April 2013 Vol. 56, No. 10

ILLINOIS STATE BAR ASSOCIATION

FAMILY LAW

The newsletter of the Illinois State Bar Association's Section on Family Law

Chair's column

By William J. Scott, Jr.

I have just returned from the Section's Family Law Update 2013: A French Quarter Festival. The seminar was given Thursday April 4th and Friday April 5th in, you guessed it, New Orleans. I would like to thank the Section Council's CLE coordinator, Pamela Kuzniar for her usual outstanding job in putting together the program, lining up speakers and doing most of the background and difficult work it takes to put together a seminar and, especially, to put together a destination seminar. I also would like to thank the seminar's platinum sponsor: James Godbout of Stout, Risus, Ross, Inc., the gold sponsors: David Hopkins of Schiller, DuCanto & Fleck, Pamela J. Kuzniar and Rory Weiler of Weiler & Lengle, P.C., the silver sponsors: Morris Lane Harvey, Matthew Kirsh. David Levy of Berger Schatz and Marilyn Longwell, the bronze sponsors: Hon. Robert Anderson, Christopher Bolen, Kelli Gordon of Feldman, Wasser, Draper & Cox, Cecelia Griffin of Griffin, McCarthy & Rice, LLP, Russell Knight, Robin Miller, Lisa Nyuli of Ariano, Hardy, Ritt, Nyuli, Richmond, Lytle & Goettel, Treva O'Neill, Angela Peters, Susan Rogaliner and Joan Scott. Each of these sponsors contributed a donation which helped underwrite the ISBA's expenses for the seminar and helped guarantee the success of the event.

I cannot mention all of the speakers and will

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The road less traveled: Using Illinois courts as a vehicle to award unallocated maintenance & child support

By Leon I. Finkel and Danielle E. Ahlzadeh

Without clear statutory guidelines in Illinois delineating the court's authority to award unallocated maintenance and child support, much debate has emerged on whether the courts have the inherent power to grant these awards. This article asserts that under Illinois case law the answer is clear: Illinois courts have both the discretion and the power to award unallocated maintenance and child support to divorcing couples.

Traditional Tax Treatment of Maintenance and Child Support: The Basics

As a general background, maintenance payments are typically deductible to the payor, and taxable to the payee. Section 71 and 215 of the Internal Revenue Code ("IRC") regulates the taxability and deductibility of maintenance payments. For these payments to be deductible to the payor and taxable to the payee, all Section 71 requirements must be satisfied.[1] If these requirements are fulfilled, then the maintenance payments are assumed to be income to the recipient spouse.

Unlike maintenance, child support payments are tax neutral, meaning they are neither deduct-

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Chair's column

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not. Suffice it to say that the presentations were all outstanding and extremely informative. I have practiced law for 40 years and my definition of a successful seminar is that I come away with something I did not know before and that there be that moment when I say to myself: "I have to remember that!" This time there were many of those moments.

The speaker were outstanding, both informative and entertaining. It was obvious that many hours of hard work and preparation went into each presentation. The seminar ended with a closing argument on the issue of maintenance before three judges from across the state. The arguments were interesting and, obviously, well thought out and well prepared. Both Lane Harvey and Robin Miller were outstanding. The lesson to be learned was that every judge has a different take on maintenance, at least in this fact pattern. There were three distinct and different takes on the outcome by three different judges. Perhaps the outcome in this hypothetical constitute an argument for statewide statutory guidelines for maintenance.

Bourbon Street was fun to say the least. The food was outstanding. Dinner at Antoine's, breakfast at Brennan's and dinner at Herbsaint were, for me, highlights. For others, highlights may have been the CLE coordinator riding the mechanical bull late on Thursday or may, for others, drinking something blue from test tubes after 1:00 in the morning. Or maybe, the blackjack table with Rico Mirabelli.

A destination seminar is a herculean task and, again, I than Pam Kuzniar for all her hard work. It won't happen next year, but stay alert for an announcement for the next one, it promises to be outstanding and fun. ■

The road less traveled: Using Illinois courts as a vehicle to award unallocated maintenance & child support

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ible to the payor nor taxable to the payee as income. In many instances, a non-custodial parent is ordered to pay both maintenance and child support to his or her ex-spouse.

In appropriate situations, a combined award of maintenance and child support known as "unallocated maintenance and child support" will benefit both the payor and the payee. Unallocated maintenance and child support may allow both parties to take advantage of the tax code and walk away with more cash in their pockets.

Advantages of Unallocated Maintenance and Child Support: Tax Shifting and Easy Math

Unallocated maintenance and child support is treated the same as maintenance: it is deductible to the payor and taxable to the payee. The unallocated amount does not delineate between what amount is maintenance and what amount is child support. This settlement umbrella could save divorcing couples money and time, with benefits in the form of tax shifting and financial ease.

Tax Shifting

Combining payments under the "unallocated maintenance and child support" umbrella comes with considerable tax advantages if the divorcing individuals fall in different tax brackets. The payor can find a tax shelter in the tax return of his or her former spouse. For purposes of this discussion, the payor is assumed to be making more income and in a higher tax bracket. By converting otherwise nondeductible child support into a tax deduction, the payor may pay a higher combined amount of support to the payee. This income shift allows the payee to have greater cash flow to support the parties' child(ren), while simultaneously allowing the payor to have a lower payment after taxes. In effect, the same amount of income will yield more after-tax cash to both parties.

Calculating Gross Income: It's Easy as 1, 2, 3…

In addition to the advantages via tax shifting described above, unallocated mainte-

FAMILY LAW

Published at least four times per year.

Annual subscription rate for ISBA members: $20.

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OFFICE
Illinois Bar Center
424 S. Second Street
Springfield, IL 62701
Phones: 217-525-1760 OR 800-252-8908
www.isba.org

CO-EDITORS
Matthew A. Kirsh

Rebecca Berlin
Rory T. Weiler

MANAGING EDITOR/PRODUCTION
Katie Underwood
kunderwood@isba.org

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

nance and child support is also attractive to individuals with fluctuating income. In situations where the payor's income fluctuates, the payee may be entitled to a base amount of child support plus a percentage of the payor's net income over a specified amount. Calculating net income in these situations may be difficult and require the involvement of an accountant on an annual basis. By choosing an award of unallocated maintenance and child support, the award amount can be based on a percentage of the payor's gross income (usually salary and bonus). Determining gross employment income is generally simple and not susceptible to different interpretations (as is often the case in determining net income).

Tax Treatment of Unallocated Maintenance and Child Support: The Devil's in the Details

While opting for unallocated maintenance and child support can be extremely advantageous to divorcing couples, drafting enforceable unallocated support awards requires practitioners to be knowledgeable of the IRC and its potential snares.

One critical tax issue of which practitioners must be aware is the "contingency rule." This rule bans the use of child-related contingencies in triggering changes in the settlement structure of the unallocated support award. The trigger event cannot be linked to a time that is clearly associated with such a contingency, regardless of whether such event is likely or certain to occur.[2] If it is determined that a reduction or termination of unallocated support is a "contingency related to a child," then the total payment will be treated as nondeductible child support, thus negating the intended tax benefits.

Child related contingencies include reductions tied to a child's marriage, death, attaining a specified age or income level, leaving school, leaving the spouse's household, or gaining employment.[3] Avoiding these contingency measures is crucial to ensuring that the combined payment stands as intended.

Practitioners must be cautious when drafting unallocated support provisions to prevent any specific reference to a child related contingency. However, simply refraining from alluding to such a contingency is not enough to ensure that the unallocated support award will not be characterized as child support. Averting this trap is relatively simple, as only two specific situations can exist in which a reduction in payment will be presumed to be clearly associated with a contingency related to a child. These two occasions are referred to as the "six month rule" and the "multiple reduction rule."[4]

To avoid potential issues with these rules, any reduction or termination must be at some fixed time outside of the "six month rule" and "multiple reduction rule."

In addition to the contingency provisions, as with any award of maintenance, practitioners must also be aware of the recapture issues that may be present when drafting an award of unallocated maintenance and child support.[5]

The Court's Authority to Award Unallocated Maintenance and Child Support

No statute in Illinois specifically references unallocated maintenance and child support.[6] Nevertheless, it is common practice for marital settlement agreements to include unallocated maintenance and child support and for courts to incorporate such marital settlement agreements into judgments. It is less common for courts to order unallocated maintenance and child support after a trial. However, case law clearly demonstrates that courts can and should order unallocated maintenance and child support where it will benefit the parties.[7]

The first district in particular has a long history of authorizing awards of unallocated maintenance and child support.

In *In re Marriage of Dwan*, the first district appellate court affirmed the trial court's award of $2,500 per month in unallocated maintenance and child support.[8] On appeal, the husband argued that the award was excessive and unwarranted.[9] In its decision, the appellate court pointed out that "the amount of an award of maintenance and child support is a matter within the sound discretion of the trial court."[10] In upholding the award, the appellate court noted that the unallocated award was for both maintenance and child support, and the trial court properly considered the statutory factors enumerated in Sections 505(a) and 504(b) of the Illinois Marriage and Dissolution of Marriage Act.[11] Moreover, the appellate court stated that given that the "real cost of the award to [the] [husband] [was] diminished because he [was] able to deduct the amount of the award from his gross income," the award was not an abuse of discretion.[12]

Another first district case in support of the court's power to award unallocated support is *In re Marriage of Kennedy*.[13] Here, the husband argued that the trial court's award of unallocated maintenance and child support in the amount of 36 and two-thirds percent of his monthly net income, but not less than $525, was excessive and constituted an abuse of discretion.[14] Even though the trial court miscalculated the wife's monthly net income, the mathematical errors were not dispositive.[15] The trial court determined that none of the property awarded to the wife was income producing, she needed the parties' home and outside funds to meet monthly expenses, and the husband's financial condition allowed him to meet both his own expenses while assisting with his wife's expenses.[16] Thus, the appellate court held that the record supported the trial court's award of unallocated maintenance and child support.[17]

The first district is not alone in confirming the trial court's inherent authority to award unallocated maintenance and child support. The second district in *In re Marriage of Ingrassia*,[18] as well as the third district in *In re Marriage of Murphy*,[19] likewise held that the trial courts did not abuse their discretion in awarding unallocated maintenance and child support.

Because of these decisions, divorced persons all over Illinois are enjoying the use of more of their income.

In *In re Marriage of Ingrassisa*, the wife appealed from a modification proceeding in which the judge modified the trial court's original award of unallocated maintenance and child support from $1,200 per month to $1,700 per month.[20] On appeal, the wife argued that the court's subsequent increase in unallocated support was not large enough, or should have been awarded separately, because of the parties' costs related to their daughter's private school.[21] In affirming the award, the second district held that in light of the expenditures for the daughter's private school, the award of $1,700 in unallocated maintenance and child support was proper.[22] Given the wife's ability to seek and secure employment, the daughter's upcoming ability to work part-time, the financial resources and needs of father, and the obligation of both parents to support their daughter, the trial court's award was not an abuse of discretion.[23]

Moreover, in *In re Marriage of Murphy*, the third district appellate court affirmed the trial

court's award of unallocated maintenance and child support mentioned above, specifically taking into consideration the tax benefits to the parties.

Here, the husband challenged the trial court's award of $900 per month in unallocated maintenance to his wife, arguing that she did not request maintenance, that her estimated expenses were only $780 per month, and that she should be expected to work full time.[24] In reaching its conclusion, the appellate court cited the husband's petition for rehearing in which the judge made clear that the maintenance award was entered in order to assure the maximum tax advantage to the parties.[25] The judge stated that:

By utilizing an unallocated maintenance award, rather than simple child support, the trial court enabled [husband] to deduct the full maintenance payment as an itemized deduction for purposes of his federal income tax. The trial court reasoned that the substantial reduction in tax which will result is then passed on to [wife] in the form of a greater maintenance payment than would otherwise be possible.[26]

The appellate court in *Murphy* noted that because the husband was in a higher tax bracket than the wife, the tax consequences of the trial court's decision were substantial.[27] Under such circumstances, the appellate court held that the trial court's award of the $900 in unallocated support was proper.[28]

Further, in *In re Marriage of Belluomini*, the first district emphasized that with regard to the allocation of an award between maintenance and child support "the trial court is allowed, even encouraged, to consider tax consequences in making its determination."[29] In this case, the trial court awarded the wife an unallocated sum of $450 per month as alimony and child support.[30] On appeal, the wife argued that the trial court's determination of alimony and child support was inadequate given the respective conditions of the parties, and the husband's comfortable lifestyle.[31]

The court held that, despite the justification for limited maintenance to the wife given the short duration of the marriage, the unallocated award was to be increased by $200 per month to help provide for their minor child.[32] Taking note of the disparate tax situations of the parties, the court held that the trial court did not abuse its discretion in specifying unallocated payments to reduce the tax burden on the husband.[33] The decision of the "able trial judge" in providing that the husband's payments be unallocated was affirmed.[34]

What becomes evident from *Murphy*, *Belluomini*, and related cases is that not only do Illinois courts have the authority to award unallocated maintenance and child support, but that courts can and should consider the tax advantages that come with such awards.

The court's tax optimization can also be seen in the first district appellate court case of *In re Marriage of Sheber*.[35] In this case, the husband argued that the trial court abused its discretion in requiring him to pay maintenance.[36] The husband conceded that, while his wife was entitled to child support, any provision for maintenance was an abuse of discretion because he was unemployed at the time of judgment and received only $190 per week in unemployment compensation.[37] In affirming the trial court's award of unallocated maintenance and child support, the appellate court noted that "the trial court may consider the tax consequences in reaching its determination, and there is some indication that it did so here."[38]

This indication was evident because the final written decree in *Sheber* provided for unallocated maintenance and child support, even though the trial court referred to the amount in question as child support throughout the oral proceedings of the case.[39]

Additionally, the second district in *In re Marriage of Romano* reiterated this past year that "an award of unallocated maintenance and child support, attendant with any federal income tax benefits, may be made under the Marriage and Dissolution of Marriage Act."[40] Although the unallocated award in *Romano* was improperly structured because it contravened the statutory right to modify child support, the court's citation to *Belloumini* suggests that the consideration of tax consequences is still a relevant factor that courts should include in their analysis.

Conclusion: The Court's Authority to Award Unallocated Maintenance and Child Support is Definite

Illinois case law is clear: courts can and should award unallocated maintenance and child support when it benefits the parties. In the right situation, unallocated maintenance and child support can be extremely advantageous to divorcing couples and should be utilized by both practitioners and the courts. Practitioners should be encouraged to present the court with evidence (often through FinPlan or Family Law Software) of various support scenarios showing how unallocated maintenance and child support can maximize each party's net cash flow. Who could argue with less taxes and more money in your clients' pockets? ■

Leon I. Finkel lfinkel@bergerschatz.com is the managing partner at Berger Schatz and has concentrated in matrimonial law since 1983. Danielle E. Ahlzadeh dahlzadeh@bergerschatz.com is a law clerk at Berger Schatz and completing her third year of law school at Northwestern University.

1. *See* I.R.C. § 71(b)(1). The requirements set forth in Section 71 are as follows:
   - A. The payments must be in cash.
   - B. The payments must be made pursuant to a divorce or separation instrument. These instruments include a decree of divorce or separate maintenance, a written separation agreement, and temporary support orders.
   - C. The spouses must be living in separate households when the alimony is pursuant to a decree of divorce or a decree of separate maintenance, but not where the payments are made under a written separation agreement or a temporary support order.
   - D. The payments must terminate at the payee spouse's death, either as a result of the divorce or separation instrument, or by operation of state law, and there can be no substitute payments.
   - E. The payments cannot be fixed for children's support.
   - F. The parties must not have opted out of deductible/taxable alimony by designating their payments as ones that are not includible in the gross income of the payee spouse pursuant to § 71 and not allowable as a deduction of the payor spouse under § 215.

2. *See* I.R.C. § 71(c); Treas. Reg. § 1.71-1T(c), Q&A (17).

3. Treas. Reg. § 1.71-1T(c), Q&A (17).

4. *See* Treas. Reg. § 1.71-1T(c), Q&A (18). The "six month rule" is where the payments are to be reduced not more than six months before or after the date the child is to attain the age of 18, 21, or local age of majority.

The "multiple reduction rule" is where the payments are to be reduced on two or more occasions which occur not more than one year before or after a different child of the payor spouse attains a certain age between the ages of 18 and 24, inclusive. The certain age referred to in the preceding sentence must be the same for each such child, but need not be a whole number of years.

5. Pursuant to § 71(f), to avoid "frontloading," the payor spouse must calculate the alimony payments paid during the first three (3) years after the divorce. If the payments are determined to be

frontloaded, then the tax due from the recaptured amount is paid in the third post-separation year. The result of recapture is that some of the alimony payments that the payor formerly deducted become taxable income, and some of the payments formerly taxable to the payee are no longer taxable, resulting in a refund to payee.

6. Sections 504 (b-5) and 504 (b-7) of the Illinois Marriage and Dissolution of Marriage Act do reference unallocated maintenance and child support; however, these citations refer to interest accruals and orders deemed as a series of judgments. No statute explicitly refers to unallocated maintenance and child support in the context of the court's authority to award it.

7. *See, e.g., In re Marriage of Kennedy*, 214 Ill. App.3d 849, 573 N.E.2d 1357 (1st Dist. 1991); *In re Marriage of Ingrassia*, 140 Ill.App.3d 826, 489 N.E.2d 386 (2d Dist. 1986); *In re Marriage of Dwan*, 108 Ill.App.3d 808, 439 N.E.2d 1005 (1st Dist. 1982).

8. *In re Marriage of Dwan*, 108 Ill.App.3d 808, 813, 439 N.E.2d 1005, 1009 (1st Dist. 1982).

9. *Id.* at 812, 439 N.E.2d 1008.

10. *Id*. at 812, 439 N.E.2d 1008.

11. *Id.* at 812-13, 439 N.E.2d 1008-09.

12. *Id.* at 813, 439 N.E.2d 1009.

13. *In re Marriage of Kennedy*, 214 Ill.App.3d 849, 573 N.E.2d 1357 (1st Dist. 1991).

14. *Id.* at 858, 573 N.E.2d 1363.

15. *Id.* at 860-61, 573 N.E.2d 1364.

16. *Id.* at 861, 573 N.E.2d 1364.

17. *Id.* at 861, 573 N.E.2d 1364.

18. *In re Marriage of Ingrassia*, 140 Ill.App.3d 826, 489 N.E.2d 386 (2d Dist. 1986).

19. *In re Marriage of Murphy*, 117 Ill.App.3d 649, 453 N.E.2d 113 (3d Dist. 1983).

20. *Id.* at 828, 832, 489 N.E.2d 387, 390-91.

21. *Id.* at 832, 489 N.E.2d 390-91.

22. *Id.* at 833, 489 N.E.2d 391.

23. *Id.* at 833, 489 N.E.2d 391.

24. *Id.* at 654-55, 453 N.E.2d 117.

25. *Id.* at 655, 453 N.E.2d 117.

26. *Id.* at 655, 453 N.E.2d 117. It should be noted that the court mistakenly referred to unallocated maintenance and child support as an itemized deduction. Unallocated maintenance and child support does not constitute an itemized deduction, but is rather deducted from gross income in arriving at adjusted gross income.

27. *Id.* at 655, 453 N.E.2d 117.

28. *Id.* at 656, 453 N.E.2d 118.

29. *In re Marriage of Belluomini*, 104 Ill.App.3d 301, 307, 432 N.E.2d 958, 963 (1st Dist. 1982).

30. *Id.* at 304, 432 N.E.2d 960.

31. *Id.* at 305, 432 N.E.2d 960.

32. *Id.* at 307, 432 N.E.2d 962.

33. *Id.* at 307-08, 432 N.E.2d 963. *See also Schuppe v. Schuppe*, 69 Ill.App.3d 200, 387 N.E.2d 346 (2d Dist. 1979).

34. *Id.* at 308, 432 N.E.2d 963.

35. *In re Marriage of Sheber*, 121 Ill. App. 3d 328, 459 N.E.2d 1056 (1st Dist. 1984).

36. *Id.* at 340, 459 N.E.2d 1065.

37. *Id.* at 340, 459 N.E.2d 1065.

38. *Id.* at 340, 459 N.E.2d 1065.

39. *Id.* at 340, 459 N.E.2d 1065-66.

40. *In re Marriage of Romano*, 2012 IL App (2d) 091339, 968 N.E.2d 115.

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

By Heather Hurst

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 attorney 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 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 type 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.

The second and probably more important issue for the Supreme Court to consider 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. 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 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*. Even with a reversal by the Supreme Court in *Earlywine*, it appears it is time for the legislature to consider revisions to Section 5/501(c-1)(3). ■

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