

Family Law

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Disgorgement of fees ordered in *In re Marriage of Squire*

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In *In re Marriage of Squire*, 2015 IL App (2d) 150271, the Appellate Court affirmed a disgorgement order requiring the wife's attorneys to pay \$60,000 to the husband's attorneys, even though the wife had borrowed funds from her mother to pay her own fees, and the husband was gainfully employed. Applying the analysis developed by our Supreme Court in *In re Marriage of Earlywine*, 2013 IL 114779, the Appellate Court held that disgorgement under these circumstances met the requirements of the statute and promoted the policy of leveling of the playing field between the parties.

In *Squire*, both the husband and wife claimed that they lacked their own funds to pay their attorneys. The wife was unemployed, and, although the husband earned a six-figure income, his expenses exceeded his monthly earnings because he was making debt-service payments stemming from the parties' prior bankruptcy. The wife, however, had borrowed approximately \$120,000 from her mother to pay her current attorneys a retainer, while the husband owed his attorneys more than \$50,000 in fees.

In upholding the ruling of the circuit court that ordered the wife's attorneys to disgorge \$60,000 of the fees already paid to them as a retainer and to turn over that amount to the husband's attorneys, the

unanimous panel in *Squire* relied upon *Earlywine* and the "leveling of the playing field" doctrine.

Section 501(c-1)(3) of the Illinois Marriage and Dissolution of Marriage Act ("Act") (750 ILCS 5/501(c-1)(3)) provides that if the court finds that "both parties lack financial ability or access to assets or income for reasonable attorney's fees and costs, the court ... shall enter an order that allocates available funds for each party's counsel, including retainers or interim payments, or both, previously paid, in a manner that achieves substantial parity between the parties." In *Earlywine*, the Supreme Court explained that the purpose of this provision was to advance the "leveling of the playing field" policy regarding attorney's fees reflected in the Act, and, under the facts there, held that an advance payment retainer was subject to disgorgement.

In *Squire*, the Appellate Court rejected the argument raised by the wife's attorneys that the analysis and holding in *Earlywine* was limited to advance payment retainers, and therefore *Earlywine* did not allow the trial court to disgorge those fees that the firm had already billed against and earned. The *Squire* panel held that *Earlywine* did not intend to limit its holding to advance payment retainers, and that doing so would "completely frustrate the purpose

of the statute" (Id., ¶ 21), specifically, to ensure that the advantaged spouse and his or her attorney cannot effectively block access to funds simply by characterizing their retainer agreement in a certain way. Further, limiting *Earlywine* in that fashion would provide the attorney representing the advantaged spouse with "a strong incentive to earn the fees at an early stage of the litigation," and the court envisioned that the lawyer "could file voluminous pleadings and motions early in the case, thus 'earning' the retainer, while leaving the other spouse to respond to a mountain of paperwork with little chance of obtaining resources to do so properly." Id.

In arriving at its ruling, the court applied well-known principles of statutory construction in determining how far the legislature intended disgorgement to reach. Examining both the plain language of the statute and the purpose for enacting the provision, the *Squire* court held that section 501(c-1)(3) does not limit the types of retainers to which it applies, as it simply states that funds in "retainers" or "interim payments" may be used to achieve parity between the parties. *Squire* agreed with *Earlywine* that a "broad construction of this provision was necessary to effectuate its purpose." Id., ¶ 20.

In addition, *Squire* rejected the argument advanced by the wife's attorneys

that the funds at issue were not “available” within the meaning of section 501(c-1)(3) because they had already been earned and deposited into the firm’s general account. The Appellate Court held that *Earlywine* had dispensed with this argument - albeit, indirectly - in that the funds in that case had also already been deposited into the general account of that firm prior to disgorgement. From this, the *Squire* court concluded that the term “available” as used in section 501(c-1)(3) “simply means that the funds exist somewhere.” *Id.*, ¶ 22. Thus, *Squire* went one step further than *Earlywine*, in that it defined the statutory term “available,” and did so in a broad manner.

In sum, the *Squire* court liberally construed the plain language of the disgorgement provisions in section 501(c-

1)(3) to effectuate the legislature’s intent to level the playing field with respect to attorney’s fees in dissolution actions. The analysis used by *Squire* tracks that used by our Supreme Court in *Earlywine*, which also liberally construed these same provisions in order to carry out this same important public policy. Indeed, *Squire* quotes extensively from *Earlywine* in conducting its analysis. Although *Earlywine* was decided in the specific factual context of an advance payment retainer, *Squire* is correct that there is nothing in *Earlywine* which limits the application of its construction of the statute to that fact-pattern, and that its analysis is equally applicable to the facts presented in this case.

Thus, we may expect our courts to continue to apply this analysis to a host of

factual situations, as long as the statutory prerequisites are met: both parties have an inability to pay fees, a retainer or interim payment has been paid on behalf of one party, and the funds are “available” – meaning they “exist somewhere.” In practical application, *Squire* leads to the conclusion that all funds appear to be fair-game for application of the leveling provisions and the remedy of disgorgement. Significantly, in its most-recent rewrite of the Act, the General Assembly made no move to amend section 501(c-1)(3) post-*Earlywine*, reflecting the fundamental principle that where the legislature chooses not to amend a statute after a judicial construction, it is presumed that it has acquiesced in the court’s statement of the legislative intent. ■

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