To Be Argued By:
Michael A. Carvin
Time Requested: 30 Minutes

APL-2013-00264

New York County Surrogate's Clerk File No. 175/82

Court of Appeals

STATE OF NEW YORK

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

SYLVAN LAWRENCE,

Deceased.

RICHARD S. LAWRENCE and PETER A. VLACHOS, as Executors
of the Estate of Alice Lawrence, Deceased,

Respondents-Plaintiffs-Respondents,

against

GRAUBARD MILLER,

Petitioner-Defendant-Appellant,

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

Defendants-Appellants,

and

RICHARD S. LAWRENCE, SUZANNE LAWRENCE DECHAMPLAIN
and MARTA JO LAWRENCE,

Intervenors-Respondents.

BRIEF FOR DEFENDANTS-APPELLANTS C. DANIEL CHILL, ELAINE M. REICH, AND STEVEN MALLIS

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QUESTIONS PRESENTED

I. The "continuous representation" doctrine tolls the statute of limitations on a client's claim arising from a professional's error or malfeasance in providing professional services for the period during which the professional continues to represent the client in the same matter. The first question presented is whether the Appellate Division erred by applying that doctrine to toll the six-year statute of limitations on a client's claim seeking the return of unsolicited, one-time gifts she made to her attorneys, with respect to which the attorneys never represented her.

II. Under this Court's decisions, an *inter vivos* gift from a client to an attorney is valid if given knowingly and without undue influence. The Honorable Howard A. Levine was appointed below as a Referee to hear and report. After a long trial, he found that the unsolicited gifts Appellants received were given knowingly and voluntarily, free of undue influence. The second question presented is whether the Appellate Division erred by holding Judge Levine's determination "preclude[d]" as a matter of law by three factors it held dispositive: (i) Appellants' failure to urge the client to seek independent counsel regarding the gifts, which no rule of law or ethics requires; (ii) the gifts' size, although they were minor relative to the client's net worth and consistent with gifts she gave others; and (iii) Appellants' adherence to the client's instruction not to tell their law partners or her children about the gifts, although they discussed them openly with her financial advisor; and further,

whether the court erred by doing so on a record that conclusively established the gifts' validity and was legally insufficient to support a contrary finding.

PRELIMINARY STATEMENT

The dispute between Appellants C. Daniel Chill, Elaine Reich, and Steven Mallis ("the Attorneys") and the Estate of Alice Lawrence ("the Estate") concerns three unsolicited gifts that Alice Lawrence ("Alice") gave the Attorneys in 1998 following a monumental, $124 million victory by the Attorneys in litigation they had been pursuing on Alice's behalf for fifteen years. Accompanying the gifts were Alice's handwritten, heartfelt notes expressing deep appreciation to and affection for the Attorneys. After discussions with her accountant/financial advisor, Alice filed a gift tax return and paid taxes on the gifts. Seven years later, an unrelated fee dispute erupted between Alice and the Attorneys' law firm, Graubard Miller. After Graubard sued her for fees, Alice filed a retaliatory suit alleging, for the first time, that the gifts were invalid and seeking their return. After a lengthy hearing, the court-appointed Referee, the Honorable Howard A. Levine—a former trial and appellate judge (including on this Court), as well as a former prosecutor—characterized that claim as merely a defensive litigation tactic.

I. Alice's claim was plainly barred by the statute of limitations. There is no dispute that the applicable limitations period was six years, and that Alice did not sue for the gifts' return until nearly *seven* years after giving them.

The court below nonetheless held that the "continuous representation" doctrine tolled the statute of limitations. That was a fundamental error of law. As this Court repeatedly has held, continuous representation tolling applies to claims challenging the *provision of professional services*, and extends only for so long as the professional continues to represent the client in the *same matter that gave rise to the claim*. The quintessential example is malpractice. Lacking expertise, clients cannot be expected to second-guess the way that professionals render professional services, particularly while representation in that matter is ongoing. Moreover, awaiting the end of the challenged representation allows the professional the chance to remedy any errors, thereby avoiding the need for a lawsuit. This Court has held that, absent such rationales, the tolling doctrine should not be applied.

Neither the doctrine of continuous representation nor its rationale has any application where, as here, the client's claim is not based on the professional's *representation of the client*, but instead arises from a separate and distinct financial transaction *between* professional and client. In a gift transaction, as in the payment of a fee, the professional is not *representing* the client *at all*, much less doing so *continuously*. Hence, the client is not called upon to assess the manner in which expert professional services are being performed. Nor would deferring suit allow the professional the opportunity to take corrective measures in the course of rendering ongoing services in the matter.

It is therefore not surprising that *no case*—before this one—has applied the continuous representation doctrine to a fee or gift dispute, or to any dispute that did not concern the manner in which professional services were performed. Other states similarly have rejected application of continuous representation tolling to financial disputes between professionals and client. Affirming the court below not only would contravene well-settled law, it would expose professionals in New York to liability for routine financial transactions (such as billing) for the duration of the general professional-client relationship, thereby undermining the important public policies that statutes of limitations are designed to protect. This case, in fact, is a perfect example: By refusing to apply the statute of limitations, the Attorneys were forced to defend a transaction that was (by the time of trial) over *ten years* old, and do so without the testimony of Alice Lawrence—who died after resisting a years-long effort to depose her. The decision below should be reversed, and the Estate's claim for return of the gifts should be dismissed as time-barred.

II. After presiding over 15 days of hearings, listening to the testimony of 22 witnesses, reviewing hundreds of exhibits, and analyzing extensive post-trial submissions, Judge Levine issued a 105-page Report in which he concluded that the Attorneys had satisfied their burden of proving that the gifts (of $2 million, $1.55 million and $1.5 million, respectively to Chill, Reich, and Mallis) were fully understood and not induced by undue influence. (I:A100a, 124a)

Judge Levine's conclusion was fully supported by the evidence. Each gift was accompanied by a contemporaneous, handwritten note from Alice expressing "deep appreciation" to the Attorneys. (I:A124a) Extensive evidence depicted Alice as "not at all a person susceptible to undue influence" (I:A108a), but rather—even according to her children and closest confidants—"intelligent," "strong-willed" and "tough" (I:A109a). Alice was immensely wealthy, financially sophisticated, and "extraordinarily demanding" as a client (I:A125a) to the point of being abusive to the Attorneys, whom she frequently threatened to fire (I:A127a). Yet, Alice could also be extremely generous, as demonstrated by seven-figure gifts she made to other non-family-members, including her physician. (I:A125a) Based on these undisputed facts—as well as Alice's telling failure to express regret to *anyone* about the gifts until the Attorneys' firm sued her for fees seven years later (I:A126a)—Judge Levine correctly determined that the gifts were made knowingly and without undue influence. That was, indeed, the only legally permissible or rational conclusion that could be drawn from the evidence.

Without questioning any of Judge Levine's factual findings, the Appellate Division held that the conclusion he reached was "preclude[d]" as a matter of law by three factors: *First*, the Attorneys had not urged Alice to obtain independent counsel regarding the gifts. *Second*, the gifts were in "extraordinary amounts." *Third*, there was alleged "secrecy surrounding the gifts." That was legal error.

It is well-settled that a client gift is valid if made knowingly and without undue influence. Recommending independent counsel is obviously not a *sine qua non* of satisfying that common-law standard. No case (until this one) has held otherwise. Indeed, client gifts have been upheld numerous times notwithstanding the absence of such advice. Even professional ethics rules—which are *stricter* than the common law, not more permissive—do not mandate urging independent advice. Hence, under the decision below, lawyers would be fully authorized under the ethics rules to accept a voluntary gift without recommending independent advice, but nonetheless be liable for damages because, absent such a recommendation, they are deemed as a matter of law to have unduly influenced the client. That is contrary to the law of undue influence articulated by this Court, and is particularly unwarranted here, where undisputed facts show that Alice *did* obtain independent advice from her accountant/financial advisor within days of making the gifts and then reaffirmed her intent to make the gifts by directing him to report them on a gift tax return and paying the gift taxes.

As to the size of the gifts, they were minor in relation to Alice's vast fortune, each gift representing a fraction of 1% of her net worth—and that is surely the only relevant comparison, since the inquiry into the size of a gift is meant to detect whether there was undue influence *on the donor*. Moreover, Alice's gifts to the Attorneys were comparable to gifts she had given other non-family-members.

The third factor invoked by the Appellate Division as preclusive of a valid gift—"secrecy"—refers to the fact that the Attorneys, adhering to Alice's express direction, did not mention the gifts to their law partners or Alice's children. They did discuss the gifts openly, however, with Alice's financial advisor (who was also co-executor of her estate), thus dissolving any remotely rational or conceivable inference of undue influence. Particularly given these facts, holding "secrecy" to be preclusive of a valid gift is also plain legal error.

The Appellate Division's error is all the more obvious when one considers the undisputed evidence upon which Judge Levine determined that the gifts were made knowingly and without undue influence. The spontaneous, unsolicited nature of the gifts, Alice's heartfelt notes, her consultation with her financial advisor and payment of the gift taxes, her continued work with (and abuse of) the Attorneys for seven additional years, her lack of complaint about the gifts until the fee dispute, her history of substantial gift-giving to non-family members, and her famously domineering nature *compel* the conclusion that the gifts were valid. Given these *undisputed* facts, the three factors cited by the Appellate Division are legally *insufficient* to invalidate the gifts, and certainly cannot *mandate* such a result. The Appellate Division thus doubly erred—by holding that Judge Levine's determination of the gifts' validity was legally "preclude[d]," and by doing so on a record that cannot legally support a contrary finding of invalidity.

STATEMENT OF THE FACTS

A. For Fifteen Years, the Attorneys Faithfully Represent Alice, a Notoriously Difficult and Demanding Client, in a Battle over Her Deceased Husband's Estate.

The events that preceded the 1998 gifts to the Attorneys are not in dispute. (I:A100a) Alice's husband, Sylvan Lawrence, died in 1981, leaving an empire of commercial properties in New York City. (I:A88a) Sylvan's brother and business partner, Seymour Cohn, was named executor of Sylvan's estate. (*Id.*) Cohn controlled not only his own 50% interest in the partnership properties, but, as executor, Sylvan's 50% interest as well. (I:A101a) Alice wanted her "freedom" and not "to be subject to Mr. Cohn's whims." Cohn, however, "resisted selling the properties" and distributing the proceeds. (I:A101a; V:A77-78; VII:A1130-32)

As a result of this conflict, Alice brought suit in 1983 and "[c]onstant litigation followed … concerning virtually every aspect of the administration of the estate." (I:A88a) After hiring and firing two other law firms (VII:A1153-54, 1186-87), Alice retained Graubard in August 1983 to represent her in the proceedings. (X:A2726) At Graubard, Chill was Alice's primary contact, Reich worked on the case from the outset, and Mallis joined the team in 1989. (V:A76; VI:875) Because of Cohn's reluctance to sell the properties, Alice's attorneys brought numerous proceedings seeking to compel him to do so. (I:A101a; V:A81-84)

Alice was an intelligent, aggressive and domineering client. Based on undisputed evidence, the Referee found she was "intelligent, sophisticated, strong-willed, independent, tough, aggressive, [and] experienced in dealing with attorneys." (I:A153a) Alice's son described her as "intelligent," "very self-willed," and "famous for yelling" at "[a]nything and everything." (VII:A1221-22, 1252, 1267-68) She was so intimidating that her own children hesitated to call her for fear of being abused. (VII:A1198-99, 1267-68, 1528-29) Alice's confidant, co-executor, and accountant, Jay Wallberg, similarly described Alice as "tough," "strong-willed," and "not a pushover." (VIII:A1942) Alice had described herself in prior proceedings as a "force to be reckoned with" (VII:A1208); her "own person" who made her "own decisions" (VII:A1174); and one who "never" consulted with her attorneys or children about business decisions, but kept her own counsel. (VII:A115a) She tersely stated: "I trust nobody." (VII:A1103)

These stark qualities were patently evident in Alice's dealings with professionals. The Referee found that Alice "was tough, aggressive and abusive to … those whom she employed." (I:A125a) His Report cites undisputed evidence that:

> Alice retained and terminated the services of many professionals including architects, attorneys, physicians, and accountants. She was demanding, abusive and willing to fire them when she felt that they were not following her directions or otherwise displeased her. The record is replete with examples of her dominating, micromanaging, vituperative behavior. In addition to dismissing attorneys who

> represented her before she hired Graubard, she frequently got into arguments with and fired various architects, accountants, and other professionals that she had retained.

(I:A109a) The Referee's findings regarding Alice's domineering character and controlling behavior is supported by uncontradicted testimony and unimpeached documentary evidence. (*See, e.g.*, V:A582-83; VI:A639-41; VII:A1153-54, 1198-99; XV:A5728, 5729-30, 5734, 5735, 5981-82, 5986, 5987 (referring to an architect with whom Alice had recently concluded an arbitration, and asking that Chill "KILL Him PLEASE!!"), 6002-18)

Alice treated the Attorneys in the same domineering manner. The Referee recounted the following undisputed testimony regarding Alice's relationship with the Attorneys:

> She was tough and aggressive (Tr. 876). She insisted on being involved in all aspects of the litigation from major decisions to minor ones (Tr. 877). She reviewed drafts of briefs, motion papers and correspondence (Tr. 878-79). Frequently she would demand that the documents be tougher and she would threaten to fire Graubard (Tr. 586-90, 665-66).[1]

(I:A109a; *see also* XI:A3386, 3406-08, 3413, 3418-21, 3423-24, 3427, 3475-76, 3489-90, 3557, 3713-14, 3756)

The Referee found that when Alice disagreed with the Attorneys, "she ignored or overrode" their advice. (I:A154a) He found in this regard that Alice:

[1] Transcript excerpts referenced in the Referee's Report can be found at the same page numbers in the Joint Appendix preceded by the letter "A."

> was deeply involved with the strategy and the tactics of the litigation and she was an extraordinarily demanding client. She did not want anything of importance, and indeed many things of little importance, to be done without her knowledge and approval. She reviewed drafts of documents and forcefully voiced her opinion on matters large and small (Tr. 577-80, 584-89).

(I:A125a)

The Referee further found that Alice not only engaged in "micromanagement of the litigation," but was "abusive [in her] treatment of the Attorneys" as well. (I:A125a) She "frequently verbally abused the Attorneys and threatened to fire them if they dared to not carry out her commands." (I:A127a)

Despite Alice's demanding and abusive behavior, she also appreciated the Attorneys' tireless efforts on her behalf. In a note to Chill, she expressed gratitude to him for "being there for me—over and over—and for listening so patiently to all the ravings & rantings—mostly, for caring." (XV:A5926; emphasis in original) Another note stated: "Monumental job! My grateful thanks to you—Elaine and Steve—It's in the hands of God, now. You've done all that could be done—and much more." (XV:A5928; *see also* XV:A5922-25, 5927)

B. In 1998, the Attorneys Achieve a Life-Altering Victory for Alice, Forcing the Distribution of $124 Million to Alice and Her Children and "Liberating" Her from the Executor's Control.

It was not until 1998—fifteen years after litigation began—that Alice's legal team finally succeeded in forcing Cohn to sell the remaining properties and to distribute the proceeds. Alice's share was $84.3 million (VI:A671), delivered in

two checks deposited on November 16 and November 30, 1998, respectively. (XV:A6046-50) The Lawrence Children received another $40 million (VI:A671), totaling $124 million for Alice and her family.

The Referee found that "Alice fully understood the difficulty of the litigation with [Cohn] and the significance of this distribution." (I:A125a) Alice at last had achieved her hard-fought battle with her despised brother-in-law for her "freedom" and the power to "run my own life as I see fit" and "not to be subject to Mr. Cohn's whims." (VII:A1130-31) To mark the occasion, Alice framed copies of the two checks (XV:A6051-52)—even though she already had a net worth of "approximately $220 million" prior to receiving her $84.3 million share of the $124 million November 1998 distribution. (I:A126a)

C. Alice Celebrates Her Victory by Expressing Her Appreciation to the Attorneys with Gifts Amounting to a Small Fraction of the Sums They Had Won on Her Behalf.

It is undisputed that in the aftermath of her victory, on November 25, 1998, the day prior to Thanksgiving, Alice asked Chill to come to her home in Connecticut, where she told him that, as an expression of her gratitude, she intended to make substantial gifts to her litigation team—Chill, Reich, and Mallis. (I:A105a; VI:A672-73, 679) Alice's friend and business partner, Barbara Kling, testified that several days after Chill's visit, she saw checks payable to Chill, Reich, and Mallis sitting on a counter in Alice's house. (VIII:A2105-06)

Alice subsequently mailed to Chill an envelope marked "Personal" containing a cover note and three smaller envelopes addressed to him, Reich, and Mallis. (VI:A680-84; XV:A6021) The outer envelope was postmarked November 30, 1998—the day the second of Alice's two distribution checks was deposited, and five days after Alice met with Chill. All of the notes are in Alice's handwriting. (I:A106a; XV:A6021, 6023-25, 6027-28) Their authenticity was unchallenged. (I:A124a) Alice's cover note stated:

> Danny –
>
> You were kind to suggest you distribute the enclosed envelopes for me. Thank you again and yet again! from <u>all</u> the Lawrences.
>
> Alice

(I:A106a; XV:A6023)

Inside the smaller envelope addressed to Chill was a check for $2 million and a note from Alice dated November 30, 1998, which reads:

> Dear Danny –
>
> Without you—what?
>
> You've stood by me all these years—buoyed me up with unflagging optimism and persistence—and kept all the team actively functioning despite continual frustration—knowing we all would prevail one day.
>
> You are my friend of all friends,
>
> Most affectionately,
> Alice

(I:A107a; XV:A6024-26)

Inside the envelope addressed to Reich was a check for $1.55 million accompanied by a note dated November 30, 1998 which reads:

For Elaine

My Friend—my children's friend.

All of us thank you!

Appreciatively,
Alice

(I:A107a-08a; XV:A6027-29)

And inside the envelope addressed to Mallis was a check for $1.5 million and a note, also dated November 30, 1998, which reads:

Dear Steve,

Justice seemed to be blinded forever, but with just such a shove as you, Elaine and Danny have made in my behalf, she came through after all.

My most grateful thanks for <u>all</u> your unprecedented efforts—<u>all</u> these years.

Affectionately,
Alice

(I:A108a; XV:A6030-31)

Each of the Attorneys sent Alice a warm thank-you note soon after receiving the gifts. (VI:A895-96; XV:A6032-34) Alice retained Chill's thank-you note until her death. (XV:A6032) Replete with humility, Chill's note reads:

Dear Alice,

> Emotion resulting from your munificence to me keeps interfering with my ability to write an appropriate thank you note. But here goes!
>
> I was deeply touched by your generosity, both fiscal and spiritual. Your profession to me of such unconditional friendship moved me profoundly. I will be forever grateful and shall strive to prove worthy of your largesse.
>
> May God grant both of us good health and long life so that we may share in future triumphs in friendship and love.

Love,
Danny

(XV:A6032)

The Estate conceded, and the Referee found, that the gifts were not solicited. (I:A119a) The Referee further found that Alice's handwritten notes to the Attorneys conclusively established the absence of undue influence. His Report states that Alice's notes:

(a) "speak in Alice's voice" (I:A124a);

(b) "bespeak spontaneity and sincerity" (I:A125a);

(c) were "manifestly sincere and genuine expressions of Alice's deep appreciation" to the Attorneys "for their efforts and loyalty" (I:A124a); and

(d) themselves "show that the gifts were made voluntarily" and "not as a result of any undue influence" (I:A124a).

D. Within Days After Sending the Gift Checks, Alice Discusses the Gifts with Her Accountant/Financial Advisor and Thereafter Pays the Gift Taxes.

The Referee found that at the time Alice made the gifts, "she was already familiar with the gift tax consequences of making substantial gifts." (I:A123a) The evidence was incontrovertible: Alice had previously filed four gift tax returns and paid substantial gift taxes. (I:A123a; XVI:A6163; *see also* XVI:A6159 (memo regarding Alice's request for tax advice regarding a $500,000 gift)) In addition, the Referee credited Reich's testimony that in prior estate planning sessions with Alice, Reich had explained the gift tax rules to her. (I:A123a; VI:A916-17, 921-23; XVI:A6157) The Referee also found that one of the reasons Alice had not wanted the children to receive a larger fraction of Sylvan's residuary estate was her concern that "the Internal Revenue Service would view the excess amount passing to the children as a gift from Alice which would be subject to gift tax (Tr. 923-26)." (I:A123a) Finally, the Referee noted that monthly $800 checks (totaling $9600 for the year) that Alice gifted to each of two grandchildren in 1998 "showed that Alice was aware of the [then applicable] $10,000 annual exclusion limitation on tax-free gift giving (Tr. 928-32)." (I:A123a; *see also* XVI:A6166-88, 6280)

With respect to gift taxes payable on the Attorneys' gifts, the Referee found that Alice discussed the matter with her accountant, Wallberg, within days of making the gifts. (I:A123a) Wallberg testified that his conversation with Alice

concerning the taxes occurred on December 10, 1998 (VIII:A1909), when he told Alice that the gift tax would amount to $2.7 million. (I:A123a; VIII:A1911-12) Wallberg also told Alice that instead of paying gift taxes, she could report the transfers as bonuses, in which event the Attorneys would be required to report the amounts as income and Alice would be entitled to a tax *deduction*. (I:A123a-24a; VIII:A1911-12) Wallberg "did not testify that [Alice] had expressed any doubts or regrets about having made the gifts (Tr. 1908-17)." (I:A127a)

Based on Wallberg's testimony, the Referee found that Alice "decided to report the transfers as gifts and to pay the $2.7 million gift tax (Tr. 1912, 1917, 1944-45)." (I:A124a) Following Alice's instructions, Wallberg prepared a gift tax return for her signature, treating the transfers as gifts. (VIII:A1917) The Referee concluded that, in choosing to pay the gift taxes, Alice "re-confirmed her intent to make the gifts to the Attorneys with a full understanding of the gift tax consequences." (I:A124a) He also found that in signing the gift tax return as preparer after extensive discussions with Alice, Wallberg—under penalty of perjury—"declared in substance his belief that the transfers to the Attorneys were *bona fide* gifts (Tr. 1943-44)." (I:A126a-27a)

E. For Nearly Seven Years, Alice Continues To Be a Difficult Client But Gives No Hint of Regret Concerning the Gifts.

Alice continued to work closely with the Attorneys on litigation against Cohn. The Referee found that, for "seven continuous years" following the gifts,

Alice, as in the past, "frequently verbally abused the Attorneys and threatened to fire them if they dared to not carry out her commands." (I:A127a) Nevertheless, it is uncontroverted, as the Referee found, that Alice "never complained to them about the validity of the gifts or expressed any regret for having made them." (I:A126a, citing V:A360; VI:A689-90, 896) To the contrary, she "continued to show confidence in the judgment and integrity of the Attorneys" (I:A127a), as by appointing Chill as co-executor (with Reich as an alternate) in her 2000 and 2004 wills (VI:A668, 690; XV:A6113, 6140-41) and Chill as her health care proxy in 2004 (VI:A690-92; XV:A6036-39). Needless to say, as the Referee found, "[i]t is unlikely that she would have made these appointments if she had had the slightest conviction that Chill had manipulated her into making the gifts." (I:A127a)

F. Alice First Asserts the Gifts Are Invalid in 2005, After She Is Sued by Graubard for Legal Fees.

Alice's litigation against Cohn concluded on July 25, 2005, with a settlement in excess of $110 million. (I:A140a & n.17) Under a revised fee agreement that Alice had negotiated with Graubard, the firm was entitled to 40% of this sum. (I:A137a-39a) When Alice learned of the settlement amount, in early May 2005, she confided in her son that she had "made a mistake" in entering into the revised fee agreement and assured him that she would "handle it." (VII:A1223, 1229-30) Indeed, days after the settlement closing, Alice informed Graubard, through new attorneys, that the firm was fired and its fee would not be paid. (I:A321a)

Graubard promptly commenced a proceeding against Alice in Surrogate's Court to collect its legal fee. (I:A308a) Within weeks, Alice filed a retaliatory suit in Supreme Court against Graubard and the Attorneys, seeking (a) rescission of the contingency fee agreement, (b) a return of all legal fees she had paid Graubard since 1983, and (c) a return of the gifts she had given the Attorneys in 1998. (I:A338a-39a) Alice's action was transferred to Surrogate's Court. That action, and Graubard's suit to recover its fees, are the two proceedings that were referred to Judge Levine and that are now before this Court.

Judge Levine found that Alice's September 2005 action was "[t]he first time Alice asserted the gifts were not valid." (I:A126a) He found that her almost seven-year delay "raises serious doubts as to the *bona fides* of her challenge," and "suggests that the gift validity challenge was only devised as a defensive litigation tactic and not as a legitimate claim having merit on its own." (I:A126a, 127a)

G. Alice Obstructs the Litigation and Lies To Evade Her Deposition, Behavior the Referee Found To Be "Willful and Contumacious."

Having made scurrilous allegations against the Attorneys in her Complaint, Alice obstructed the discovery process by persistently thwarting the Attorneys' efforts to obtain her deposition. Following a motion for sanctions brought by the Attorneys and Graubard, Judge Levine issued a 38-page Report detailing her misconduct. (I:A199a-236a) He found that Alice successfully resisted a more than two-year effort to take her deposition until, due to a terminal illness that she

deliberately concealed, she died on February 16, 2008 without ever having been deposed. (I:A213a)

The Referee found that although Alice "was a critical witness whose testimony was highly relevant and necessary to the issues presented," she pursued a course of "resistance" that "went beyond what can be legally justified." (I:A213a, 215a) She filed duplicative, meritless requests for reconsideration of the decision to permit her deposition, the "real purpose" of which "was delay." (I:A218a) When that failed, Alice defaulted in appearing for a deposition the Referee had ordered; she then filed meritless appeals. (I:A218a-21a) Alice also made "repeated representations to [the courts] that she would appear for her deposition within thirty days of an adverse decision by the Appellate Division" on her interlocutory appeals—and then "reneg[ed] on her commitment." (I:A223a)

The Referee further found that Alice represented, repeatedly, that there was no condition that would "impair her ability to testify if a stay of her deposition was granted"—even after she was told that "she was terminally ill." (I:A223a) As a result of that deception, the Attorneys were unable "to depose [Alice] before she died." (I:A227a) Based on these events, the Referee concluded that Alice:

> demonstrated a consistent pattern of deliberate, reasoned refusal to comply with disclosure orders and to otherwise comply with her disclosure obligations. She also made misrepresentations to her adversaries, to me, to the Surrogate, and to the Appellate Division on material issues. …

> [Alice's] pattern of deliberate refusal to fulfill her disclosure obligations and her various misrepresentations were *willful and contumacious* and require the imposition of sanctions … .

(I:A233a-34a (emphasis added))

Since Alice's testimony was "critical" to the pending disputes, the Referee noted that "it might well be appropriate to strike [her] pleadings." (I:A235a, 236a) Ultimately, however, he recommended only that the Estate be required to waive the Dead Man's Statute (CPLR § 4519), which otherwise could have barred the Attorneys' testimony at the hearing about their transactions and communications with Alice. (I:A236a) Surrogate Webber confirmed the Referee's Report and upheld that limited sanction against the Estate. (I:A192a, 196a)

PROCEDURAL HISTORY

In September 2005, in response to Graubard's lawsuit against Alice for legal fees, Alice sued Graubard and the Attorneys in Supreme Court seeking, *inter alia*, return of the gifts she had given the Attorneys in 1998. (I:A338a-39a) The action was transferred to Surrogate's Court and referred to Judge Howard A. Levine, as Referee. The Attorneys moved for summary judgment on statute of limitations grounds. The Referee recommended that the motion be denied. (I:A281a) Surrogate Weber confirmed his Report without analysis. (I:A263a)

Judge Levine conducted a lengthy evidentiary hearing in October through December of 2009. (I:A87a, 100a) In August 2010, he issued a 105-page Report

concluding that the Attorneys "had met their burden to show by strong, convincing and satisfactory proof that the gifts were free from undue influence and that the gift transaction was fully understood by Alice." (I:A122a, 124a) He therefore recommended dismissal of the Estate's claim for return of the gifts. (I:A190a)

Without holding oral argument, Surrogate Nora Anderson disaffirmed that part of Judge Levine's Report that upheld the gifts. (I:A68a) She thereafter entered an Amended Decree ordering the Attorneys to "forfeit and return" the gifts. (I:A58a, 65a) The Attorneys appealed.

The Appellate Division, First Department issued an opinion and order on May 23, 2013, which affirmed the Surrogate's Amended Decree as to the dispute between the Estate and the Attorneys. (XVII:A7391-97) It modified the Amended Decree as to the fee dispute between the Estate and Graubard, and remanded for proceedings to determine the amount of the fees owed by the Estate. (*Id.*)

Appellants moved in the Appellate Division for leave to appeal from the May 23, 2013 order as follows: Mallis on May 29, 2013, Chill and Reich on June 18, 2013, and Graubard on June 20, 2013. While the motions for leave to appeal were pending, the parties stipulated to a Final Decree on Remand that (i) resolved the Estate-Graubard fee dispute in accordance with the Appellate Division's May 23, 2013 decision and (ii) ordered the Attorneys to return the gifts. The Surrogate entered the Final Decree on Remand on July 29, 2013. (XVII:A7398)

JURISDICTIONAL STATEMENT

On September 10, 2013, the Appellate Division granted the motions filed by the Attorneys and by Graubard for leave to appeal to this Court. (XVII:A7388-90)

This Court has jurisdiction pursuant to CPLR § 5602(a)(1)(i), because this action originated in Supreme Court and was transferred to Surrogate's Court, and the Appellate Division's order is not appealable as of right and is final as to the Attorneys (who were not parties to the Surrogate's Court proceeding commenced by Graubard to recover its fees). *Sokoloff v. Harriman Estates Redevelopment Corp.*, 96 N.Y.2d 409, 414 n.* (2001); *Barile v. Kavanaugh*, 67 N.Y.2d 392, 395 n.2 (1986). Alternatively, this Court has jurisdiction under CPLR § 5602(a)(1)(ii), because the May 23, 2013 order of the Appellate Division necessarily affected the Surrogate Court's Final Decree on Remand, which is not appealable as of right and which finally resolved the action. (XVII:A7398) *See also* CPLR § 5602(b)(1).

The issues on which the Attorneys seek review were properly preserved. The Attorneys argued in Surrogate's Court that the Estate's claim was barred by the statute of limitations. (*See* I:A279a) That issue was decided by the Referee, Surrogate's Court, and the Appellate Division. (I:A263a, 280a-81a; XVII:A7393) The Attorneys also argued throughout that the gifts were valid as a matter of law. (*See* I:A104a-110a) Again, the Referee, Surrogate's Court, and Appellate Division all addressed that issue. (I:A82a, 128a; XVII:A7394)

ARGUMENT

I. THE ESTATE'S CLAIM FOR RETURN OF THE GIFTS WAS TIME-BARRED AND SHOULD HAVE BEEN DISMISSED.

It is undisputed that the applicable limitations period for Alice's claim for return of the gifts was six years. It also is undisputed that Alice waited nearly seven years after giving the gifts before asserting that claim. The claim was therefore barred by the statute of limitations and should have been dismissed.

The lower courts, however, invoked the "continuous representation" tolling doctrine to save the Estate's claim. That doctrine operates to postpone the time by which clients must bring suit against professionals for malpractice or analogous misfeasance, on the sensible assumption that clients cannot be expected to understand or promptly sue professionals regarding ongoing matters within the latter's professional expertise. Further, it is preferable to afford professionals the opportunity to try to fix their own errors while the representation is ongoing, rather than require clients to sue at once, potentially precluding such self-correction.

Neither the doctrine nor its underlying rationale has any force with respect to claims over disputed fees or gifts—arms-length transactions that do not themselves entail rendering professional services. In other words, where (as here) a client's claim concerns a transaction *between* attorney and client, separate and distinct from the rendition of professional services, rather than representation *by* the attorney *of* the client as *part of* a professional representation, the doctrine is inapt.

Moreover, even where continuous representation tolling does apply, it lasts only for so long as the professional continues to represent the client *in connection with the challenged matter*. But, as is obvious and as the Referee found after trial, the Attorneys did not represent Alice with respect to the *gifts*; they represented her in *estate litigation,* an entirely distinct matter. (I:A135a) Since the Attorneys did not represent Alice *at all* in connection with the gifts, much less *continuously*, the continuous representation doctrine cannot save the Estate's time-barred claim.

Indeed, any contrary rule would undermine well-established law governing day-to-day financial interactions between attorneys and clients, thereby exposing professionals to liability of indefinite duration for all sorts of routine disputes, and thus disrupting the repose to human affairs that statutes of limitations are intended to provide. This case is a perfect example: As a result of the lower courts' application of the continuous representation doctrine, the Attorneys were forced to bear the burden of proof as to conduct that (by the time of trial) had occurred more than ten years earlier, and were unable to depose Alice, who died after years of avoiding deposition through willful and contumacious misconduct.

For these powerful reasons, no New York court has previously applied the continuous representation doctrine to claims such as overbilling or improper receipt of a gift. Appellate courts in other states have expressly refused to apply the tolling doctrine to such circumstances. This Court should do the same here.

A. Alice's Gift Claim Was Concededly Brought Beyond The Six-Year Limitations Period.

CPLR § 213(1) provides a maximum six-year limitations period for actions for which "no limitation is specifically prescribed by law." Accordingly, "the parties do not dispute that the longest relevant period of limitations with respect to [the gift] claims had expired sometime in the beginning of December, 2004, six years after Chill received the envelope from [Alice] containing gifts for each of the [Attorneys]." (I:A280a) There is likewise no dispute that Alice's Complaint was "filed on September 13, 2005," nearly a year *after* the expiration of that six-year period. (I:A280a) There is thus no question that, absent a tolling of the statute, Alice's claim for return of the gifts should have been dismissed as time-barred.

B. The Continuous Representation Doctrine Did Not Toll The Statute Of Limitations.

The Appellate Division held that the six-year statute of limitations applicable to Alice's gift claim was tolled by reason of the continuous representation doctrine. (*See* XVII:A7393) In so holding, the court applied the doctrine to a claim concerning one-time gifts, transactions in which the Attorneys did not represent the client *at all*, let alone continuously. That was legal error. The continuous representation tolling doctrine does not and should not apply here.

1. The continuous representation doctrine applies only to a claim alleging improper provision of professional services, and only if professional representation regarding the disputed act remains ongoing.

Controlling Court of Appeals authority holds that two essential criteria are the *sine qua non* of continuous representation tolling: (i) a claim of misconduct concerning the manner in which professional services were performed, and (ii) ongoing professional services with respect to the specific matter or transaction complained of. *Williamson v. PricewaterhouseCoopers LLP*, 9 N.Y.3d 1, 9, 11 (2007) (continuous representation tolling not applicable unless there is a "mutual understanding" of the need for *further representation* with respect to the "*particular problems [conditions]* that give rise to [the] *malpractice claims*"; a "continuing professional relationship" alone does not suffice); *McCoy v. Feinman*, 99 N.Y.2d 295, 306 (2002) (tolling applies "only where there is a mutual understanding of the need for further *representation* on the *specific subject matter* underlying the *malpractice claim*"); *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 167-68 (2001) (tolling applicable "only where the continuing representation pertains *specifically to the matter* in which the attorney committed the *alleged malpractice*"); *Glamm v. Allen*, 57 N.Y.2d 87, 94 (1982) (tolling during period of "*ongoing representation*" if "attorney who allegedly was responsible *for the malpractice* continues to represent the client *in that case*") (all emphases added).

Unsurprisingly, until this case, the First Department had enforced those same requirements. *Booth v. Kriegel*, 36 A.D.3d 312, 314 (1st Dep't 2006) (tolling applies to claims "arising from the *rendition of professional services* only so long as the defendant continues to advise the client" regarding the "*particular transaction* sued upon") (emphases added); *Transp. Workers Union of Am. Local 100 AFL-CIO v. Schwartz*, 32 A.D.3d 710, 713-14 (1st Dep't 2006) (doctrine not applicable where continuing representation has only "incidental connection" to transaction giving rise to the lawsuit), *leave denied*, 8 N.Y.3d 942 (2007).

In light of these requirements, continuous representation tolling has never previously been applied when a client's claim concerns a financial transaction *between* the professional and client (such as a fee dispute), rather than malfeasance in the provision of professional services *on behalf of* the client (such as malpractice). In the former case, the two basic elements are not satisfied: When a professional engages in a financial transaction *with* a client, by charging a fee or accepting a gift, the professional is not *representing* the client in that transaction—and certainly not *continuously*. Rather, the two parties are engaging in a financial transaction that is separate and distinct from the rendition of professional services.

Other states similarly have refused to apply the continuous representation tolling rule to disputes over attorneys' fees and the like, as opposed to claims of deficient professional performance. *E.g.*, *Burns v. McClinton*, 143 P.3d 630, 632,

636 (Wash. Ct. App. 2006) (holding that "'continuous representation' rule does not apply to a fee dispute arising out of an ongoing professional relationship," because it did not arise from "professional error"); *Bambi's Roofing, Inc. v. Moriarty*, 859 N.E.2d 347, 358 (Ind. Ct. App. 2006) (finding continuous-representation doctrine inapplicable to claim of "embezzlement" of client's funds by professional).

In sum, continuous representation tolling applies—as its name indicates—to claims (like malpractice claims) arising from a professional's error or malfeasance in the course of a particular *continuous representation*. Here, the Attorneys never represented Alice with respect to the gifts she mailed to them. As Judge Levine found after the hearing, and nobody disputed, "accepting the gifts … did not occur in the course of Graubard's rendering legal services to Alice." (I:A135a) Even if, as the Estate has argued, the gifts were given in *recognition* of the Attorneys' representation, that at most would simply mean the gifts were akin to legal fees, which (as shown) are not subject to continuous representation tolling, given that the doctrine is limited to disputes about the actual *rendition* of legal services.

2. The policy rationales for continuous representation tolling do not apply in the context of a fee- or gift-related dispute.

The purposes underlying continuous representation apply only to claims alleging malfeasance in the rendition of professional services and are inapplicable to financial transactions between clients and professionals. This confirms that the doctrine should not be extended beyond its longstanding parameters.

Continuous representation tolling has two rationales. *First*, a lay person "realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." *Greene v. Greene*, 56 N.Y.2d 86, 94 (1982). That is, a client cannot "be expected, in the normal course, to oversee or supervise the attorney's handling of the matter." *Id.* Thus, the client should not be burdened with the obligation to identify the professional's errors midstream: "The client is hardly in a position to know the intricacies of the practice or whether the necessary steps in the action have been taken." *Siegel v. Kranis*, 29 A.D.2d 477, 480 (2d Dep't 1968). *Second*, if the client becomes aware of an error, the client should not be required immediately to sue, since that would only "interrupt corrective efforts." *Borgia v. City of New York*, 12 N.Y.2d 151, 156 (1962). Rather, the professional should be afforded a chance to "provide corrective or remedial services" in the course of the same representation, and thereby obviate the need for a suit entirely. *Williamson*, 9 N.Y.3d at 11. Importantly, this Court has rejected continuous representation tolling where "the purpose underlying [the doctrine] would not be served by its application." *Id.*

Neither of the concerns that justify continuous representation tolling has any force in the context of a dispute between a client and a professional over fees or a personal gift. *First*, when a client pays a lawyer or gives the lawyer a gift, the lawyer is not—in that transaction—"perform[ing] legal services on the [client's]

behalf." *Greene*, 56 N.Y.2d at 95. Requiring the client to dispute the payment or seek return of the gift within the ordinary limitations period would therefore not impose on the client a duty to "question and assess the techniques employed" by the professional, or evaluate "the manner in which the services are rendered." *Id.* at 94. To the contrary, there is every reason to expect the client to "oversee or supervise" a financial transaction between attorney and client. *Id.* Indeed, the "account stated" doctrine *requires* clients to review attorneys' invoices and timely raise any objections. *Rodkinson v. Haeker*, 248 N.Y. 480 (1928); *Whiteman, Osterman & Hanna, P.C. v. Oppitz*, 105 A.D.3d 1162, 1163 (3d Dep't 2013); *Ruskin, Moscou, Evans & Faltischek, P.C. v. FGH Realty Credit Corp.*, 228 A.D.2d 294, 295 (1st Dep't 1996) (client obligated to make "objection within a reasonable time" of receiving a "law firm's invoices").

The law thus presupposes that clients are fully capable of conducting arms-length financial transactions with lawyers. As the account stated doctrine shows, the law assumes that clients can and will—and indeed must—exercise independent judgment when dealing with lawyers on financial matters in which the attorney is not acting on the client's behalf. *See also* N.Y. Rules of Prof'l Conduct, R. 1.8(a) (rules governing a business transaction between attorney and client not applicable unless the client expects the lawyer "to exercise professional judgment [in the transaction] for the protection of the client"). Put simply, clients may defer to

lawyers only on questions of *professional judgment*—not as to payment for services, and not as to receipt of gifts. In both of the latter situations, the client is not burdened with any need to exercise contemporaneous oversight over the matter in which professional services beyond their expertise are being rendered.

Second, unlike ongoing professional matters, disputes over fees or gifts involve no "mutual understanding of the need for further representation" regarding that transaction. *McCoy*, 99 N.Y.2d at 306. Since the disputed act is not the subject of any prior or ongoing representation, there is no concern that disputing a payment or seeking return of a gift would interrupt "corrective efforts." *Borgia*, 12 N.Y.2d at 156. Postponing the time for commencing litigation over a fee or gift, therefore, would not permit the attorney to "correct his or her malpractice" and so avoid suit. *McDermott v. Torre*, 56 N.Y.2d 399, 408 (1982). Here, there was no "mutual understanding of the need for further representation" regarding the gifts. *McCoy*, 99 N.Y.2d at 306. And having done nothing on the client's behalf in the gift transaction, there was nothing for the Attorneys to "correc[t]" through any ongoing professional services regarding the gifts. *Borgia*, 12 N.Y.2d at 156.

3. The Appellate Division committed legal error.

Contrary to all of the foregoing authority, the Appellate Division below held that the continuous representation doctrine "applies where, as here, the claims involve self-dealing at the expense of a client in connection with a particular

subject matter." (XVII:A7393) This novel application of the doctrine to financial disputes, by labeling them "self-dealing" by the professional, is plain error. Such disputes, however characterized, do not either satisfy the essential components of continuous representaation tolling or serve its underlying purposes.

No New York court heretofore has applied continuous representation tolling to a *financial* dispute between client and attorney (or any other professional). Indeed, the one case the Appellate Division cited as supposed authority for its holding—a "cf." cite to *Woyciesjes v. Schering-Plough Corp.*, 151 A.D.2d 1014 (4th Dep't 1989)—expressly *rejected* application of continuous representation tolling to a fee dispute. The client in *Woyciesjes* claimed that his attorney "improperly charged him a fee of 50% rather than one third" and "erroneously calculated the 50% fee." *Id.* at 1014. Despite an allegation that the attorney committed "fraud" as to those billing practices, the court flatly rejected "plaintiff's contentions that the continuous representation doctrine is applicable." *Id.* at 1014-15. *Woyciesjes* thus confirms that tolling is inapplicable to claims arising from financial transactions between clients and professionals. *Accord Glavey v. Latzman*, No. 570379/03, 2003 WL 23095673, at *1 (App. Term 1st Dep't Nov. 18, 2003) (per curiam) (holding claim for overcharge of fees time-barred, even though "representation of plaintiff in the underlying matter may have continued").

The doctrine is inapplicable to financial disputes with clients regardless of whether, as below, these disputes are characterized as "self-dealing" by the professional. *All* such disputes can be described as enrichment by the professional at the client's expense. If that were enough to constitute "self-dealing" and thus, under the Appellate Division's novel rule, trigger continuous representation tolling, then any plaintiff suing a professional could describe the latter as engaging in "self-dealing," and thereby circumvent at the threshold the statute of limitations. Allowing the Appellate Division's rule to stand would thus open a Pandora's box, allowing application of continuous representation tolling to all financial (or other) controversies between clients and professionals. Indeed, under the Appellate Division's formulation, merely sending a bill to a client would constitute "self-dealing at the expense of a client."

Moreover, as the foregoing reflects, the Appellate Division mischaracterized what constitutes "self-dealing" and plainly erred by suggesting that any such "self-dealing" is even alleged here. The Attorneys' receipt of unsolicited gifts cannot conceivably constitute an act of "self-dealing" since the Attorneys were on one side of the transaction only. They simply accepted the checks that Alice herself wrote and mailed to them. No plausible definition of "self-dealing" could encompass that conduct. Rather, self-dealing requires that the professional act on *both* sides of the transaction. The Appellate Division's characterization of the gift

transaction as involving "self-dealing" by the Attorneys is thus itself without any foundation. Accordingly, the lynchpin for the Appellate Division's application of the novel rule that it enunciated simply does not exist.[2]

In short, at the heart of the Appellate Division's "self-dealing" label is the premise that professionals can never engage in arms-length financial transactions with clients; that attorneys are *always* representing their clients, even when negotiating against them. Yet, as shown above, that premise is fundamentally irreconcilable with well-established doctrines (such as account stated) that govern financial transactions between attorneys and clients.

Thus, under well-settled law, attorneys are plainly *not* providing professional services for a client when they engage in a financial transaction with a client, such as routine billing. Because a lawyer who charges a fee or accepts a gift does not thereby render professional services to the client, the continuous representation doctrine does not apply.

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[2] Of course, continuous representation tolling can apply to claims of self-dealing, but *only* where its basic elements—a disputed transaction that is the subject of ongoing professional representation—are present. *E.g.*, *Greene*, 56 N.Y.2d at 90-91, 94-95 (applying tolling where lawyer mismanaged trust assets entrusted to him "for professional assistance"); *Schlanger v. Flaton*, 218 A.D.2d 597, 599 (1st Dep't 1995) (attorney protected "his own interests at the expense of" client, "while … acting as counsel"). The gift transactions at issue here, however, involved neither professional representation nor *ongoing* professional representation (nor self-dealing, for that matter).

C. The Holding Below Eviscerates The Public Policy Interests Served By Statutes Of Limitations, As This Case Exemplifies.

The Appellate Division's predicate for its novel application of continuous representation tolling to this case—*i.e.*, "claims that involve self-dealing at the expense of a client"—in practical effect extends tolling for the duration of the relationship between professional and client, a result this Court has squarely rejected. *Williamson*, 9 N.Y.3d at 9. Such uncircumscribed expansion of the continuous representation doctrine violates not only Court of Appeals authority, but statutory law as well, and also defeats well-established public policy.

The primary purpose of statutes of limitation is fairness. *Duffy v. Horton Mem. Hosp.*, 66 N.Y.2d 473, 476 (1985). "The statutes embody an important policy of giving repose to human affairs." *Flanagan v. Mt. Eden Gen. Hosp.*, 24 N.Y.2d 427, 429 (1969). There comes a point at which a defendant "ought to be secure in his reasonable expectation that the slate has been wiped clean." *Id*. "The Supreme Court has noted that statutes of limitation 'are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity … .'" *Id.* (quoting *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390 (1868)).

Also, a defendant should be entitled to defend against a claim "before his ability to do so has deteriorated through passage of time." *Martin v. Edwards*

Labs., 60 N.Y.2d 417, 425 (1983); *accord Nussenzweig v. DiCorcia*, 9 N.Y.3d 184, 188 (2007) ("[S]tatutes of limitations are designed to spare the courts from litigation of stale claims, the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost … ." (internal quotation marks omited)); *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 542 (1994) (statutes of limitations serve "society's interest in adjudication of viable claims not subject to the vagaries of time and memory"). The Appellate Division's transgression of these policies is flagrant—and exacerbated by the fact that *the Attorneys* here bore the burden of proof regarding Alice's belated claim.

Transforming the continuous representation doctrine per the decision below would expose all types of professionals in New York to liability of indefinite duration. The continuous representation doctrine applies, under common law and by statute, to professionals such as "architects, engineers, … and accountants." *Castle Oil Corp. v. Thompson Pension Employee Plans, Inc.*, 299 A.D.2d 513, 514 (2d Dep't 2002); *see also* CPLR § 214-a (codifying continuous representation for "medical, dental or pediatric malpractice … where there is continuous treatment for the same illness, injury or condition which gave rise to the … act, omission or failure" complained of). If tolling applies outside the context of rendering professional services, as the Appellate Division held, then all of those professionals face the prospect of potential liability of indefinite duration for even routine

financial disputes in which the professional is claimed to have been enriched at the client's expense—that is, *all* financial disputes with professionals.

For example, an accountant who has an ongoing relationship with a client could be sued for self-dealing based on overbilling that allegedly took place many years earlier. An architect who spends years building a home for a client could be sued and forced to defend expense items billed at their first meeting. And law firms could be accused by a long-time client of self-dealing based on alleged overbilling that occurred decades before. Line items on old invoices may be impossible to defend given the passage of time. Yet, this Court repeatedly has determined that a defendant eventually "ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations," especially because "loss of evidence" makes it difficult to defend against such "stale claims." *Flanagan*, 24 N.Y.2d at 429; *accord Nussenzweig*, 9 N.Y.3d at 188.

This case exemplifies the harm that expanding the continuous representation doctrine would wreak upon the important policy interests served by statutes of limitations. The Attorneys had a right to rely on the gifts in structuring their financial affairs. Certainly following expiration of the limitations period, the Attorneys ought to have been "secure" in their "reasonable expectation" that such would not be unsettled. *Flanagan*, 24 N.Y.2d at 429. Moreover, the trial occurred *more than ten years after the gifts were given* and after Alice had died. And

because Alice died without ever having been deposed—due to her willful and contumacious refusal to submit to deposition—the Attorneys had to bear the burden of proving that the gifts were given knowingly and free of undue influence without being able to cross-examine Alice. Such "loss of evidence" is precisely why legislatures "protec[t] parties from the prosecution of stale claims." *Id.* at 429-30 (quoting *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390 (1869)).

As this Court has noted, "the Legislature has specifically enjoined that 'no court shall extend the time limited by law for the commencement of an action.'" *McCoy*, 99 N.Y.2d at 300 (quoting CPLR § 201). Tolling doctrines are judicially created exceptions to that rule. Accordingly, they should be applied only where necessary to satisfy their purposes, not injudiciously expanded until they swallow the limitations period entirely, as the decision below would do here.

II. THE ESTATE'S CLAIM FOR RETURN OF THE GIFTS FAILS ON THE MERITS, AS A MATTER OF LAW, BECAUSE THE GIFTS WERE GIVEN KNOWINGLY AND WITH NO UNDUE INFLUENCE, AS THE COURT-APPOINTED REFEREE PROPERLY FOUND.

Under the common law, a client's gift to an attorney is valid if the attorney proves that it was made (i) knowingly and (ii) without undue influence. *Nesbit v. Lockman*, 34 N.Y. 167, 170 (1866) (such gift must be "fair, voluntary and well understood"); *id.* (attorney must provide "evidence" that there was no "fraud or undue influence"). *Accord Snook v. Sullivan*, 53 A.D. 602, 606 (4th Dep't 1900) ("free from fraud and was her voluntary act"); *Reoux v. Reoux*, 3 A.D.2d 560, 562

(3d Dep't 1957) (per curiam) ("free and voluntary on the part of the donor"); *Matter of Clines*, 226 A.D.2d 269, 270 (1st Dep't 1996) ("understandingly made by the donor, uninfluenced by fraud, duress or coercion").

This Court has recognized that there is nothing inherently improper about a client making a gift to an attorney:

> A testator's freedom to bequeath property in accordance with his or her wishes should not be diminished merely because the object of the testator's generosity happens to be an attorney with whom the testator has enjoyed a beneficial professional relationship. Attorneys often extend themselves on behalf of their long-time clients, and such "acts of kindness and consideration" do not by themselves "constitute undue influence" when they "evoke reciprocal sentiments of gratitude and affection" by the client.

Matter of Henderson, 80 N.Y.2d 388, 392-93 (1992) (citations omitted). But because courts are "vigilan[t]" in applying the undue-influence inquiry in the context of a fiduciary relationship (I:A104a), the attorney bears the burden of establishing the gift's validity (*Reoux*, 3 A.D.2d at 562).

In this case, Judge Levine reviewed the evidence and rendered detailed, fully-supported findings establishing that the gifts to the Attorneys were valid as a matter of law. Indeed, New York courts have upheld client gifts on records far less robust than this. Nevertheless, the Appellate Division ordered the Attorneys to return the gifts, conclusorily citing three factors—size, secrecy, and the failure to urge independent counsel—as legally preclusive of the gifts' validity. (XVII:A7394) These factors, however, do not remotely suggest undue influence,

even when considered in isolation, much less when viewed in the context of all the undisputed record evidence cited by Judge Levine. At a minimum, they surely do not *require* the trier of fact (here, Judge Levine), who is owed great deference, to find undue influence as a matter of law.

A. The Undisputed Evidence Establishes, As A Matter Of Law, That Alice Gave The Gifts Knowingly And Without Undue Influence.

Judge Levine presided over a lengthy hearing, heard from numerous witnesses, examined hundreds of exhibits, and ultimately issued a comprehensive Report that made extensive factual findings and credibility determinations. Based on uncontroverted evidence, Judge Levine correctly found that Alice's gifts to the Attorneys were legally valid, carefully detailing the supporting evidence and the ineluctable inferences that followed therefrom. (*See* I:A122a, 124a)

1. The Attorneys did not exercise undue influence.

Undue influence is "'a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against [her] free will and desire, but which [s]he was unable to refuse or too weak to resist.'" *Children's Aid Soc'y v. Loveridge*, 70 N.Y. 387, 394 (1877). "'To be 'undue,' the influence exerted must amount to mental coercion that lead the testator to carry out the wishes of another ….'" *Matter of Ryan*, 34 A.D.3d 212, 213 (1st Dep't 2006). Judge Levine concluded that "the gifts were free from undue influence." (I:A124a)

First, the Referee credited the Attorneys' unrebutted evidence that the gifts were not solicited. The Estate did not claim otherwise. (I:A119a) Since it was conceded that the Attorneys did not solicit the gifts, the gifts had to have been voluntarily made and therefore could not have been induced by undue influence.

Second, Judge Levine found that the "hand-written notes from Alice accompanying the checks sent to each of the Attorneys" conclusively established the absence of undue influence. (I:A124a) "These notes," Judge Levine observed, "show that the gifts were made voluntarily by Alice and not as the result of any undue influence by her Attorneys." (*Id.*) As is evident from the documents themselves, the notes "speak in Alice's voice"; were "manifestly sincere and genuine expressions of Alice's deep appreciation to each of the members of her 'team' for their efforts and loyalty"; and "clearly bespeak spontaneity and sincerity." (I:A124a, 125a) Alice's effusive, heartfelt expressions of gratitude and affection to the Attorneys, as set forth in her notes to each of them (for example, to Chill, "my friend of all friends" (XV:A6024-26)), leaves no room for doubt as to the voluntary nature of the gifts and the absence of undue influence.

Third, the gifts were made "immediately after the Attorneys had achieved what to Alice was a major victory in her battle with … her despised brother-in-law [Cohn]," following "years of bitter litigation" and "despite [Cohn's] fierce resistance" and resulting in the distribution of "approximately $124 million to

Alice and the Lawrence Children." (I:A124a) For Alice, this was a profound, liberating event, which she marked by framing her distribution checks. (VI:A891-92; VII:A1130-31; XV:A6051-52) After fifteen years of struggle, she had gained the "freedom" "to run [her] own life as [she] see[s] fit," "not . . . subject to Mr. Cohn's whims." (VII:A1130-31) Since Alice "was an extraordinarily demanding client" (I:A125a), it was "not surprising," as Judge Levine found, that Alice would, of her own volition, want to recognize the Attorneys "for their success," "for their willingness to use unusually aggressive tactics in zealously advancing her cause," and "for tolerating her abusive treatment and her micromanagement." (*Id.*)

Fourth, overwhelming, unrebutted evidence illustrated Alice's domineering personality, which permeated her interactions with the Attorneys. (*Id.*) The record was "replete with examples of her dominating, micromanaging, vituperative behavior." (I:A109a) Alice frequently fired lawyers—including two firms before she retained Graubard—and frequently "would threaten to fire Graubard." (*Id.*) Alice's domineering personality and abusive behavior are utterly antithetical to her claim of undue influence. Judge Levine accordingly found it "highly improbable that anyone would have been able to persuade Alice to make multimillion dollar gifts against her will in 1998." (I:A125a) Indeed, the evidence of Alice's independent, domineering nature was so extraordinary that on the seventh day of the hearing Judge Levine excluded further evidence on this point as cumulative,

finding the evidence that already had been introduced enough "to take down a forest." (VII:A1211)

Fifth, further negating undue influence, the Referee found that Alice's "spontaneous and grandiose generosity to others demonstrates that the gifts to the Attorneys were not aberrational on Alice's part. (I:A125a) Alice gave her doctor a gift of $1.4 million to buy an apartment; her friend and business partner, Barbara Kling, a "$1 million painting" (*id.*) and $5.7 million in unpaid loans to a business Alice and Kling owned jointly (VIII:A1991; XV:A5892-93); and cash to her handyman of "over $600,000 in loans-gifts, and a house." (I:A125a)

Sixth, Judge Levine evaluated the gifts' size relative to Alice's net worth. The latter, in 1997, was "approximately $220 million." (I:A126a) Thus, Alice's gifts to the Attorneys, after she received another $84.3 million in November 1998, "had only a minor impact on Alice's fortune, making it less likely that undue influence was needed to impel her to make the gifts against her will." (*Id.*)

Seventh, Judge Levine found that Alice's "seven year delay in challenging the gifts seriously undermine[d] [her] undue influence claim." (*Id.*) The Referee noted that during those years, Alice never complained about the gifts—not to the Attorneys, despite her continued work with them; or her accountant, despite their discussions concerning gift taxes—and not until after Graubard's lawsuit in August 2005 to collect fees. (*Id.*) The Referee inferred from this suspicious chronology

that "the gift validity challenge," whose "*bona fides*" he questioned, "was only devised as a defensive litigation tactic and not as a legitimate claim having merit on its own." (I:A126a, 127a) Indeed, no other conclusion is plausible.

As the foregoing evidence definitively establishes, if ever there was a client not susceptible to undue influence, it was Alice Lawrence.

2. Alice fully understood the gifts.

The evidence incontrovertibly showed that Alice, then 73 years old, fully understood the gifts. (I:A122a) The Estate "concede[d]" that Alice "was mentally competent" when the gifts were made. (*Id.*) In addition, Judge Levine found that Alice was knowledgeable and experienced regarding gifts and gift taxes. It is undisputed that she routinely made gifts (I:A123a; XVI:A6166-88, 6280; *see also* XVI:A6159); had filed gift tax returns in the past and paid substantial gift taxes thereon (XVI:A6063); had previously been advised regarding the gift tax rules (I:A123a; VI:A916-17, 921-23; XVI:A6157); discussed the amount of gift taxes payable on the gifts here at issue with her accountant/financial advisor, Wallberg (I:A123a; VIII:A1909, 1911-12); and subsequently signed and filed a gift tax return prepared by him and paid the gift taxes thereon (I:A361a, A366a), thereby reaffirming and ratifying her intention to make the gifts. (I:A123a-124a)

* * *

To summarize, the *undisputed facts* show that a robustly independent and extremely demanding client, in full control of her faculties, known for making generous gifts to non-family members (including her physician), made unsolicited gifts (representing an inconsequential percentage of her vast fortune) to the lawyers who had just succeeded—following fifteen years of effort and abuse—in obtaining a momentous legal victory that left the client's family $124 million wealthier. Contemporaneous, handwritten notes document the transaction; gift taxes were paid after consultation with an independent advisor who offered an out; and the gifts went unchallenged for nearly seven years, until the client became embroiled in an unrelated fee dispute and sued, but even then refused to be deposed. On these facts, it is simply impossible, as a matter of law, to reach the conclusion that the Attorneys exerted "mental coercion" (*Ryan*, 34 A.D.3d at 213) that Alice was "too weak to resist" (*Children's Aid Soc'y*, 70 N.Y. at 394).

Comparing the facts here to those in other client gift cases vividly illustrates the point. The cases in which New York courts have required forfeiture of gifts uniformly involve highly vulnerable clients; gifts that represent significant portions of their net worth; the absence of any credible writings in the donor's own hand that the gifts were intended; insidious concealment of the gifts until after the donors expired; and other circumstances leading one to wonder why such gifts would have been made. This case involves the very *opposite* in *every* particular.

In *Matter of Howland*, 9 A.D.2d 197 (3d Dep't 1959), an "infirm and eccentric" elderly woman purportedly conveyed to her lawyer a residence she had bequeathed to another, with the conveyance prepared by the lawyer's secretary's husband "in an automobile" and not recorded until after her death. *Id.* at 199.

In *Snook v. Sullivan*, the court voided a purported conveyance of stock by a client of "advanced age" in "feeble health" who "easily became nervous and excitable over business transactions," whose stock dividends were "her only support" and who had already willed the stock to her sister, where the donee never told the bank of the transfer until "after her death." 53 A.D. at 602-03, 607.

In *Radin v. Opperman*, 64 A.D.2d 820 (4th Dep't 1978), the lawyer transferred "over $20,000" to himself from the decedent, an octogenarian resident of a "Veterans' Administration Facility." *Id.* at 820. The decedent subsequently "notified the bank not to honor any withdrawals from his accounts unless he personally presented the bankbook." *Id.*

In *Matter of Bartel*, 33 A.D.2d 987 (4th Dep't 1970), the lawyer sold his 84-year-old client's home so she could move "to a nursing home," and then "breached his trust relationship with his elderly client in initially commingling the proceeds of the sale with his own funds in his personal account." *Id.* at 987-88. He claimed that the client had later, orally, gifted him those proceeds—"which constituted almost half of [her] resources"—but "[n]o writing of any kind was introduced." *Id.*

And, in *Matter of Clines*, the decedent had been "diagnosed with Organic Brain Syndrome," and there was no "documentation," not even "a gift tax return," to support the alleged transfer of "the bulk of the decedent's estate" to his "caretaker and/or fiduciary." 226 A.D.2d at 270.

The facts here also compare favorably to cases in which courts found that donees *had* satisfied their burden with respect to *inter vivos* gifts. *See, e.g.*, *Matter of Sherbunt*, 134 A.D.2d 723, 723-34 (3d Dep't 1987) (per curiam) (upholding gift from "retired schoolteacher" who lived "in a nursing home," "not revealed to any other party," and memorialized only in a writing "typed by" the donee himself).

If the record facts in this case do not establish a legally valid client gift, no facts ever could.

B. The Appellate Division Erred By Conflating An Aspirational Ethical Canon With The Governing Common-Law Standard.

The Appellate Division did not dispute any of Judge Levine's specific factual findings. Instead, it ruled *on the law* that the Attorneys' failure to "advis[e] [Alice] to seek independent counsel" "preclude[d] a finding in [their] favor" on the legally dispositive question of the gifts' validity. In support of that determination, the Court exclusively cited Ethical Consideration ("EC") 5-5 of New York's former Code of Professional Responsibility, which said that, before accepting a gift, a lawyer "should urge that the client secure disinterested advice from an independent, competent person." That was legal error.

EC 5-5 was expressly *aspirational*, and so obviously could not be a *requirement* of the common law. Indeed, it is self-evident that a donor need not be advised to seek independent counsel in order to give a knowing and voluntary gift. Thus, as Judge Levine correctly concluded, under the caselaw the failure to adhere to EC 5-5 does not invalidate a gift. (I:A120a) *Advising* independent counsel may prove a gift *valid*, but *failing to so advise* cannot and does not prove a gift *invalid*.

1. EC 5-5 was "aspirational" only; it was not a "mandatory" Disciplinary Rule. *See* N.Y. Lawyer's Code of Prof'l Resp., Preliminary Statement (2007). EC 5-5 contained three aspirational guidelines regarding gifts, apparently formulated to protect attorneys from unfounded client charges of undue influence.[3] *First*, a lawyer should not solicit a gift. *Second*, a lawyer may accept an unsolicited gift "but before doing so he should urge his client to secure disinterested advice from an independent, competent person." *Third*, a lawyer should not prepare an instrument for a client which names the lawyer beneficially.

When in April 2009 the Appellate Divisions replaced the Code (including its Ethical Considerations) with the new Rules of Professional Conduct, they chose to incorporate only the first and third of EC 5-5's guidelines—and drop altogether the aspirational concept that a lawyer should, before accepting a client gift, urge the

[3] EC 5-5 stated in this regard: "If a lawyer accepts a gift from the client, the lawyer is peculiarly susceptible to the charge that he or she unduly influenced or overreached the client."

client to consult with an independent third party. It would be downright bizarre for the common law to *forbid* what professional ethics rules *allow*—namely, acceptance of an unsolicited gift without urging independent advice.

In all events, the test for a gift's validity is whether it was given under "undue influence." *See supra*, Part II.A. Ethics rules obviously would not tolerate "undue influence" over a client, so their failure to *require* suggesting independent advice demonstrates conclusively that such advice is not needed to avoid undue influence (or otherwise render gifts valid). Equally obvious, a gift can be knowing and voluntary even if the donor was not urged to obtain independent advice. EC 5-5's recommendation is prophylactic, and following it may be *sufficient* to show that a gift *was* voluntary. But *not* following it does not remotely establish that a gift was *not* voluntary. A gift is invalid if the product of undue influence—"a moral coercion, which … constrained the [donor] to do that which was against [her] free will," *Children's Aid*, 70 N.Y. at 394. Failure to urge independent advice, standing alone, could hardly create such "coercion" as a matter of law.

For a multitude of reasons, a donor might not need (or might not want) to be urged to seek independent advice before giving a gift. Alice, for example, was extraordinarily wealthy and insisted on making all of her own decisions; moreover, she spoke to her financial advisor, Wallberg, about the gifts on her own accord, even though the Attorneys purportedly did not urge her to. (*See* I:A126a) Since

Alice did, in fact, consult an independent third party, the Attorneys' alleged failure to recommend that course of action cannot *conceivably* bear on, let alone be *legally dispositive* of, whether she made the gifts with full understanding and without undue influence—*i.e.*, of her own free will.[4] Retroactively turning what had been an aspirational guideline recommending that attorneys urge a client to seek independent advice into a rule whereby attorneys must urge the client to consult with independent *counsel* as the *sine qua non* of a knowing and voluntary gift is fundamentally unfair and simply makes no sense.

2. Accordingly, it is not surprising that *no prior case* has held failure to urge a client to consult with independent counsel to be dispositive of the common-law question whether the gift was given knowingly and without undue influence. To the contrary, the caselaw confirms, contrary to the Appellate Division, that EC 5-5 cannot be equated with the common-law test for undue influence and cannot be the legal basis for invalidating gifts. In *Matter of Buchyn*, 300 A.D.2d 739 (3d

[4] We note, simply for the Court's reference, that Chill testified that he *did* advise Alice to consult other counsel before giving the gifts. (*See* I:A117a) The Referee found that testimony inconsistent because Chill could not recall whether he had so advised Alice *twice* or *three times* (I:A117a-18a), but the conversation had taken place *eleven years earlier*. He also found it implausible that Chill would have given this advice despite not being familiar with the applicable ethical rules (which did not, in any event, require it). (I:A117a) But suggesting independent legal advice, even if not required, is a fairly standard approach to all sorts of ambiguous or uncertain ethical scenarios, and was precisely the advice previously given to Alice in somewhat analogous circumstances. (VI:A669, 701-02, 909, 974-75) Nevertheless, recognizing the great deference owed to Referees on matters of fact and credibility, the Attorneys accept the Referee's determination on this matter for purposes of this appeal.

Dep't 2002), an attorney accepted assets from a "feeble" woman in her 90's without urging independent advice. *Id.* at 740-41. The court nonertheless found no undue influence, noting that the evidence "does not lead to the necessary conclusion that undue influence was exerted." *Id.* at 741. Similarly, in *Matter of Sherbunt*, the court found that the attorney had violated EC 5-5 but still affirmed that the gifts were not "the product of undue influence." 134 A.D.2d at 724.

Indeed, under *Matter of Putnam*, 257 N.Y. 140 (1931), and its progeny, an attorney who drafts a will for a client and names himself as a beneficiary—in violation of EC 5-5's third guideline and of new *mandatory* Rule 1.8(c)(2) of the Rules of Professional Conduct—is nonetheless entitled to a hearing on the issue of undue influence. Thus, even in the far more egregious scenario where the attorney drafts the instrument of transfer, the attorney is not thereby precluded from proving the absence of undue influence. In *Matter of Delorey*, 141 A.D.2d 540 (2d Dep't 1988), an attorney drafted a will naming himself "sole legatee" and "conceded that he never advised [the client] to have the will drawn by someone other than himself." *Id.* at 540-41. Yet the court allowed the attorney to seek to "rebut" the presumption of undue influence with proof "that the gift was freely and willingly made." *Id.* at 541-42. And in *In re Schneiderman*, 105 A.D.3d 602 (1st Dep't 2013), the court found "no evidence to suggest that [the donor] consulted with [independent counsel] regarding the $1 million gift" he had given to his lawyer

before his death. *Id.* at 603. Yet, the court did not rule the gift to be invalid as a matter of law. To the contrary, it held that there were "triable issue[s] of fact" regarding the dispositive question of undue influence as to the gift. *Id.* at 602.

Yet if a lawyer who violates a mandatory ethics rule by drafting a client's will granting himself a bequest is not precluded from proving that the bequest was not tainted by undue influence, then surely one who receives an unsolicited gift and violates no ethics rule is not—contrary to the Appellate Division—"preclude[d]" from proving the same.

In the few cases that have mentioned failure to urge independent advice, overwhelming evidence necessitated an "undue influence" finding, regardless of whether such advice was given. In *Radin*, the lawyer transferred money to himself from an octogenarian who told the bank "not to honor any withdrawals from his accounts unless he personally presented the bankbook." 64 A.D.2d at 820. In *Reoux*, the lawyer took securities from a client's safe-deposit box—after the "forgetful" client was "ill and confined in a nursing home"—and misadvised her that she had contracted to give him half of her property. 3 A.D.2d at 562-64.

At most, these cases suggest that urging advice can be a factor confirming that gifts were voluntary, serving as a "shield" *for* the attorney. But failure to do so is not, in itself, probative of undue influence and so cannot be used as a "sword" *against* the attorney, certainly not *dispositively* as held by the Appellate Division.

And here, where the client is a sophisticated, independent woman of immense wealth who gives unsolicited gifts to lawyers who recently secured $124 million for her family, and handwrites notes thanking the lawyers for their long, loyal support, any additional "shield" would be wholly redundant—surely not, contrary to the decision below, legally mandated.

3. Invalidating Alice's gifts because the Attorneys did not encourage independent advice is especially erroneous, because it is undisputed that Alice *did* obtain such advice about the gifts, from her principal financial advisor/confidant, Jay Wallberg. As Judge Levine found, Alice "had extensive phone conversations" with Wallberg about the gifts just days after they were given, and then reaffirmed her intention to make the gifts by signing and filing a gift tax return she instructed Wallberg to prepare and paying the taxes. (I:A126a) So even if there were a rule under which undue influence turns on independent advice (which there is not), surely it is satisfied where, as here, the donor *actually procured* such advice.

C. The Appellate Division Erred By Overturning Judge Levine's Report On The Basis Of Facts That Are Not Even *Probative* Of Undue Influence In This Case.

Beyond its invocation of EC 5-5, the Appellate Division conclusorily held, without citation, that Judge Levine's determination that the gifts were valid was "preclude[d]" by two other factors: (i) the gifts' "extraordinary amounts"; and (ii) "secrecy surrounding" them. (XVII:A7394) That, too, was legal error. For

reasons persuasively explained by Judge Levine, neither the size of the gifts nor the so-called secrecy concerning them is even *probative* of undue influence in this case—much less *dispositively* so.

1. Size of the gifts.

The Appellate Division held that the "extraordinary amounts" of the gifts precluded a finding that they were knowingly and voluntarily given. However, neither EC 5-5 of the former Code of Professional Responsibility, nor Rule 1.8(c) of the current Rules of Professional Conduct, nor prior decisional law invalidates a gift to an attorney by reason of its size. (XVII:A7394) Moreover, as Judge Levine observed, the gifts "had only a minor impact on Alice's fortune," and were "not aberrational" in light of similarly large gifts that Alice gave other non-family members, including her physician. (I:A125a, 126a) Of course, the size of *Alice*'s fortune and *Alice*'s gift-giving are the only relevant factors, because the relevant legal inquiry is whether the *donor* was unduly influenced.

If a client gift is large relative to the donor's assets, that raises suspicions as a matter of common sense, as the gift jurisprudence recognizes. *See, e.g.*, *Clines*, 226 A.D.2d at 270 (purported gift constituted "bulk of the decedent's estate"); *Bartel*, 33 A.D.2d at 988 (purported gift represented "almost half of [client's] resources"); *Henderson*, 80 N.Y.2d at 394 & n.2 (hearing on undue influence where purported bequest was nearly half of client's estate). But if, as here, a gift is

"minor" relative to the donor's net worth (each gift being a fraction of 1% thereof), then its size is not probative of anything; it raises no special suspicions. (I:A126a) That is especially true here, since Alice gave gifts to others in comparable amounts. Notwithstanding Alice's largesse to the Attorneys and others, she died leaving an estate worth nearly $350 million. (XV:A5899)

2. The so-called "secrecy."

The other factor the Appellate Division held to be legally preclusive of the gifts' validity was the so-called "secrecy surrounding the gifts." (XVII:A7394) Judge Levine addressed the issue of secrecy and found: "The evidence does not support any shroud of secrecy." (I:A127a n.11)

The facts regarding the "secrecy" with which the gifts were given are not in dispute. The gifts were obviously not secret *from Alice*, since it is undisputed that it was her idea to make the gifts, she who wrote the gift checks and handwritten notes that accompanied them, and she who mailed them to the Attorneys. Secrecy came into play only because, at Alice's instruction, the Attorneys did not disclose the gifts, *ex post*, to their law partners or her children. (I:A115a)[5] Alice, of course, was free to disclose the gifts to anyone she chose, including her children or others at Graubard. Consistent with her instructions to the Attorneys, she did not.

[5] Under Rule 1.6(a) of the Rules of Professional Conduct, an attorney is required to maintain confidentiality regarding "information that the client has requested be kept confidential."

With respect to the Attorneys, it was undisputed that they openly discussed the gifts, more than once, with Jay Wallberg or Paul Bishop, who worked in Wallberg's accounting office. Wallberg was Alice's confidant and financial advisor and Bishop was Wallberg's associate—the last people a gift recipient would talk to if trying to conceal a coerced gift. (V:A361; VII:A1301-02) Standing alone, this dispels any notion of nefarious secrecy.

Again, silence surrounding a gift *could* be probative of undue influence where the silence was designed to keep knowledge of the gift from the donor or her close advisors. *See, e.g.*, *Howland*, 9 A.D.2d at 199-200 (finding undue influence where lawyer's secretary's husband prepared conveyance of house from "infirm and eccentric" elderly client and kept the deed secret until "after the death" of client); *In re Van Den Heuvel's Will*, 76 Misc. 137, 148-55 (Surr. Ct. 1912) (finding undue influence where client suffering from "senile dementia" executed new will and drafter "failed to advise" client's personal lawyer of the new will, which was kept "profoundly secret" until her death). In other words, obvious attempts to hide the exploitation of highly vulnerable clients from their closest advisors plainly bolsters suspicion about the transaction's *bona fides*. But here the client was neither vulnerable nor was any attempt made to hide the gifts from her closest advisor.

Keeping gifts private is not independently suggestive of an effort to conceal undue influence. After all, most people normally do not discuss their personal financial matters with others, and attorneys normally do not discuss their client interactions with others. Here, the Attorneys, as noted, did not keep the gifts secret from Alice's financial advisor and confidant, the very person they would have concealed the gifts from if there were any impropriety involved. Moreover, they took other affirmative steps to *document* the gift transactions, which would have been self-defeating if they wanted to "cover-up" improperly induced gifts. Most obviously, they each sent *Alice* effusive "thank you" notes, providing the alleged victim with contemporaneous, undeniable evidence of the generous gifts. (VI:A895-96; XV:A6032-34) (Alice did, in fact, retain Chill's "thank you" note until after this litigation commenced. (XV:A6032)) The Attorneys' discussions with Alice's closest advisor and their providing contemporaneous documentation to Alice about the gifts are irreconcilable with any effort to "hide" those gifts.

Thus, the only rational conclusion to be drawn from the Attorneys' decision not to mention the gifts, *ex post*, to their law partners or to Alice's children is the one reached by Judge Levine: that such non-disclosure provided "scant, if any, evidence of undue influence applied to Alice." (I:A127a n.11) It is undisputed that the so-called secrecy was at *Alice's* express instruction. (I:A115a; V:A353; VI:A676-77, 901) Indeed, that is why Alice was confident enough to assert in her

Complaint, seven years later, that the Attorneys "never have reported … to the Graubard firm" the gifts that she gave them. (I:A349a)

Alice's confidentiality instruction was hardly surprising: The gifts were none of anybody's business. As her daughter testified, Alice "gave money to whom she gave money to. It's her money." (VII:A1530) As for the Graubard partners, Alice did not want them to be resentful. (VI:A676-77) The Attorneys' adherence to Alice's instruction in this regard is thus not probative of undue influence, as Judge Levine found. *See Sherbunt*, 134 A.D.2d at 724 (finding no undue influence even though sizeable gift was kept confidential at donor's request). Nor, of course, would it be surprising even absent such a directive for the Attorneys not to boast about the gifts, just as people typically do not boast about their salaries.

* * *

As explained above, neither the gifts' size, nor the Attorneys' adherence to Alice's instruction not to disclose them to others, nor the absence of advice to seek independent counsel, is remotely indicative of undue influence here. Those factors are thus *legally insufficient* to establish that the Attorneys failed to satisfy their burden of proving that the gifts were knowingly and voluntarily given. So it was plain legal error to conclude that these factors *required* such a finding as a matter of law. Moreover, particularly given the incontrovertible evidence relied upon by Judge Levine—*i.e.*, Alice's heartfelt notes, the $124 million distribution to her

family, Alice's domineering personality, her discussions with Wallberg, her gift tax return, her comparable gifts to others, and her seven-year delay in seeking their return—the undisputed facts can legally support only one possible conclusion: that the gifts were knowing and voluntary. Consequently, the claim for return of the gifts must fail as a matter of law, and the decision below must be reversed.

D. Other Evidence Adduced By The Estate, Which Even The Appellate Division Did Not Rely On, Is Also Legally Insufficient To Invalidate The Gifts.

Beyond the three factors cited by the Appellate Division, the Estate has previously argued that other evidence demonstrates that the gifts were induced by undue influence. But even the Appellate Division did not rely on this "evidence," none of which is remotely legally sufficient to invalidate the gifts.

The alleged solicitation of the notes: With respect to Alice's handwritten notes, Judge Levine expressly discredited testimony from the co-executor of Alice's estate, Jay Wallberg, that the Attorneys had asked Alice to write them. (I:A124a n.10) Wallberg claimed that Reich told him the Attorneys "had Alice write" the notes. Reich denied saying that. Noting Wallberg's receipt of "more than $6 million" in executor's commissions, his "hostility toward the Attorneys," and his "attempt[ ] to be helpful to the Estate," Judge Levine *expressly discredited* Wallberg's testimony, concluding: "I do not credit his version of the conversation with Reich." (*Id.*) He further found that, even if Reich *had* made the statement

attributed to her, it would have been "puffery" since, given Alice's undisputed domineering personality, the Referee did "not believe that the Attorneys could have persuaded Alice to write these notes." (*Id.*) Indeed, no such allegation was made in Alice's Complaint. (I:A342a) And even if the notes *had* been solicited, that suggests nothing more than a request for Alice to document the transaction.

Alice's supposed doubt: The Estate offered the hearsay testimony of Barbara Kling, Alice's friend and business partner, that during a visit to Alice's home before the gifts were mailed, Kling "think[s]" Alice told her that Alice "didn't think that these checks were the right thing to do, but she did write them." (VIII:A2107) Apart from its tentative nature, Judge Levine discredited Kling's testimony because of her clear bias. He noted that "Wallberg's testimony showed an interest in helping the Estate, *as did Kling's*." (I:A156a n.21 (emphasis added)) Judge Levine therefore gave no credence to this testimony which, in any event, is legally insufficient to overcome the conclusive evidence establishing the gifts' validity. Even if Alice had made the statement Kling thinks she made, it would show only that Alice engaged in a deliberative process before subsequently mailing the gift checks and writing the notes that accompanied them.[6]

[6] The checks were not mailed until November 30, 1998, the same date the notes are dated. (XV:A6021, 6024, 6027, 6030; I:A106a)

The note accompanying Graubard's bonus: A week after giving the gifts, Alice sent Graubard a bonus check with a cover note addressed to Chill. (XV:A6035) Dripping with sarcasm, the note stated: "I'm not sure just what I should be thanking the firm for (keeping me on as a client?)" (*Id.*) The Estate has suggested that this note somehow supports its claim as to the gifts.

To infer from Alice's sarcastic note regarding the firm's bonus that the gifts to the Attorneys were the result of undue influence is logic that borders on the backwards. In stark contrast to the sarcastic note accompanying the firm's bonus, the notes conveying the Attorneys' gifts were effusive, heartfelt, spontaneous, and sincere expressions of appreciation. Thus, if anything, Alice's note accompanying the firm's bonus further shows that Alice was willing and able to speak her mind openly, making the contrasting notes to the Attorneys—notes, in Judge Levine's words, of "spontaneity and sincerity" (I:A125a)—all the more compelling.

Thus, Alice's note with respect to the firm's bonus (as to which no claim of undue influence was ever made) does not give rise to any rational inference that the gifts to the Attorneys were not knowingly and voluntarily made. The only inference to be drawn from this evidence cuts precisely the other way.

The alleged Svengali effect: The Referee also expressly rejected as "not credible" the Estate's speculative theory that Chill exercised a "Svengali-like influence over Alice," accounting for her decisions both to make the gifts and

remain silent about them for seven years. (I:A127a, 155a) Based on the evidence, the Referee found it "highly improbable that Chill could have exerted Svengali-like influence over Alice to induce her to make the gifts," and "even less likely that Chill could have exerted such influence over her for seven continuous years," during which Alice continued to harass and abuse the Attorneys. (*Id.*)

In short, neither the factors cited by the Appellate Division, nor the other "evidence" adduced by the Estate and rejected by Judge Levine, provides a legally sufficient basis for invalidating the gifts—much less a basis to legally compel the trier of fact to reach that result, as the Appellate Division erroneously held.

E. At Minimum, Judge Levine As Trier Of Fact Was Entitled To Great Deference In Weighing The Evidence, And Was Clearly Not Legally *Required* To Find Undue Influence.

In the alternative, even if the facts do not *compel* a finding that the gifts were valid as a matter of law, they surely do not legally compel the *contrary* conclusion, for all of the reasons discussed above. Even if Judge Levine could permissibly have held that the gifts were unduly influenced—which he could not have—the evidence plainly did not *foreclose* him from reaching the contrary determination, which was fully supported by the record. Thus, even if the evidence was legally *sufficient* for a finding of undue influence, it clearly did not legally *compel* such a finding. Consequently, undue influence would have been *at worst* a question for the trier of fact to resolve—which Judge Levine did, in the Attorneys' favor.

That resolution was entitled to great deference. "[T]he decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses." *Thoreson v. Penthouse Int'l, Ltd.*, 80 N.Y.2d 490, 495 (1992). This Court cited *Penthouse* just weeks ago, reversing the Appellate Division for "instead substituting its own view of the trial evidence." *409-411 Sixth St., LLC v. Mogi*, 2013 N.Y. Slip Op. 06604, at *2 (N.Y. Oct. 10, 2013) (mem.). That deference is particularly warranted when the trier of fact is a Referee. "New York courts will look with favor upon a Referee's report, inasmuch as the Referee, as trier of fact, is considered to be in the best position to determine the issues presented." *Matter of Holy Spirit Ass'n v Tax Comm'n*, 81 A.D.2d 64, 70-71 (1st Dep't 1981). The Referee "see[s] and hear[s] the witnesses" and so is best positioned to "resolv[e] matters of credibility." *Poster v. Poster*, 4 A.D.3d 145, 145 (1st Dep't 2004). His report "should be confirmed whenever its findings are substantially supported by the record." *U.S. Trust Co. v. Olsen*, 194 A.D.2d 481, 482 (1st Dep't 1993). And all "reasonable inferences" drawn from the evidence are to be sustained, *Matter of Von Wiegen*, 101 A.D.2d 627, 628 (3d Dep't 1984), even if competing ones are "no less likely and no more speculative," *Clean Rental Servs., Inc. v. Karten*, 146 A.D.2d 462, 463 (1st Dep't 1989).

Consistent with this longstanding jurisprudence according great deference to Referees, the Appellate Division did not question any of Judge Levine's factual findings. To the contrary, the court cited *Clines* (XVII:A7394), which similarly held that a Referee will be reversed only if his conclusions "could not have been reached based upon any fair interpretation of the evidence." 226 A.D.2d at 269. Rather, the Appellate Division reversed Judge Levine's Report "as a matter of law" (XVII:A7388) and as legally "preclude[d]" (XVII:A7394). That was clear legal error, because even assuming *arguendo* that the evidence was legally *sufficient* to invalidate the gifts, it certainly did not *legally preclude* the contrary conclusion reached by the trier of fact—Judge Levine. And, of course, unless Judge Levine's Report was *legally* precluded, the Appellate Division could not and would not have reversed it, because that court cannot and does not simply "substitut[e] its own view of the trial evidence." *Mogi*, 2013 N.Y. Slip Op. 06604, at *2.

In short, however the issue is analyzed, the Appellate Division legally erred by invalidating the gifts, and its decision must be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision and order of the Appellate Division, and order that the Surrogate's Amended Decree be modified to dismiss the Estate's gift claim against the Attorneys.

Respectfully Submitted,

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