if a [petition for leave to appeal], if it was raised here, would ever be granted," said Paul L. Feinstein.

DiDomenico speculated it will take another divorce case in another appellate district with similar circumstances to prompt a review of the law by the high court.

Justice Terrence J. Lavin concurred with the majority.

Justice Aurelia Pucinski partially concurred and partially dissented. She agreed with the 2nd District panel's decision in *Squire*, but wrote that the 1st District panel should have defined whether an attorney has "earned" those fees.

In her three-page dissent, Pucinski wrote that the fees Gerage is contesting are an interim award, not a final one. Gerage has a right to "recoup all reasonable fees" he has earned, but it is the court that decides whether those fees are reasonable.

"Until then, there has been no final determination of the attorney's earned fees and there has been no determination of the reasonableness or necessity of the fees that Gerage allegedly earned," Pucinski wrote.

Bradford said he agrees with Pucinski's dissent, and argued that, because the 1st District panel didn't discuss whether Gerage's fees were earned or not, "by omitting that, it sort of implies that the earned definition is at the attorney's discretion."

At the same time, Bradford said he is torn on the issue, as he would also not want the tables turned on him, having to return a year-old payment to the firm.

"To be frank, I did not want to disgorge Steve Gerage to begin

with," Bradford said.

Altman and Block have been mired in this case since 2013, and the 1st District panel quoted Haracz in calling the proceedings "extremely contentious" and "overly litigious."

Gerage represented Block until August 2014. While the appeal was being considered, Block represented himself.

Block earned a \$160,000 salary before he was laid off; however, Altman has asserted Block falsified his income and hid his assets. Altman makes less than \$30,000 a year as a rabbi and full-time mother.

Altman in February 2014 filed her request for interim attorney fees. She owed her attorneys \$54,098.68 in fees and wanted Block to pay them or be disgorged of the fees he already paid.

It was from Altman's fee petition that Haracz in July 2014 ordered Block's paid fees to Gerage be disgorged and given to Altman.

It was also at this point that Altman had access to a nonmarital retirement account worth \$100,000 she had not tapped into.

On appeal, Gerage challenged the notion Altman did not have access to funds to pay her fees when she the retirement account became known.

But the 1st District panel found that state law — specifically Section 12-1006(a) of the Illinois Code of Civil Procedure — exempted retirement plans from attorney fee awards. Additionally, the justices found that the retirement account cannot be counted as an asset because Altman has not used it to pay for the litigation.

In defending its break from the 2nd District panel in *Squire*, the 1st District majority placed heavy emphasis on the existence of the word "available" in the divorce statute.

"If the legislature meant that all funds 'paid' to one spouse's

lawyer were subject to disgorgement when neither spouse was able to pay attorney fees, it could have easily said so,” Mason wrote.

Additionally, the 1st District panel said the holding in *Squire* created an absurdity — meaning

that an attorney who may have left a case years ago “could be called upon ... to write a check to the opposing party’s counsel.”

The panel acknowledged that while it’s only an interim fee, “we must ask how realistic it is to assume that the attorneys will

ever be paid” if both parties lack funds.

Gerage was also represented by Sean M. Hamann of Lake, Toback.

The Illinois chapter of the American Academy of Matrimonial Lawyers was also

represented by Jamie R. Fisher and David C. Adams of Grund & Leavitt P.C.

The case is *In re Marriage of Heather Altman and Jeffrey Block*, 2016 IL App (1st) 143076. [dthomas@lbpc.com](mailto:dthomas@lbpc.com)