THE ENFORCER

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Are attorney fees payable from my client's support payments?

In these difficult economic times, getting paid by your clients remains a major concern. An effective tool to ensure payment is a lien on your client's assets. As a family law attorney, there is a good chance that your client's only available assets are support payments owed to them. Given the public policy rationale behind support, you may wonder whether you are even permitted to assert a lien on support. In Michigan, you can take such action, but before you proceed take some time to ensure you have all the facts of your case straight. The case law indicates that a valid lien on support requires the circumstances to be very specific. For example, whether it is an arrearage or current obligation makes a difference. If it is an arrearage, you need to know whether it has resulted from a retroactive increase or a failure to pay. Whether you have a retaining or charging lien is also potentially relevant. Finally, its questionable whether the type of support (child or spousal) matters.

There are two types of attorney liens; retaining[1] and charging[2]. It is easy to think of situations where an attorney may have a need to assert either type of lien against support funds. A retaining lien could be asserted if a client's regular support or arrearage payments are paid to the attorney's office on their behalf. A charging lien could be asserted by an attorney who secured payment of support in the first place or who represented a client in the collection of a support arrearage. The status of the law is not crystal clear, but the one Michigan case directly dealing with an attorney asserting a lien on *support* indicates it is permitted in at least one circumstance.

In the first section of this article, we will review the specific circumstance in which Michigan case law tells us it is permissible to assert an attorney's lien on support. In the second section, we will discuss other possible situations, mainly where spousal support is involved, where your attorney's lien asserted against support may hold up in court.

Landry v. Roebuck

In *Landry v. Roebuck*, 193 Mich. App 431, 484 NW2d 402 (1992), the defendant law firm undertook representation of the plaintiff Hope Landry and obtained an increase in child support. Due to its retroactivity, the increase created an arrearage. When paid by the father, the check was retained by the defendant law firm who asserted a retaining lien against the funds.

After the lower court directed the money be turned over to Ms. Landry, the defendant law firm appealed. The question on appeal was one of first impression in Michigan. The court posed it in the following manner: "Is a retroactive order for an increase in child support subject to the same public policy considerations that guide the courts in preserving child support payments in trust for the child beneficiaries?" *Id* at 433. The court answered this question NO. Having no binding Michigan case law to guide it, the court looked to the seminal case at that time, *Fuqua v Fuqua*, 88 Wash2d 100, 558 P2d 801 (1977).

In *Fuqua*, the Washington court held that permitting attorneys' liens to be asserted against child support would result in counsel for the custodian taking monies the court determined were necessary to assure the adequate support of the children.[3] *Landry*, *supra* at 434. The *Fuqua* court actually decided two consolidated cases in which a lien was asserted on support, *Fuqua*, *supra*, where there was unpaid support and *Kaur v. Chawla,* 11 Wn. App. 362, 522P2d 1198 (1974), where support was ordered upon the establishment of paternity and made retroactive.

The *Landry* court noted that *Fuqua*'s reasoning was well grounded and based upon sound public policy but distinguished it. *Id*. The *Landry* court stated that because *Fuqua* was about an arrearage created by failure to pay as opposed to an arrearage created by a retroactive increase the same reasoning could not be applied.[4] *Id*. The *Landry* court thought that the monies were not necessary for the *immediate* needs of the child due to the fact that the arrearage did not become payable until adequate present

and future payments were in force and effect. *Id*. The *Landry* court also noted that the defendant law firm was asserting a retaining lien as opposed to the charging lien at issue in *Fuqua*. *Id*. However, it did not explain how this factor weighed into its decision. The *Landry* court further reasoned that a contrary ruling would inhibit litigation on behalf of minors and their custodians who seek to increase support orders in force but believed to be inadequate. *Id*.

The *Landry* dissent pointed out that the majority was making a distinction without a difference, i.e, whether it is a retaining lien or charging lien, the money comes from the same source and is for the same end. *Id*. The dissent also reasoned that although the majority held that an attorney may not tap regular support payments but may tap an arrearage, back support is no different than regular support. *Id*. The dissent quoted the *Fuqua* court when it stated that just because children got by without support for some time does not mean that the support monies are any less important.[5] *Id*. The *Fuqua* court thought it was quite likely that the back support would be needed to satisfy indebtedness incurred by the custodian on behalf of the family during the period in which the family was without adequate support. *Id*.

So *Landry* tells us that a valid attorney's lien on support applies to a very specific situation. It requires that:

1. You have a retaining lien;

2. The funds in your possession are for payment of a support arrearage;

3. The arrearage arose from a retroactive increase in support ordered by the court; and

4. It is child support.

It seems unlikely that the facts of your case will fit so neatly into *Landry*. So let's look at some other possibilities using the *Landry* reasoning as a guide.

Will your lien hold up if your facts differ from *Landry*?

Based upon the *Landry* court's reasoning, it is difficult to understand why your *charging* lien could not be asserted against arrearage payments created by a retroactive increase. You may not have possession of the funds, but you still did the work to obtain the increase. Similarly, why couldn't either type of lien be asserted against an arrearage accrued because the payor failed to pay support previously ordered? The *Landry* court was concerned that prohibiting an attorney's lien would inhibit the representation of clients wanting to increase their current support obligation. *Landry*, *supra* at 434. If a client's ability to pay is a concern, wouldn't you be just as likely to hesitate to undertake collection of an unpaid support obligation as to obtain an increase?

And what if your case involves spousal support? Spousal support was not at issue in *Landry* or *Fuqua*.[6] At least one Michigan case has barred counsel from garnishing its client's payments arising from a judgment of divorce. In *Cunnighman et al v. Herr et al*, 198 Mich. 258, 497 NW2d 575 (1993), the plaintiff law firm had obtained a judgment against its client for unpaid fees. It then tried to garnish distributions paid to its client by her ex-spouse's retirement plans pursuant to a qualified domestic relations order. The court held it could not reach its client's distributions. *Id* at 261. But don't let *Cunningham* convince you that a lien on spousal support is off limits. The *Cunnigham* court's reasoning indicates its decision was based upon the funds being exempt from garnishment because they were 1) controlled by federal law, the Employee Retirement Income Security Act ("ERISA") and 2) retirement funds. The court did not even mention that support factored into its decision.

Since the same policies lie behind spousal and child support, its not hard to reason that you could prevail in a *Landry*-like situation if the type of support was the only difference. You may even be more likely to prevail since most courts take the position that child support belongs to the child and not the parent.[7]

Conclusion

Based upon the case law in this area, if you have another choice, it may be a good idea to assert your lien on other assets besides support. If you cannot, make sure you analyze all of the factors carefully. By asserting a lien on support, you may be running afoul of the law.

Endnotes

1. A retaining lien attaches to documents, funds or other property of the client coming into the hands of the attorney during his professional employment. It gives the attorney the right to retain possession until the fee for services is paid. *Kysor Industrial Corp. v. D.M. Liquidating Co.*, 11 Mich. App 438, 444, 161 NW2d 452 (1968).

2. A charging lien creates a lien on a fund or judgment recovered as a result of an attorney's professional services. It is an attorney's equitable right to secure payment of fees from the recovery that his work created. *Kysor Industrial Corp. v. D.M. Liquidating Co.*, *supra*. See also *Mahesh v. Mills et al*, 237 Mich. App 359, 361, 602 NW2d 618 (1999).

3. The *Fuqua* court stated that a majority of jurisdictions have declared attorney's liens filed against funds representing child or spousal support invalid. *Fuqua, supra* at 106.

4. The *Landry* court did not mention *Chawla*, *supra*, which was consolidated with *Fuqua* and did involve a retroactive increase.

5. In *Ehrhart v. Ehrhart*, 155 BR 458, 463 (ED Mich. 1993), the Bankruptcy court agreed with the *Landry* dissent failing to see "how the needs were less immediate for an arrearage owed as a result of a retroactive increase in child support as opposed to an arrearage created by a failure to pay."

6. *Fuqua* did involve a lien against funds for child support and separate maintenance but the court decided the funds were commingled and not readily severable. It specifically limited its holding to child support. *Fuqua, supra* at 108-109.

7. See *Copeland v. Copeland*, 109 Mich. App 683, 31 NW2d 452 (1981)("Support payments are not property of the custodial parent, and are for the sole benefit of the child, measured by the needs of the child."). There is some authority for the proposition that the custodian has a beneficial interest in back child support. See *Renn v. Renn*, 318 Mich. 230, 27 NW2d 618 (1947) and *Ehrhart v. Nathan, supra*.

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