Attorney's Fees and Divorce

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ATTORNEY'S FEES AND DIVORCE

Attorney's fees can be awarded in divorce and post-divorce litigation either to a "prevailing party" or to a party in need of financial assistance, regardless of "success" in litigation. In some states, fees can be awarded as a form of a sanction for a party taking unreasonable positions in litigation. When an ex-spouse files for Bankruptcy and owes money to the non-debtor spouse or their attorney, litigation will often arise regarding the categorization of those fees as a DSO and whether those fees can be discharged.

In a Chapter 7 Bankruptcy, the fees due the non-debtor spouse or their attorney will be non-dischargeable in most circumstances. Often the fees will be deemed as a DSO either because the fees were incurred in litigation over child-related or spousal maintenance-related litigation or because the fee award was based upon the financial needs of the recipient spouse. Different jurisdictions will look to different standards in making this determination. *See* In re Rugiero, 2012 WL 4800059 (6th Cir. Oct. 10, 2012) (applying both tests); In re Lowther, 321 F.3d 946 (10th Cir. 2002) (unusual fact pattern in which Debtor had custody but was ordered to pay fees to non-debtor spouse-Court held that the Debtor's financial hardship overcame presumption that fees in custody dispute would generally be in the nature of support); In re Maddigan, 312 F.3d 589 (2d Cir. 2002)(applying both standards); Eden v. Chapski, Ltd., 405 F.3d 582 (7th Cir. 2005) (applying both standards and recognizing that the state court had concurrent jurisdiction with the federal court to determine whether the obligation was in the nature of support); In re Chang, 163 F.3d 1138 (9th Cir. 1998) (applying a standard that simply looked at the nature of the litigation and not the financial resources of the parties); Macy v. Macy, 114 F.3d 1 (1st Cir. 1997); In re Hudson, 107 F.3d 355 (5th Cir. 1997) (fees incurred in enforcing or establishing support obligations are support obligations themselves); In re Strickland, 90 F.3d 444 (11th Cir. 1996); and In re Kline, 65 F.3d 749 (8th Cir. 1995) (strictly financial needs analysis).

If the fees are deemed to be "in the nature of support" or a DSO, then those fees are non-dischargeable pursuant to 11 U.S.C. § 523(a)(5), are entitled to Priority under § 507 and are not subject to claims of exemption under § 522(c)(1). If the fees are not deemed to be a DSO,

in most circumstances those fees are still not dischargeable under § 523(a)(15), assuming the fees meet the criteria established in that section. For example, fees awarded in a non-marital litigation between parents (such as paternity litigation or custody litigation between parties who have not been married) that are not "in the nature of support" (perhaps due to an unreasonable position in litigation) may be dischargeable. Fees which are not dischargeable under § 523(a)(15) will not be entitled to Priority status and will be subject to exemption claims.

It is more likely that a dispute over the nature of attorney's fees will arise in the context of Chapter 13 matters, in which inter-spousal obligations which arise under § 523(a)(15) are dischargeable. 11 U.S.C. § 1328(a)(2) still extends the "super discharge" to debts which arise under that section. It is one of the few remaining elements of the "super discharge."

The issues regarding attorney's fees in the context of dischargeability litigation assumes that the debt is owed by the debtor to the non-debtor spouse or the attorney for the non-debtor spouse. Fees that the debtor owes to their own attorney from the divorce are dischargeable, barring claims of fraud, willful and malicious injury or a breach of a fiduciary duty (in which case other subsections of 523 would apply, as would the applicable time periods proscribed therein). Is there anything that the debtor's former attorney can do to protect fees incurred in the representation of the debtor in a divorce?

Is an attorney entitled to a lien on the assets that the attorney obtains for a client when the client files for relief under the Bankruptcy Code? Is there a "charging lien?" Can the attorney create lien rights by contract? To what property can a lien attach? Does the trustee have the right to avoid the lien? These are issues which can confront counsel in the attempt to protect fees earned.

The first inquiry is to examine state law to see if, by statute, an attorney has lien rights on property obtained in the course of representation. If so, counsel needs to strictly comply with the statutory scheme- notice to the client, notice to third parties, etc. If there is no statutory entitlement, is the attorney entitled to a "common law" lien?

Arizona, unlike many states, does not have a statute that establishes the rights of an attorney to a lien. Rather, the attorney's lien rights in Arizona arise from common law. The

Florida District Court of Appeal explained how common law liens for attorneys arise and how they are perfected.

> Charging liens in Florida are an equitable right and a creature of common law. *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So.2d 1383, 1384 (Fla.1983). Such liens have been recognized in our jurisprudence for more than 150 years, during which time our courts have established requirements for, and procedures governing, their validity and enforcement. *Id*. *See e.g.*, *Nichols v. Kroelinger*, 46 So.2d 722 (Fla.1950); *Greenfield Villages v. Thompson*, 44 So.2d 679 (Fla.1950); *Carter v. Davis*, 8 Fla. 183 (1858); *Carter v. Bennett*, 6 Fla. 214 (1855). There are no requirements for perfecting a charging lien beyond the giving of timely notice to the client. *Baucom*, 428 So.2d at 1385.

CK Regalia, LLC v Do Campo & Thornton, 159 So. 3d, 358, 360 (Fla. Dist. Ct. App. 2015)

Arizona recognizes such a lien to protect an attorney from a dishonest client.

> "A charging lien is an attorney's lien that attaches after a judgment is obtained in the litigation." *Skarecky & Horenstein, P.A. v. 3605 N. 36th St. Co.*, 170 Ariz. 424, 428, 825 P.2d 949, 953 (App.1991). Part of the reason for permitting charging liens is to ensure that a dishonest client does not walk away with an award secured for the client through the attorney's efforts without paying the attorney for those efforts. *See In re Warner's Estate*, 160 Fla. 460, 35 So.2d 296, 298–99 (1948) ("[A] litigant should not be permitted to walk away with his judgment and refuse to pay his attorney for securing it."); *Dorsey & Whitney, LLP v. Grossman*, 749 N.W.2d 409, 420 (Minn.Ct.App.2008) ("An attorney lien is an equitable lien created to prevent a client from benefiting from an

> attorney's services without paying for those services."); *Computer One, Inc. v. Grisham & Lawless, P.A.*, 144 N.M. 424, 188 P.3d 1175, 1179–80 (2008) ("The charging lien arises from a recognition that when an attorney assists a client in procuring a judgment or 'fund recovered by his efforts,' the attorney needs to be paid from that fund for the value of services rendered before the proceeds are disbursed. A court, sitting in equity, has a responsibility to enforce the lien against the judgment to protect lawyers from dishonest clients."). "The principle ... was settled long ago ... that the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances, at whose expense, those fruits are obtained." *State v. Nat'l Sur. Co.*, 29 Idaho 670, 161 P. 1026, 1035 (1916) (quoting *Read v. Dupper*, 101 Eng. Rep. 595, 596 (1795)).

Langerman Law Offices, PA v. Glen Eagles at Princess Resort, LLC, 204 P.3d 1101, 1103 (Ariz. App. 2009)

Assuming that the law of the state recognizes a common law charging lien, the lien is enforceable against the property awarded Debtor in the Divorce proceedings. The only remaining question is the priority of this lien against the Estate and the general creditors of the Estate. Debtor, having consented to the lien, cannot now claim it does not exist or that his or her rights to property are superior to the lien which he or she voluntarily gave to their attorney. The Debtor lacks standing to claim that the attorney's lien rights are subordinated to the rights of other creditors.

Since the lien in question is a "common law" lien, there is no requirement for formal "perfection" such as exists for liens such as mortgages, liens created under the UCC or various Motor Vehicle laws.

> If, then, the attorney has obtained a favorable judgment or settlement for the client which results in what the law recognizes

> as proceeds, the attorney has merely to assert timely a claim of lien in the case to become entitled to a determination by the court, sitting without a jury, of the amount of attorney's fees due. Kozich v. Kozich, 501 So. 2d 1386 (Fla. 4th DCA 1987) (footnotes omitted).

Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A., 517 So. 2d 88, 93 (Fla. 3d DCA 1987).

Bankruptcy case law is consistent with various state law decisions regarding the priority of an attorney's common law lien rights as against the Trustee's exercise of "strong arm powers."

> The trustee assumes that perfection of an attorney's lien is required, and argues that because the Friedman firm's lien was not perfected it is invalid as against the trustee. Not one New Jersey state court case, however, holds that an attorney's lien under N.J.S.A. 2A:13–5 must be perfected to be valid as against third parties. Neither does N.J.S.A. 2A:13–5 or any other New Jersey statute or rule require that an attorney's lien must be perfected. The same is true of certain other statutory liens. *See e.g.* N.J.S.A. 2A:44–36 (hospital, nursing home and physician's lien); N.J.S.A. 2A:44–21 (garage keeper's lien); *Regan v. Metropolitan Haulage Co.*, 127 N.J.Eq. 487, 14 A.2d 257 (Ch.1940) (garage keeper's lien does not have to be perfected). By contrast, where the New Jersey legislature has decided that a lien must be perfected, it has explicitly said so. *See e.g.* N.J.S.A. 12A:9–302 (requiring the filing of a financing statement to perfect certain security interests, but not others); *See also* N.J.S.A. 2A:44–6 (mechanic's lien must be filed within 90 days after completion of work).

In re Smith, 263 B.R. 71, 79 (Bankr. D. N.J. 2001)

The attorney's lien relates back to the time that the agreement was executed and the services rendered. In re Sea Catch, Inc., 36 B.R. 226 (Bankr. D. Alaska 1983).

> In those states which provide that an attorney's charging lien attaches to a judgment, verdict or order and that the effective date of the lien relates back to the commencement of the attorney's services, § 546(b) will protect the attorney's lien from being invalidated by the trustee's status as a hypothetical lien creditor as of the date of the filing of the petition. *See, In re PDQ Copy Center, Inc.*, 27 B.R. 123 (Bkrtcy.S.D.N.Y.1983) (applying New York's attorney's lien statute); *In the Matter of TLC of Lake Wales, Inc., supra*, (applying Florida common law). As noted previously, although the judgment was obtained prior to the filing of the bankruptcy petition, the lien did not attach to the fund until after the conversion of the case to a Chapter 7.
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> The general rule is that an attorney's charging lien relates back to and is effective from the time the attorney commences his services. 7 Am.Jur.2d *Attorneys at Law* § 332 (1980); 2 S. Speiser, *supra*, § 16:21. The principle of relation back was applied in *Hanna Paint Manufacturing Co. v. Rodey, Dickason, Sloan, Akin & Robb*, 298 F.2d 371 (10th Cir.1962) to allow an attorney's lien to defeat a creditor to whom a partial assignment of the judgment was made during the appeal of the judgment. The court first looked to New Mexico law to determine if an attorney's charging lien was valid, but relied on general legal principles in stating that:
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> > The lien of an attorney for services rendered in an action relates back to, and takes effect from, the time of the commencement of the services, when it attaches to a

> judgment, it is superior to the claim of a creditor in whose favor execution has been levied, or to a subsequent attachment, garnishment, or trustee process, or other liens on the money or property involved, subsequent in point of time.
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> ... The lien attached at the commencement of appellees [sic] legal services in the case and is prior and superior to the lien of appellant, which arose by virtue of an assignment made during the course of the litigation.

Id. at 373 (emphasis added, footnotes omitted).

Sea Catch, *supra* at page 232.

Bankruptcy case law in other jurisdictions also upholds the right of an attorney to assert a lien against property obtained as a result of the attorney's labors and efforts. In In re Durkay, 9 B.R. 58 (Bankr. N.D. Ohio E.D. 1981), the Court upheld the priority of an attorney's lien under Ohio common law, recognizing that the lien arose when the funds were awarded to the client and the lien was perfected upon notice. *See also* In re DiPasquale, 105 B.R. 187 (Bankr. D. R.I. 1989) regarding perfection of common law liens by notice.

Counsel's rights are superior to those of both Debtor and the Estate.

> The Trustee does not contest the existence of Howard's inchoate lien as of the Filing Date. Rather, the Trustee argues that because the judgment on the state court action entered after the Filing Date, the lien was not "perfected" and thus is subject to the Trustee's avoidance powers under §§ 544, 545(2), and 549. However, the Trustee neglected to discuss the application of 11 U.S.C. § 546(b) which limits a trustee's avoidance powers. Section 546(b) provides in relevant part:

> (1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that—
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> (A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection ...

The purpose of § 546(b) is to protect, in spite of the surprise intervention of a bankruptcy petition, those creditors whom state law allows to perfect their liens or interests against an intervening interest holder. *See Collier on Bankruptcy*, 15th Ed. Rev. 5:546.03[1] (1996) (quoting S. Rep. No. 95–989, at 86–87 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5872–5873; H.R.Rep. No. 95–595, at 371–72 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6327–6328). Section 546(b)(1)(A) does not focus on the date the lien is "perfected"; rather, it focuses on the lien's effect once it is "perfected." In re Microfab, Inc., 105 B.R. 152, 157 (Bankr. D. Mass. 1989). Specifically, § 546(b)(1)(A) explores whether, under state law, a lien, once perfected, takes priority over interests which were perfected before the lien. Id. If it does, the trustee in bankruptcy may not avoid the lien. *Id*.

Bankruptcy courts have held that where state law provides that the effective date of an attorney's lien relates back to the commencement of the attorney's services, § 546(b) protects the attorney's lien from being avoided by the trustee. *E.g.*, *Kleer–Span Truss Co., Inc. v. Ray (In re Kleer–Span Truss Co., Inc.)*, 76 B.R. 30, 32 (Bankr. N.D.N.Y. 1985); *In re Sea Catch, Inc.*, 36 B.R. 226, 233 (Bankr.D.Alaska 1983); *In re PDQ Copy Ctr., Inc.*, 27 B.R. 123, 125 (Bankr.S.D.N.Y. 1983). Massachusetts law provides that the attorney shall have a lien "from the authorized commencement of

> the action." Mass. Gen. Laws ch. 221, § 50; *see Thurston v. Hutchinson (In re Hoy's Claim)*, 93 F.Supp. 265, 266 (D.Mass. 1950) (lien arises from moment action is filed); *Rothwell*, 159 B.R. at 379; *Leading Edge Products*, 121 B.R. at 131; *Cohen*, 38 Mass.App. Ct. at 5, 644 N.E.2d at 252 (lien takes effect from authorized commencement of an action); John S. McCann, *The Attorney's Lien in Massachusetts*, 69 Mass.L.Rev. 68, 83–84 (1984). *But see United States v. Shearer*, 243 F. Supp. 433, 435–36 (D.Mass. 1965) (attorney's lien which was not choate when a tax lien was perfected did not have priority over the tax lien). Thus, once a judgment, decree, or other order is entered, the lien relates back to the date the action was filed. *Rothwell*, 159 B.R. at 380. As a result, the attorney's lien would be superior in priority to any other interest in the recovery which arose between the time the action was filed and when an order entered. Accordingly, Howard has a valid attorney's lien in the settlement proceeds which cannot be avoided by the Trustee.

In re Albert, 206 B.R. 636,639-640 (Bankr. D. Mass. 1997).

An interesting issue arises when the attorney wishes to attach the lien to otherwise exempt property. There is strong public interest in protecting and recognizing attorneys' liens, including both assuring legal services are available to individuals who lack immediately available funds and protecting attorneys from the wrongful behavior of their clients when the attorney's advance services and/or costs based on the promise to receive payment from the funds or assets the client will receive later as a result of the attorneys' services. Litigants need access to the court system and attorneys need to know they will be compensated for their corresponding labors. Addressing an attorney's lien and these considerations, and precisely in the context of a divorce action, Reed v. Reed, 10 S.W.3d 173, 177-178 (Mo. App. 1999), reached the following conclusion:

> [T]he function of an attorney's lien, whether it arises under the common law or under a statute, is to assure payment of the attorney's fees and expenses from the fund created by the attorney's efforts. *KCATA*, 893 S.W.2d at 867. *See also* Jay M. Zitter, JD, Annotation, *Priority Between Attorney's Charging Lien Against Judgment and Opposing Party's Right of Setoff Against Same Judgment*, 27 ALR 5th 764, 777 (1995); 7A C.J.S. Attorney and Client Sect. 359 (1980). It is the policy of our courts to enforce these liens in order to give meaning to the "obvious purpose of the statute, i.e., to provide protection in fact for the attorney who has rendered services to a client." *Satterfield v. Southern Ry. Co.*, 287 S.W.2d 395, 397–98 (Mo. App.1956). The lien also ensures "that a client, who otherwise may not have funds to pay for legal representation, will get the assistance of an attorney." 27 ALR 5th at 777, *citing*, 7 Am Jur 2d, Attorneys at Law Sec. 332. Protecting the fund from which an attorney will be compensated is thus said to broaden the accessibility of legal services. For these reasons, attorney's liens are considered to be "remedial in nature [and] will be liberally construed." *Downs*, 413 S.W.2d at 523.

As implied by Reed, *supra*, there is no reason to deny a lawyer's lien rights simply because the representation concerned the division of marital assets.

> Below the trial court indicated that it felt that no lien could attach to the property acquired in a division of property, as no new rights or "fruits" were created, because the parties already had a right to have the property divided. Such an argument is a specious one, for the efforts of an attorney result in the parties receiving new and distinct rights which are separate and independent from their rights prior to the division of property. Until the time of the division of property, each party generally holds all jointly acquired

> property in some form of joint tenancy, whereas after the property division and disbursement, each party has rights in the property awarded, separate and distinct from their former spouse. Such rights are new and can rightfully be termed fruits of an attorney's efforts. When a carpenter, using wood and material of his employer, utilizes his skill to create a table, it would seem ludicrous to argue that the table was not the "fruit" of the carpenter's skill and effort. We deem it equally so to argue that new property rights, created by a division of property in a divorce (such rights being distinct, separate and independent from former rights), do not constitute "fruits of an attorney's skill and services. Accordingly, we hold that an attorney's lien may attach to property rights acquired by a property division in a divorce proceeding.

Campanello v. Mason, 571 P.2d 449, 451-452 (Okla. 1977).

It would be inconsistent with well-established public policy to allow a Debtor to keep the very assets which were obtained for him or her through a Firm's labors, but without recognizing the Firm's contractual and common law lien rights. This is a matter of interest not only to the litigants themselves, but also to the public in general and to administration of the judicial system. Competent divorce lawyers, and particularly those who provide notice of their attorneys' lien to the client in the written engagement agreement, need to know they will be paid for the services they render and that their clients cannot run off with the fruits of the litigation. To allow client to disavow such lien rights surely will have a chilling effect on the willingness of counsel to represent litigants who have assets but no immediate access to the funds which can be used to compensate counsel. Attorneys are willing to accept cases, especially in the area of Family Law, when they know that the laws of the State will protect them when they try to collect their fees from the fruits of their labors. Whether the attorney's lien is granted by statute, common law or contract, the public policy remains the same – i.e., to

broadly and liberally construe the lien rights of an attorney to as a means to guaranty access to legal services for prospective clients and protect the attorneys who advance such services.

Precisely to avoid the injustice of an attorney being denied access to the assets he or she obtained for the client, many state laws recognize a charging lien, a right superior to anyone, including Debtor, making claim to the funds. *See* Linder v. Lewis, Roca, Scoville & Beauchamp, *supra*. A lawyer's interest in the property "as the person helping create the fund is paramount and superior to the rights of other persons." *Id.*, at 289. The law must accommodate the attorney whose efforts established the award from which he is to be paid. *See* Holly v. State, *supra*.

The Bankruptcy Court in In re Benbow, 496 B.R. 605, 610 (Bankr. D. Col. 2013), recently rejected a Debtor's attempt to set aside, under 11 U.S.C. §522(f), an attorney's charging lien which attached to the Debtor's homestead. In upholding the lien, the Court held:

> The question then arises whether, under Colorado law, Stoorman's charging lien is subject to a homestead exemption that may be claimed upon sale proceeds of an exempt homestead under COLO. REV. STAT. §§ 38–41–201 & 38–41–207. The Colorado homestead exemption statute serves to exempt a debtor's homestead "from execution and attachment...." COLO. REV. STAT. § 38–41–201. In Colorado, "[a] proceeding to enforce an attorney's charging lien is not a levy upon property under either a writ of execution or a writ of attachment...." In re Marriage of Etcheverry, 921 P.2d 82, 83 (Colo.Ct.App.1996). Accordingly, the Court finds that Stoorman's lien interest in the proceeds of any sale of the Real Property is not subject to exemption under COLO. REV. STAT. §§ 38–41–201.

Benbow at 611.

"The attorney's lien, in so far as it relates to judgments, may be accurately defined as a right conferred by statute, or recognized by common law, to have his compensation or costs, or

both, directly secured by the fruits of the judgment." In re Benbow, 496 B.R. 605, 610 (Bankr. D. Col. 2013), citing Fillmore v. Wells, 10 Colo. 228, 15 P. 343 (1887). There is no reason to differentiate between exempt and non-exempt assets when making this determination regarding validity of the charging lien; in fact, to do so would have a chilling effect on the ability of those individuals, who are not so wealthy as to have significant non-exempt assets, to retain competent counsel. Public policy dictates that no such distinction should be drawn. In a decision contra, the Florida Supreme Court denied an attorney a lien in a matter arising from a modification of support. Chames v. DeMayo, 972 So. 2d 850 (Fla. 2007). The fee agreement signed in that matter provided that the attorney was entitled to a lien on all of the client's assets (even though the matter in question was a modification of support and not the divorce-where assets would be divided and allocated). The court denied the lien as it related to the client's homestead (due to Florida Constitution's strong protection of homestead rights). Query whether the outcome would have been different if the representation of the client led to the client obtaining the property upon which the attorney sought to place a lien.

Can the charging lien attach to spousal maintenance or support? Enforcement of attorneys' fees against alimony/spousal maintenance is long established. *See* Putnam v. Tennyson, 50 Ind. 456 (1875); Jasper v. Smith, 540 N.W.2d 399, 404 (S.D. 1995) ("An attorney's lien against an alimony award does not violate the public policy of this state provided a valid contract for fees supports the lien."); Cherpelis v. Cherpelis, 125 N.M. 248, 959 P.2d 973 (1998); *e.g.*, Hampton v. Hampton, 85 Utah 338, 39 P.2d 703 (1935). As with the homestead, the lien attaches to what is obtained through the attorney's services, as the spousal maintenance judgment is rendered. Counsel should review state law to see it is prohibited to voluntarily grant a consensual lien against spousal maintenance as security for payment of legal fees.