SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of a Petition to Compel Payment of Legal Fees for Services Rendered in Connection with the Estate of

SYLVAN LAWRENCE,

Deceased.

----------x File No. 1982-175

RICHARD S. LAWRENCE and JAY L. WALLBERG, as Executors of the Estate of Alice Lawrence, Deceased,

Plaintiffs,

- against -

GRAUBARD MILLER, C. DANIEL CHILL, ELAINE M. REICH, and STEVEN MALLIS,

Defendants.

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ANDERSON, S.

The multi-million-dollar estate of Sylvan Lawrence was the subject of continuous and heated litigation in this court for decades, with decedent's beneficiary widow and executor brother as the chief antagonists. The litigation, involving a multitude of proceedings and a barrage of motions, was eventually settled (in mid-2005), but only after the brother himself had died. However, on the heels of the settlement, a related contest erupted in two trial courts in New York County (a Surrogate's Court proceeding and a Supreme Court action, the latter ultimately transferred to this court). In both the proceeding and the action, the principal combatants were the widow and her three children (collectively, the "Lawrence Family"), on one side, and, on the other, the law firm (and three of its partners) that had advocated for her interests in the estate litigation.

Presently before the court are motions and cross-motions to confirm, modify, or reject a

Special Referee's post-hearing report on the merits filed by the several parties to that spin-off litigation -- including the executors of the widow's estate (she too having escaped the fray only in death).

Procedural Background

In the proceeding commenced in this court shortly after settlement of the Sylvan Lawrence litigation, the law firm sought payment from the Sylvan Lawrence estate for the firm's services to the widow during her legal battles with the executor (SCPA 2110). In the alternative, the firm sought to enforce its right to legal fees from the widow under their revised retainer agreement (the "Revised Retainer"). According to the petition, the Revised Retainer entitled the firm to 40 percent of the sum (approximately $110.3 million) received by the widow in the settlement with her brother-in-law (which was reached only a few months after she had executed the Revised Retainer). The law firm also sought damages against one of the Lawrence children individually[1] on the ground that he had tortiously interfered with his mother's performance of her obligations under the Revised Retainer. The firm's amended petition identified the two other Lawrence children (who were residuary beneficiaries of their father's estate, along with their mother and brother) as persons interested in the outcome; the two were formally joined in the proceeding in mid-2006, pursuant to an uncontested motion by the firm.

Shortly after the firm commenced its proceeding, the widow filed a complaint in Supreme Court (New York County) against the firm and three of its partners; as noted above, that action was eventually transferred to this court. Among other things, the widow sought rescission of the

[1]The child in question is Richard Lawrence, who succeeded his uncle Seymour Cohn as executor of the estate of Sylvan Lawrence.

Revised Retainer, restitution of some $18 million in fees that she had paid to the firm under their original retainer agreement, as well as return of a total of $5.05 million in gifts that she had made to the three individual partners in 1998.

By a series of orders issued in 2006, this court referred all aspects of the proceeding and action to the Hon. Howard A. Levine as Special Referee. Numerous pre-trial motions ensued, including motions to dismiss (CPLR 3211) and for summary judgment (CPLR 3212). By the time motion practice was concluded, the only claim remaining in the firm's proceeding was the fee issue between the firm and the widow's estate, the firm having discontinued its claim for payment of fees from the Sylvan Lawrence estate and the court having dismissed the firm's cause of action against the son for tortious interference.

The remaining fee dispute in the proceeding and the issues raised in the widow's action were then tried by the Special Referee at an evidentiary hearing that began on October 5, 2009, and continued for another 14 sessions.

In the report of his findings of fact and conclusions of law based upon that hearing (the "Report"), Judge Levine made the following recommendations to this court:

> 1) the widow's claims concerning the gifts (and taxes thereon) should be dismissed with prejudice, the lawyer defendants having borne their very heavy burden of establishing that (a) the client's gifts to them were not voidable products of undue influence and (b) any violation of the partners' duties to their clients did not warrant forfeiture of the gifts;
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> 2) the widow's claim for restitution of the $18 million in fees that she had paid under the original retainer agreement should be dismissed with

prejudice, the firm having not committed the type of wrong-doing against the the widow that would constitute a basis for disgorgement of the fees that she had already paid;

3) the firm's claim for compensation under the Revised Retainer should be granted only to the extent of ordering the executors of the widow's estate to pay the firm $15,837,374.02 (as opposed to the $44 million or so claimed by the firm under the Revised Retainer); and

4) the widow's claims for relief in connection with the firm's fees under the Revised Retainer should be dismissed with prejudice.[2]

The Lawrence Children's Motion to Intervene

Before addressing the substantive merits of the Report, the court must pause to consider the Special Referee's disposition of the Lawrence children's motion to intervene, an application made on the cusp of the evidentiary hearing. The motion appears to have been prompted by a pre-hearing letter from the firm to the Special Referee to the effect that there was no basis for the children to continue to participate as litigants now that the firm's request for relief under SPCA 2110 and its tort claim against the son were no longer in issue.

As is disclosed by a review of the filings in this litigation, the intervention issue here is burdened by certain procedural anomalies that have inspired somewhat curious legal arguments from the parties. As noted above, all three of the Lawrence children had been joined in the firm's proceeding. It appears, however, that none of them was ever formally made a party to the

widow's action. Nevertheless, it further appears that during the years of pre-trial litigation (before the Special Referee, the Surrogate's Court, and the Appellate Division) all of the Lawrence children were treated as parties and no distinction was made between their relationship to the firm's proceeding, on the one hand, and to the widow's action, on the other hand.

The firm's theory for eventually opposing the Lawrence children's continued participation was simple enough: the children (although residuary beneficiaries of the widow's estate) had no interest in the litigation now that relief was no longer being sought against the Sylvan Lawrence estate or the Lawrence son individually. But such argument (as applied to the fee issue and, for that matter, the gift issue raised in the action) was hardly consistent with the rationale that the firm itself had advocated in its 2006 motion for the daughters' joinder in the firm's proceeding, *i.e.*, that residuary beneficiaries as a practical matter have a material interest in issues that threaten to reduce the size of the residuary by millions of dollars.

The position assumed by the Lawrence children themselves in relation to the intervention question is equally awkward. At no point since 2006 has either of the two daughters filed so much as a proposed (much less ripe) pleading in either the proceeding or the action. Nor has the son for his part filed even so little as a proposed amended pleading in the proceeding or a proposed answer in the widow's action.

As is pointed out on behalf of the Lawrence children, a failure to annex a proposed pleading to a motion to intervene (under CPLR 1014) is not necessarily fatal to the motion (*Ryder v Travelers Ins. Co.*, 37 AD2d 797 [4th Dept. 1971]). Moreover, as noted above, the parties here had stipulated to dispensing with formal intervention motions. However, but for the suggestion of the children's counsel to the contrary, it would seem clear that would-be

intervenors must ultimately submit a proposed pleading (*Sterling Natl. Bank and Trust Co.*, 86 AD2d 547 [1st Dept 1982; *Ryder v Travelers Ins. Co., supra*) identifying, for the other parties and for the court, the intervenors' position on the issues raised by the petition or complaint. If there was some circumstance that prevented the filing of such pleadings by this juncture, it remains unidentified.

In view of the foregoing, the intervention granted by the Special Referee might appear problematic, but for the combined force of three considerations. First, the right to object to a flaw in a pleading (and at least arguably, by extension, to the absence of any pleading at all) may be waived by the adversary (*see Nardi v Hirsh*, 250 AD2d 361 [1st Dept 1998]) or may be retroactively cured even after judgment is rendered or a decree issued (*see Gonfiantini v Zino,* 184 AD2d 268 [1st Dept 1992]). Second, a procedural default may in some contexts be excused if the adversary will suffer no prejudice as a result (*id.*, at 369). There is surely a basis for applying such principles to this case, given the fact that (a) the position of the Lawrence children has been clear for years and (b) that position is largely derivative of the widow's claims and technically does not amount in any event to a "claim for relief" directed to the Lawrence children themselves. Thus, the firm and the individual defendants cannot plausibly argue that intervention has placed them at an unfair disadvantage by a previously undisclosed exposure to broadened liability or that the litigation has been unduly burdened by the children's participation. Third, it must be noted that, although the children do not qualify as intervenors under the strict requirements of CPLR 1012, their practical stake in the issues here makes them appropriate

intervenors under CPLR 1013.[3]

Accordingly, the Special Referee's grant of the Lawrence children's motion to intervene is confirmed.

The Report's Recommendations

Before the merits of the Special Referee's recommendations are addressed, the applicable standards should be acknowledged. First, the court's function on motions such as these "is similar to that of an appellate court in reviewing the trial court's determination" (*Wynard v Beiny*, 2003 WL 21729779 (Sur Ct New York County 2003). Thus, the court may adopt or reject the Referee's recommendations, in whole or in part. Where the findings below depend upon credibility, the court must give the Referee's findings "great weight" (*Poster v Poster*, 4 AD3d 145 (1st Dept 2003), since he presided at the trial and was thus in the best position to assess credibility (*see Roberts v Fulmer*, 301 NY 277, 284; *cf. Amend v Hurley*, 293 NY 587, 594). Nevertheless, it is still open to the court to make new findings (CPLR 4403) to the extent, if any, that the findings below are unsupported by the record or against the weight of the evidence (*see Visco v Marion,* 268 AD2d 303).

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[3]Unlike the provisions of section 1012, which in essence allow intervention only to persons whose relationship to the issues make them necessary parties, the terms of section 1013 permit intervention "when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact." The statute further provides that, '[i]n exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." As the discussion in text indicates, the firm cannot plausibly point to such delay or prejudice.

Recommendation 1: That the Widow's Requests for Relief with Respect to the Three Gifts and Taxes Thereon Should be Denied

In connection with the challenged gifts, the Special Referee has provided the court with a careful and exhaustive analysis of the relevant principles and precedents. Among those principles is the well established rule that, when a gift is challenged, the donee "bears the burden of proving by clear and convincing evidence that the gift was voluntary and understandingly made by the donor, uninfluenced by fraud, duress or coercion" *(Matter of Clines*, 226 AD2d 269, 278 [1st Dept 1996]). Moreover, where the donee is a lawyer and the donor is his client, "the law ... wisely ... adjust[s] the quality and measure of proof to the circumstances, to protect the weaker party and, as far as may be, to make it certain that trust and confidence have not been perverted or abused...." (*Matter of Smith*, 95 NY 516, 523 [1884]). Thus, as the Referee recognized, a client's inter vivos gift to her lawyer – given the confidential relation between the two – is "'presumptively void, subject to proof by the lawyer, usually through disinterested persons, that the transaction was fair and fully intended by the client'" (Report at pp. 16-17, quoting *Radin v Opperman*, 64 AD2d 820 [4th Dept 1978]. While the presumption is rebuttable and there is no per se rule against such transfer (*see Lawrence v Miller*, 48 AD3d 1, 8), the lawyer who would retain the client's gift once it is challenged faces the daunting task of "show[ing] by ... strong, convincing and satisfactory proof ... that the conveyance to him ... was entirely honest, legitimate and free from taint." *Matter of Howland*, 9 AD2d 197, 200 [3d Dep't 1959]. In other words, as our Court of Appeals observed long ago, and that the Referee himself echoed,

> "it is certain that the law regards a [client's "gift" to a lawyer] ... with great suspicion; that, where persons standing in a confidential relation ... receive

> benefits from ...the persons for whom they are counsel ... the transaction is scrutinized with the [most] extreme ... vigilance, and regarded with the utmost utmost jealousy. The clearest evidence is required, that there was no fraud, influence, or mistake; that the transaction was perfectly understood by the weaker party .... The presumption is against the propriety of the transaction, and the onus of establishing the gift or bargain to have been fair, voluntary and well understood, rests upon the party claiming ...." (*Nesbit v Lockman*, 34 NY 167, 169 [1866]).

On the one hand, the lawyers in this case were able to muster proof of certain circumstances that might have pointed to the fairness of the gifts in question had there been no lawyer-client relationship and thus no added evidentiary burden on the donees: the donor here was a sophisticated and intelligent individual of extraordinary wealth,[4] who was no stranger to making large gifts and who (as her accountant's testimony confirms) knew how to reach out for independent professional advice. However, while these aspects of the situation satisfied the Special Referee that the contested gifts had been freely made and were not the products of a lawyer's unfair advantage over his client,[5] the court is nevertheless constrained to find

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[4]In a post-Madoff world, it must be recognized that an individual of such description is not unquestionably beyond victimization.

[5]Interestingly, however, the Special Referee had in one sense given the Lawrence Family an unearned benefit of a doubt in this connection, taking at face value the Family's contention that the firm had ethically mis-stepped by representing all of them jointly on the "fractional share" issue in the Sylvan Lawrence estate (see *Matter of Lawrence*, NYLJ, November 2, 1998, at 30, col 4) (the "1998 decision"). This is not to ignore that, in theory, the fractional-share, marital-deduction formula under the will gave the widow and children "zero-sum" interests in the residue and therefore implied a potential conflict between her, on the one side, and them on the other. But even apart from the practical convergence of the children's interests with their mother's (they having been the presumptive objects of her bounty under her will), there was no conflict on the one aspect of the issue that was litigated against the Sylvan Lawrence executor. As a reading of the 1998 decision confirms, that aspect – how distributions were to be valued – arose when it could not be known whether the competing methods (the "shifting fraction" methodology versus the "fixed fraction" methodology") would ultimately advantage the widow or, instead, her children. All that was then knowable in such regard was that the fixed fraction

otherwise, *i.e.*, that defendants did not satisfy their burden "to show by the strong, convincing and satisfactory proof required by the authorities .... that the conveyance to [them] was entirely honest, legitimate and free from taint" (*Matter of Howland*, 9 AD2d 197, 200 [3d Dept 1959]).

Several factors prevent the conclusion that the gifts in this case have been proved freely given by the donor. For one thing, however wilful or assertive the client might have been in other contexts or at other times, in relation to her lawyers at this particular time it is far from clear that the octogenarian, who at that point had been dependent upon defendants to champion her interests in a highly contentious litigation for 16 years, was acting in accordance with her own volition, as opposed to theirs. This at the very least is established by the note from Mrs. Lawrence with respect to her $400,000 "gift" to the law firm (contemporaneous with the gifts to the individual lawyers), which smaller gift obviously had gone against the grain of the donor's feelings and judgment (["I'm not sure just what I should be thanking the firm for (keeping me on as a client?]. You write my thank yous."). In light of that purported "gift" to the firm, it would take an unwarranted leap of faith to conclude that the multi-million-dollar checks written at about the same time to the lawyers had not likewise been extracted from her by some degree of pressure, whether express or tacit, patent or subtle, from at least one of the three donees.

Further light on the subject is scant if only because there were no neutral witnesses to the private discussions that Mrs. Lawrence had with the one lawyer donee with whom she spoke

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methodology proposed by the firm would achieve a cost-containment advantageous to the children (since, under the will's terms, their share of the residue alone would bear such cost). So much for the children's notion that the firm was favoring their mother in this respect. In any event, the Special Referee rightly concluded that any arguable breach of the firm's duty to the children by favoring the mother would not have been the basis for remedies to her.

beforehand about the gifts. Nevertheless, the record contains at least one additional piece of evidence that the gifts were not the products of the donor's unfettered choice. Such evidence came in the form of testimony at the hearing by Barbara Kling, one of Mrs. Lawrence's close friends, who recalled having seen the checks during a visit with Mrs. Lawrence at the latter's home and having been told by Mrs. Lawrence that, "she didn't think that these checks were the right thing to do, but she did write them." The Special Referee did not make a finding to the effect that the witness's veracity or accuracy of recall were to be doubted. Accordingly, we are left with a contemporaneous statement from the donor herself, strongly suggesting that as to these multi-million-dollar transfers she would not be acting as an entirely free agent. Indeed, the fact that Mrs. Lawrence's "thank you" notes were items that, in the words of one of the lawyers at trial, "we got Alice to write" is at least some further suggestion that the lawyers themselves – and not the client alone – had a hand in the making of these gifts.

This is not to ignore two aspects of the "gift" transactions that figured significantly in the Special Referee's conclusion that they had been untainted. One was that, in the Referee's estimate, the mammoth amounts of the checks were merely natural expressions of Mrs. Lawrence's generosity in light of her gargantuan means (which at the time was some $220 million). To be sure, according to expert testimony, in the history of lawyer-client relations the gifts at issue were perhaps singularly large. However, although the Special Referee conceded that these gifts might have been unprecedented in such sense, he was of the view that they were not unprecedented for Mrs. Lawrence herself. Such estimate is, however, somewhat dubious. The better comparison, it would seem, is between the magnitude of these lifetime gifts, on the one hand, and the size of the few other major lifetime gifts that Mrs. Lawrence was shown to

have made, each also occurring at points when her wealth would have allowed her to part with millions of dollars without sacrifice. Thus, to Ms. Kling, Mrs.'s Lawrence's "close friend and business partner," she had given a painting "worth as much as $1 million" (Report, at p. 24) and to her handyman she had made a loan of "over $600,000," with virtually no likelihood of his repayment" (*id.*); and (some eight years after the challenged gifts) to a medical doctor who had agreed to remain as director of a hospital facility that had been named for Mrs. Lawrence she had given $1.4 million. That there is some disparity between these other gifts and the challenged ones (*i.e.*, simultaneous gifts of $2 million to one lawyer; $1.55 million to another; and $1.5 million to a third, not to mention the $400,000 to the firm of which each was a member) appears clearer in light of the fact that by the time they received such gifts the lawyers had already collected millions of dollars from Mrs. Lawrence in more than handsome legal fees.

The second aspect of the gift issue that loomed large in the Special Referee's assessment was that Mrs. Lawrence had not challenged the gifts until after seven years had elapsed and after she herself had been put in a defensive posture in a proceeding regarding the lawyers' fees. In the opinion of the Special Referee, Mrs. Lawrence's failure to act to set aside the gifts earlier was per se a suspicious circumstance that cast strong doubt on the bona fides of her claims. Such analysis, however, favored the lawyers with an inference (*i.e.*, that Mrs. Lawrence's challenge to the gifts was not authentic) that was not necessarily warranted under the circumstances. After all, the courts have recognized that, so long as a client is depending upon a lawyer for representation in an on-going matter, the client as a practical reality may well feel obliged to forbear from assuming an adversarial posture against the lawyer (*cf. Shumsky v Eisenstein*, 96 NY2d 164, 167-68). Thus, this court does not agree that the passage of years from the time of

the gifts to the time Mrs. Lawrence contested them is itself evidence that undermines her estate's undue-influence claim.

In the final analysis, however, there is more to militate against the gifts than their sheer magnitude, or the donor's then long-term dependency upon the donees' advice, or her clear ambivalence in relation to the gifts. There is here a combination of dubious circumstances that emit an odor of overreaching too potent to be ignored. Thus, there is the sustained secrecy that defendants uniformly maintained with respect to these gifts, defendants having kept the very fact of the gifts not only from the Lawrence children, but also, from defendants' own law partners and, in the case of one of the defendants, even from her own spouse. Moreover, as what may be deemed to be but an added element of such secrecy, defendants chose not to divulge to the client what they themselves clearly knew: that the gifts' cost to her would be more than half again as great as the multi-million-dollar amounts on the face of the checks. Despite their confidential relation to the client, defendants held their peace in such respect even though they had reason to expect that mention of a gift tax of such magnitude before the checks were written might have been enough to extinguish or curb the client's donative urge.

This is not to overlook the evidence on which the Special Referee relied when he found that Mrs. Lawrence as a donor was "aware[]" (Report, at p. 37) in this regard, having more than once been called on to pay gift taxes in the past. But the record does not support the Referee's conclusion that Mrs. Lawrence was sufficiently "knowing" in relation to these particular gifts. In other words, there is no basis for finding that a word of advance warning from defendants would have had no effect on Mrs. Lawrence's willingness to make the gifts at all or at least to make the gifts in such munificent amounts. Indeed, there is evidence that suggests the contrary. Such

evidence comes in the form of testimony concerning Mrs. Lawrence's distress when she learned from her tax accountant – but only after the gifts had become a fait accomplis – the extent of the tax cost to her as donor.

Nor is this to take issue with the Special Referee's observation that there appears to be no authority for a per se rule requiring an attorney/proposed donee to advise a client donor as to the tax implications of the contemplated gift. But the absence of a per se rule would not prevent the court from concluding, as the Referee also recognized, that a good-faith donee in a case such as this, given the magnitude of the gifts in issue, might be expected to volunteer such advice. Nor would the absence of a per se rule prevent the court from regarding defendants' non-disclosure as of a piece with their other subterranean conduct in relation to these gifts. In other words, the absence of such a rule would not bar the court from concluding that, in view of such overall conduct, defendants played their cards too close to the vest to satisfy the standard of strict forthrightness to which lawyers have long been held in relation to their clients (*see, e.g., Matter of Putnam*, 257 NY 140 [1931]; *Matter of Smith, 95* NY 516 [1884]; *cf. Matter of Weinstock*, 40 NY2d 1 [1976]). Moreover, for purposes of gauging defendants' bona fides, it is somewhat telling that, when defendants purported to disclose the facts at trial as witnesses, the Special Referee himself found several aspects of their testimony not credit-worthy.

In the end, defendants' basic problem is that "[t]he law is not so impracticable as to refuse to take notice of the influence of greed and selfishness upon human conduct ...." (*Matter of Smith*, 95 NY 516, 522 [1884]). Simply put, a lawyer's covert enjoyment of a benefit derived from a client, thereafter explained by the lawyer in sworn testimony that is not wholly to be credited, are not the attributes of a stainless gift nor the ingredients of a successful defense of it.

For the foregoing reasons, it is concluded that the challenged gifts must be set aside and the funds returned to Mrs. Lawrence's estate.

Some additional observations in this connection are warranted to the extent that plaintiffs' submissions (including the complaint, proofs submitted at trial, and motion papers now before the court) refer to the gift taxes paid by Mrs. Lawrence in 1999 as the subject of possible relief. First, plaintiffs have supplied no basis for the proposition that, as their motion papers put it, defendants should "repay" the estate the sum of $2.7 million for "gift tax benefits." Simply put, defendants did not "benefit" from such taxes, which Mrs. Lawrence paid to the U.S. Treasury rather than to defendants. This is not to ignore the shadow of a suggestion in plaintiffs' case that (a) the 1998 checks were "bonuses" that were taxable income to defendants and (b) the gift tax payment by Mrs. Lawrence in effect was thus a proxy for the income taxes that defendants should instead have paid the Treasury on account of the checks. But there is nothing in the record from which to find that the checks were not what the Special Referee clearly found them to be – *i.e.*, gratuitous transfers – as among Mrs. Lawrence and the three lawyers or, for that matter, as between them and the IRS. So much for the theory of disgorgement that might follow if defendants had been unjustly enriched in relation to the gift taxes. Second, even if the complaint had given fair notice of a claim that the gift tax paid by Mrs. Lawrence was an appropriate element of recoverable damages – which the complaint in fact did not -- there is nothing in plaintiffs' submissions, in any other part of the record, or in the precedents cited by plaintiffs to inform and support such a claim. In sum, the gift tax is not a factor in the recovery in this case.

Finally, the court shares Judge Levine's view (*see* note 12 of the Report) that the

legislature would do well to establish a black-letter rule, similar in spirit to the rule supplied by SCPA 2307-a,[6] that would better protect against the current gap between the common law and the more stringent Disciplinary Rules in relation to substantial gift-giving by clients to their lawyers who are not of a familial relation to them. To that end, a copy of this decision is being sent to the Judiciary Committee of each house of the State legislature.

Recommendation #2: That the widow's claim for restitution of fees paid under the original retainer agreement should be denied.

For the reasons stated in the Report, this recommendation is confirmed.

Recommendation # 3: That the firm's claim to some $44 million for fees from the widow's estate under the Revised Retainer should be granted only to the extent of allowing the reduced amount of some $15.84 million

Recommendation #4: That the widow's request to be relieved of any obligation to pay a fee under the Revised Retainer, and for related relief, should be denied.

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[6]That section limits the commissions of an attorney-executor where the latter drafted the will in which he or she is appointed unless he or she disclosed in writing to the testator specified aspects of the conflict inherent in such an appointment.

These two Recommendations are perhaps best evaluated in the light of the alternative remedies proposed by the parties. According to the firm, the remedy due it is simply a function of contract law, the widow (having breached a purported obligation to pay its fee) being answerable in damages. By contrast, according to the other side, the Revised Retainer does not constitute a contract to speak of, having been procedurally and substantively unconscionable at its inception as well as in retrospect. In that light, the widow's fiduciaries argue, (1) the firm should be deemed to have forfeited any right to compensation from the widow, or (2) the firm's compensation should be limited to the time charges allowable under the original retainer, or (3) the firm should be awarded only in quantum meruit, as is appropriate where one person has given value to another pursuant to a contract that for some reason ultimately fails.

By contrast, the Special Referee fashioned what is in effect a middle-ground remedy, although it certainly has more to commend it than that. Having determined that the Revised Retainer had not been unconscionable at its inception, the Special Referee recognized that the parties had indeed entered into a valid contract. However, he further determined that, if enforced to the letter of every one of its terms, the contract would in retrospect be unconscionable (*see Gair v Peck*, 6 NY2d 97, 107; *Matter of Lawrence*, 11 NY3d 588, 595) – *i.e.,* in this case, it would serve as a lawyer's license to overreach.

It is therefore understandable that the Special Referee rejected quantum meruit as the basis for compensation to the firm, since such relief in quasi contract applies where no viable contract has ever been created. It was likewise understandable that he would reject the Lawrence Family's suggestion that the original retainer -- from which the lawyers and clients had agreed to

depart -- serve as a default provision for compensation. Instead, the Special Referee recommended a remedy that, while preserving a pivotal term of the Revised Retainer that was not itself unconscionable – the contingency nature of the fee – would rework the contingency formula to arrive at a result fairly reflecting various relevant factors (principally risk, proportionality, and the parties' intent). Thus, the size of the award that he recommended gives the firm appropriate credit for services rendered and results achieved under a contract that the record discloses was duly entered into. At the same time, the award also gives the Lawrence Family its own due, *i.e.*, a very substantial reduction of the contractually prescribed fee in view of circumstances pointing to the conclusion that "technical contractual rights must yield" to the lawyer's duty as an officer of the court (*Matter of Friedman*, 136 AD 750 [2d Dept 1910]).[7]

For these reasons, and the reasons stated in the Report, these two recommendations are confirmed.

The report also lists as a final recommendation that "the Lawrence Children's claims that [the firm's] ethical violations require forfeiture of all fees and expenses [the widow] paid [the firm] after making the [disputed] gifts ... should be dismissed with prejudice" (Referee's Report dated September 16, 2010, in *Matter of Lawrence* and *Lawrence v Graubard*, 1982-0175, at 105. As indicated above, [8] however, there is nothing in the record to suggest that any of the three Lawrence children filed any pleadings raising any such "claim." Accordingly, in the absence of a

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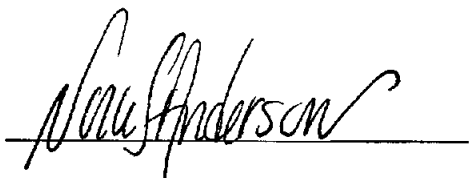
[7]It may be noted that the sliding-scale formula recommended by Judge Levine is akin to mechanisms adopted by the legislature when it has aimed to avoid either a windfall or a shortfall in compensating providers of services under contingency or quasi contingency arrangements (*see, e.g.*, SCPA 2307 [commissions of fiduciaries other than trustees); Judiciary Law 474-a [contingent fees for attorneys in medical, dental or podiatric malpractice cases]).

[8]*See* pp. 5-6, *supra.*

claim to be granted or denied, this portion of the referee's report is not treated as a recommendation to speak of in terms of confirmation or rejection. Moreover, even if the technicalities could be overlooked, the Referee's recommendation in this connection is supported by his reasoning, precedent, and the factual record, and the Report would therefore be confirmed by the court.

Finally, the court wishes to express its deep gratitude to Judge Levine for the quality and extent of the effort that he has devoted to these matters. Thanks to Judge Levine's incomparable experience and skill, the heat generated by high-stake issues and discordant counsel was converted to a useful light that informs every page of the record. Although disagreeing with that Report in one of its aspects, the court nonetheless appreciates the lucidity, care, and intelligence that characterize every aspect.

Settle Decree and Judgment.



SURROGATE

Dated: September 8, 2011