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Disgorgement or 'Claw-Back' as a Remedy for Unpaid Counsel Fees in Matrimonial/Custody Proceedings

By: Jordan Messeri and David Saxe | August 5, 2025

Can the non-monied spouse/party in a strenuously contested child custody proceeding, who has not received a court-ordered counsel fee award from the monied spouse/party, turn her enforcement activities to present and past counsel of the monied spouse/party and attempt to "claw-back" from monies paid to them as counsel fees, in an attempt to produce financial parity between the parties?

This question was presented in a highly unusual sua sponte order issued by Justice Frank Nervo (Justice, Supreme Court, New York County) in a case captioned KG v. CH. The substantive intricacies of the matter need not be explored here.

We pick up the case at a virtual conference held by Justice Nervo on Jan. 10, 2023 following the Appellate Division, First Department's reversal of a trial court order requiring petitioner (the monied party) to pay combined counsel fees and fines in excess of $2.7 million. See K.G. v. C.H., 209 A.D.3d 526 (1st Dept. 2022).

Although the purpose of the conference was a remand to schedule a hearing regarding reasonable counsel fees as directed by the First Department, the trial court nevertheless assumed a substantial counsel fee award would be made, concluded that the petitioner would not pay the counsel fees ultimately ordered, and stated its intention to hold petitioner's current and prior counsel responsible for payment through a process of disgorgement or "clawbacks." On Jan. 24, 2023, the trial court issued its order, which stated as follows:

As the court discussed at the January 10, 2023 conference, there is no dispute that the legal fees in this matter exceed several million dollars. Likewise beyond-dispute—and notwithstanding that the Court has repeatedly ordered petitioner, as the monied party, pay legal fees of respondent, the opposing non-monied party, pursuant to Domestic Relations Law §237[b]—respondent's counsel's efforts have gone mostly uncompensated while petitioner's various counsel and consultants have been compensated.

Notably, and as discussed supra, petitioner continued to retain counsel and consultants following the Court's interim orders directing petitioner to pay respondent's legal fees, while resisting payment of respondent's counsel's fees, as ordered by the Court, leaving same entirely outstanding. Put simply, petitioner has expended millions of dollars in legal fees prosecuting her failed parentage application while respondent's counsel has gone entirely uncompensated—excepting only for a payment by respondent financed by the sale of her home, various loans from family, and a move to the United Kingdom—despite Court Orders requiring petitioner to pay respondent's counsel's fees on an interim basis. Now, having exhausted millions of dollars on her own legal team, petitioner contends she is unable to pay respondent's legal fees.

The general purpose of DRL §237 is commonly referred to as seeking to level the playing field among parties. The Court, therefore, discussed with counsel on-the-record on January 10, 2023, the possibility of leveling the playing field via a claw-back of one-half of the fees petitioner paid to her various counsel and consultants throughout this litigation, pursuant to DRL §237, in order to fund a judgment for fees due respondent's counsel. It seems a perverse outcome, and contrary to DRL §237's very purpose, to countenance a monied party's expenditure of the entirety of their resources on their own legal team in order to

deprive the non-monied party's legal team of fair recompense and circumvent the protections of DRL §237. This is especially so when, as here, public records reflect the monied party has transferred title of their real estate holdings to corporate entities, ostensibly in a misguided attempt to shield same from impending judgments. If such outcome is permitted, as a practical matter, it appears likely that non-monied parties would be unable to retain sophisticated counsel, as any counsel retained would not be compensated due to the monied party's willful attempts to expend their wealth on their own litigation and parentage may, therefore, be based chiefly on the financial position of the parties and the monied party's ability to expend, hide, transfer, etc. their wealth in contravention of the purpose of DRL §237.

Accordingly, it is ORDERED that all counsel—including petitioner's current and former trial counsel, appellate counsel and consultants—shall brief the issue of whether the Court should direct petitioner's prior trial counsel, appellate counsel and consultants to remit to the Court, as a claw-back, one-half of their fees paid by petitioner to respondent's counsel so as to ensure respondent's counsel receives compensation in accordance with longstanding Court Orders; and it is further…

Direction was also made to current counsel to serve the order upon all prior counsel referenced in the order, including two prominent law firms that were specifically named.

The response of petitioner's current and past counsel (numbering at least six different law firms) was fast and furious. Focusing on the 50% "claw-back" payment provision of the order, objections were raised on the following varied grounds: jurisdiction, constitutionality, statute of limitations, public policy, and, in particular, that former and current counsel were non-parties to the proceeding and could not be bound by the court's order.

A motion for a stay pending appeal was made on behalf of all objectants to the First Department. The application for an interim stay was granted with respect to that part of the order mandating a 50% "claw-back." No further action with respect to the stay application was taken, and the remaining issues connected with the sua sponte order, and the matter in general, were thereafter resolved by Stipulation.

The interim stay granted by the Appellate Division with respect to the "claw-back" piece of the Trial Court's order was not surprising.

Indeed, it was Justice Nervo who, when contemplating the possibility of a "claw-back" remedy, initially raised on the record the uniqueness of this course of action, noting that he had researched the issue and could not find authority to support his order.

The interim stay of the "claw-back" granted by the Appellate Division, First Department was, under prevailing law, warranted. First, the court lacked jurisdiction to "claw-back" or disgorge counsel fees paid to present and prior counsel, in particular, where counsel had not been named as parties to the proceeding. *See e.g., Hartloff v. Hartloff*, 296 A.D.2d 849 (4th Dept. 2002) ("A court has no power to grant relief against an individual or entity not named as a party and not properly summoned before the court.") *Id.*, internal citations omitted.

Additionally, a demand for legal fees already paid to attorneys is essentially a claim for money damages and cannot be permitted without a finding that the attorney who has received such funds is legally responsible to return them under some recognized theory of legal liability. See *Access Point Medical, LLC v. Mandell*, 106 A.D.3d 40 (1st Dep't, 2013).

Courts have utilized disgorgement as a remedy for claims involving malpractice and breach of fiduciary duty, but in the absence thereof, "…disgorgement of earned fees remains disfavored by the courts." *Piccareto v. Mura*, 41 Misc. 3d 295, 318 (Sup. Ct. Monroe Cty. 2013).

Here, there were no allegations of wrong-doing by any counsel subject to the order. Further, there was no demonstration that the fees paid to counsel were improperly obtained or that the client had parked unearned retainer funds with any of these counsel, seeking to avoid court awarded payment

to respondent's counsel. They were simply lawyers being paid for performing legal work for their client.

Probably, but most importantly, the order was a judicial attempt to impose a novel but presently unsupported legal theory under the current counsel fee statute (Domestic Relations Law §237) applicable in matrimonial and custody proceedings.

Those who have been involved in such practice over the years recognize the unique importance of counsel fee awards pursuant to DRL §237, which sets forth the presumption that counsel fees are to be awarded to the "non-monied spouse" and that the amount be sufficient to "enable adequate representation from the commencement of the proceeding":

to enable [the non-monied spouse] to carry on or defend the action of proceeding as, in the Court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the Court's discretion, the Court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment.

The statutory language expressly codifies the primary purpose to level the litigation playing field between spouses. See O'Shea v. O'Shea, 93 N.Y.2d 187, 190 (1999). As the Court of Appeals explained:

[DRL 237(a)], which has deep statutory roots, is designed to redress the economic disparity between the monied spouse and the non-monied spouse. Recognizing that the financial strength of litigants is often unequal—working most typically against the wife—the Legislature invested Trial Judges with the discretion to make the more affluent spouse pay for legal expenses of the needier one. The Courts are to see to it that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet.

Id.

The question remains: is the "claw-back" referenced by the trial court in the subject matter an appropriate remedial extension of DRL §237? We think it is not.

In the context of this matter, the remedy simply doesn't fit. But the thought lingers—is the solution proposed by Justice Nervo so unexpected and unusual that it deserves no further attention?

Indeed, Illinois courts have debated whether and to what extent the disgorgement of fees from attorneys is appropriate to further the purposes of Illinois' matrimonial fee-shifting statutes, and have stated that disgorgement of unused retainer fees being held by an attorney is an available remedy to level the playing field in matrimonial matters. See, *In re Marriage of Earlywine*, 2013 IL 114779, 996 N.E.2d 642. The Supreme Court of Illinois has since limited recovery to "unearned" fees being held by an attorney, and refused to extend such a remedy to fees that have already been earned. See, *In re Marriage of Goesel*, 2017 IL 122046, 102 N.E.3d 230.

We think matrimonial lawyers should be alert to future possibilities that Justice Nervo's order portends. The law that has developed involving counsel fees in matrimonial litigation is solidly behind the concept of creating financial parity between the warring combatants, and yet we are still regularly faced with situations where a party is disadvantaged due to an inability to pay fees, the monied party refuses to pay fees pursuant to an order, and awards of counsel fees less than necessary for the non-monied party to pay ever-increasing litigation costs are ordered notwithstanding the mandate of DRL §237, which often fails to fully resolve the economic disparity for which it is designed.

The thought remains however—is Justice Nervo's vision as reflected in his order a prophecy for future action and might some ambitious legislator or activist judge assigned to a Matrimonial Part in the future see a need to revisit this issue? It might

be prudent for the matrimonial bar to keep a "gimlet-eye" out for such possibilities.

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The views expressed herein are solely those of the authors. The authors of this essay and their respective law firms represented petitioner at different times in the litigation.