

Family Law

Demystifying the Attorney Lien: A Useful Tool for the Family Law Practitioner

By David M. Wildstein and Cheryl E. Connors

In these trying economic times, an attorney lien can provide the family law practitioner with a useful tool to collect fees. “An attorney’s ‘special’ or ‘charging’ lien has mystified bench and bar at least since its codification from the common law in 1914.” *Martin v. Martin*, 335 N.J. Super. 212, 221 (App. Div. 2000). This article will simplify the procedure for family lawyers to perfect a charging lien for legal fees against equitably distributed property in a divorce judgment.

Procedure for Obtaining an Attorney Lien

The Attorney Lien Statute (N.J.S.A. 2A:13-5) provides that after the filing of a complaint or counterclaim, the attorney shall have a lien for compensation upon his or her client’s action, which shall attach to an award in his or her client’s favor. The statute enacted in 1914 did not contemplate a “general appearance,” which is unique to family part actions.

Wildstein is a senior shareholder and chair of the family law team at Wilentz, Goldman & Spitzer in Woodbridge. Connors is an associate with the team.

Since a general appearance allows a party to seek affirmative relief, this appears to be a distinction without a difference. The same logic may apply to the filing of an answer since the practice in family law is to allow affirmative relief without asserting a counterclaim. The statute further provides that a lien will not be affected by any settlement between the parties nor by the entry of satisfaction or cancellation of a judgment on the record. This provision of the statute appears to prevent litigants from transferring assets to each other in order to abrogate the attorney’s rights under the statute.

Although, by operation of law, the attorney lien automatically attaches to a judicial award by filing a complaint and counterclaim, it is necessary to follow certain procedures to implement and perfect the lien. The procedural requirements for asserting a lien are set forth in the seminal case of *H&H Ranch Homes, Inc. v. Smith*, 54 N.J. Super. 347, 353-54 (App. Div. 1959). The court declared that the attorney must file a petition (later clarified in *Shalit v. Shalit*, 323 N.J. Super. 351 (Ch. Div. 1999), to be a notice of motion) in the underlying action and set forth the facts upon which the court can determine and enforce the lien. The petition must request

that the court “establish a schedule for further proceedings which shall include time limitations for the filing of an Answer by defendants, the completion of pretrial discovery proceedings, the holding of a pretrial conference, and the trial.” After the court enters the order establishing the schedule, the matter must proceed as a plenary suit and not as a summary proceeding.

The practitioner must also comply with the essential step of serving a pre-action notice for fee arbitration under Rule 1:20A-6 prior to filing a motion to impress an attorney lien. The pre-action notice may be given at the same time as the filing of the motion, provided the court waits 30 days before holding a hearing to establish the amount of the lien. Prior to a hearing, the parties may be restrained from dissipating the assets upon which the lien is sought to be imposed. See also *Steiger v. Armellino*, 315 N.J. Super. 176 (Ch. Div. 1998) (noting that the court has the power to hold funds in escrow while the fee arbitration is being conducted). If an award is rendered through fee arbitration, it can be entered as a judgment. That judgment can also be converted to an attorney lien without the necessity of a plenary hearing in the family part.

Musikoff v. Jay Parrino's The Mint, L.L.C., 172 N.J. 133, 139 (2002). The entry of a lien in the underlying action should allow the lien holder a superior position over unsecured judgment creditors. *Morone v. Thuring*, 334 N.J. Super. 465, 466 (Law Div. 2000).

An attorney lien may be asserted in the underlying action when fees are outstanding and an attorney is withdrawing or being relieved from a case before the entry of a judgment. Notice of the intent to file an attorney lien should be given at the same time a substitution of attorney is filed. Thus, it is appropriate to include the following language (or similar language) in the substitution of attorney:

_____, Esq. is asserting his attorney lien pursuant to N.J.S.A. 2A:13-5 and *Martin v. Martin*, 335 N.J. Super. 212 (App. Div. 2000), in the amount of \$_____, based on his retainer agreement and the bills rendered to _____.

A letter to the client, court and substituting counsel, containing similar language, would also suffice to place the client on notice of the attorney's intent to assert the lien. Subsequent to this notice, counsel should file the motion to impress the lien and enter a judgment for the amount of the fee. The court has the power to fix the amount of the lien before or after the conclusion of the case. See *Musikoff*, 172 N.J. at 136 (clarifying that the Attorney Lien Statute "does not require an attorney to file a petition to acknowledge and enforce an attorney's lien prior to settlement or judgment in the matter that has given rise to the lien itself"). However, the lien will only attach to assets that are equitably

distributed to a client at the conclusion of the matter.

An attorney lien cannot be asserted until an attorney's representation has concluded. Rule 5:3-5(b) specifically states that it does not "prohibit an attorney from taking a security interest in the property of a former client after the conclusion of the matter for which the attorney was retained, provided the requirements of R.P.C. 1.8(a) shall have been satisfied." R.P.C. 1.8 prohibits an attorney from acquiring a proprietary interest in the cause of action except that the attorney may "acquire a lien granted by law to secure the lawyer's fee or expenses." It is advisable to provide in the initial retainer agreement that representation will terminate upon the entry of a Judgment of Divorce to allow an immediate application for an attorney lien. If an attorney waits to file the application for the lien until the conclusion of the 45-day appeal period or until the conclusion of all post-judgment issues, the marital funds may have been distributed by that point in time and it may be difficult to obtain payment. It is also recommended that counsel not distribute assets prior to filing the attorney lien because it may be deemed a waiver of the attorney's rights.

Advantages of Attorney Liens

A major advantage in obtaining an attorney lien is that attorney liens and a judgment for fees takes priority over other competing liens of a client's creditors. With respect to bankruptcy proceedings, the Appellate Division has held that subsequent insolvency proceedings [do] not destroy any lien which the [attorney] had acquired prior thereto." *Visconti v. M.E.M. Machinery Corp.*, 7 N.J. Super. 271, 275 (App. Div. 1950). However, any services rendered after a receiver is appointed will not be protected by an attorney lien.

Rather than suing for fees in the Law Division and the inevitable jury trial (where lawyers are disfavored), the attorney lien allows for a plenary hearing before a family part judge, who may be familiar with the case or, at the very least, experienced in family law practice. Generally, an attorney lien proceeding will be quicker and less burdensome than a civil law suit. Also, it seems less likely that a litigant will file a counterclaim for malpractice in the family part.

Limitations of the Attorney Lien

The family law practitioner must be mindful of the attorney lien's limitations. The attorney lien only attaches to a judgment recovered through the attorney's efforts. Thus, if one's representation only involved nonfinancial issues, the attorney lien would not secure the fee. Likewise, the attorney lien does not secure fees for post-judgment representation. See *Panarello v. Panarello*, 245 N.J. Super. 318 (Ch. Div. 1990). Pursuant to *Cole v. Cole*, 30 N.J. Super. 433 (Ch. Div. 1954), an attorney may not assert an attorney lien against the client if the parties reconcile.

When a client has been represented by several law firms, each firm stands on equal footing and any funds will be distributed pro rata. For example, "if one attorney's bill represents twenty-five percent of all the attorney fees properly due, owing and unpaid, then that attorney is entitled to a charging lien on twenty-five percent of the viable assets in the judgment awarded the client."

In today's troubled economic times, an attorney lien is an extremely useful mechanism to put in a family law practitioner's "tool box" to obtain payment for past due services. As more lawyers become familiar with the attorney lien, it will be demystified and common practice. ■