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.

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

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PRELIMINARY STATEMENT

I. Alice waited nearly seven years before seeking return of the gifts, and the continuous representation doctrine cannot save her. Tolling applies to claims alleging misconduct in the *provision of professional services*, as to which the client has no choice but to defer to the expert professional's ongoing handling of the same matter. Receipt of unsolicited, one-time gifts is not an act of representation, however, as the Estate *concedes*. Rather, it is indistinguishable from the receipt of fees, and tolling indisputably does not apply to fee-related disputes.

The Estate nevertheless blithely asserts that tolling is appropriate whenever a lawsuit would disrupt an attorney-client relationship. But that logic would extend tolling *indefinitely* to *all* claims by clients against lawyers, a result that this Court has repeatedly foresworn. The Estate also offers that the gifts were related, tangentially, to the estate litigation, in that they were given out of gratitude for the Attorneys' prior work. Again, however, that logic would encompass fee disputes, to which tolling does not apply. Ultimately, the fatal defect in the Estate's position is that *no case anywhere* has ever applied continuous representation tolling to a claimed wrongful act that does not itself entail the provision of professional services. The doctrine's policies would not be served by doing so. Any such dramatic change in law—effectively eliminating all limitations periods as to claims against attorneys—should be addressed to the Legislature, not this Court.

II. The record could not be clearer that Alice's gifts—(i) unsolicited checks, (ii) accompanied by heartfelt, handwritten notes (iii) by a domineering multimillionaire (iv) who had just been given her "freedom" (v) by lawyers who had spent fifteen years being abused by her, and (vi) which were followed by consultation with an independent advisor about gift taxes (which were paid) and (vii) not challenged until an unrelated fee dispute arose seven years later, at which point (viii) the donor contumaciously refused to be deposed (for which she was sanctioned)—were entirely volitional, purely voluntary, and thus perfectly valid. Judge Levine, the fact-finder whom the Estate concedes is entitled to deference, so found. Indeed, no other conclusion is rationally possible. At minimum, the record *permits* his conclusion. What, then, is the basis for rejecting it as a matter of law?

The Estate offers no viable legal basis and no supportable factual basis. Instead, it levels *ad hominem* attacks, cobbled together from discredited testimony, hearsay allegations never admitted into evidence, imaginary legal propositions for which the cases it cites do not stand, and facially inapposite cases it misrepresents as similar. Its brief is an attempt to lure the Court into a miscarriage of justice with a smear campaign against AV-rated Attorneys who collectively have practiced law for more than 100 years without a single blemish on their records. The Estate has to resort to such tactics because its position is devoid of facts, law, or equity. Left with nothing, the Estate "pounds the table." This Court should not fall for it.

ARGUMENT

I. THE ESTATE'S CLAIM FOR RETURN OF THE GIFTS WAS TIME-BARRED, BECAUSE THE CONTINUOUS REPRESENTATION TOLLING DOCTRINE DOES NOT APPLY.

The Estate does not dispute that Alice's gift claim was filed beyond the six-year limitations period applicable under CPLR § 213(1). It maintains, however, that the claim was timely because the continuous representation doctrine tolled the statute of limitations until Alice fired Graubard, nearly seven years after mailing unsolicited gifts to the Attorneys in 1998. (*See* Estate Br. 49-53.) Unsurprisingly, the Estate buries its terse analysis of this dispositive threshold issue, because both the doctrine and its logic cut so clearly against its unprecedented position.

As the Attorneys explained in their opening brief, continuous representation tolling applies only to claims alleging improper provision of professional services. As its name suggests, the rule governs claims challenging acts of *representation*, and only if those acts were part of a course of representation that was *continuous*. Tolling is appropriate in those limited circumstances, because clients cannot be expected to second-guess, midstream, the quality of *professional services* rendered by experts they hire to represent them. Moreover, before resorting to the courts, the client should be entitled to have the professional remedy the problem through further representation on the same matter; forcing the client to sue immediately would foreclose that preferable course. (*See* Attys. Br. 27-32.)

Neither the elements nor the purposes of the tolling doctrine are satisfied when the client's claim concerns her transactions *with* a professional—such as with respect to fees or a gift—as opposed to services rendered *by* the professional as part of representation of the client. As the Estate concedes, the professional does not represent the client *at all* in fee or gift transactions. The client is fully capable—indeed, is required by law—to oversee these collateral transactions and to timely object if anything is amiss. Moreover, since the alleged misconduct does not itself entail the rendition of professional services, there is nothing for the professional to remedy in a future, contemplated representation—and thus no reason to delay suit. Accordingly, no New York court has *ever* applied continuous representation tolling to a claim about a professional's fees or gifts, and *all* courts elsewhere have squarely rejected its application to such contexts.

Nonetheless, the Estate contends that the doctrine *does* apply to Alice's claim for return of the gifts she unsolicitedly gave the Attorneys. *First*, it contends that policy reasons support tolling. *Second*, it argues that tolling applies because the gifts were sufficiently "related" to the ongoing estate litigation. Both arguments prove far too much, and the few cases that the Estate cites do not support its position. In the end, there is no avoiding the fact that Alice's claim does not complain about any act of professional representation, and therefore that the continuous representation doctrine is simply inapposite.

There is thus no basis in this case to depart from the statutorily mandated six-year limitations period. Indeed, any departure from the statutory limitations period would be contrary to law, because the statute expressly states that "[n]o court shall extend the time limited by law for the commencement of an action." CPLR § 201. While this statutory directive does not extinguish well-established tolling doctrines such as continuous representation, its plain language does directly foreclose "court[s]" from "extending" limitations periods through new doctrines, particularly those based on policy arguments, like the Estate's, that are within the bailiwick of the Legislature. *See McCoy v. Feinman*, 99 N.Y.2d 295, 306 (2002).

A. Contrary to the Estate, Tolling Does Not Apply to *All* Claims by Clients Against Their Professionals, Only Those That Challenge the Rendition of Professional Services.

The Estate's principal argument is that policy reasons support tolling, as a suit by Alice against the Attorneys would have "disrupt[ed] the attorney-client relationship." (Estate Br. 50.) The Estate speculates that Alice may have "fe[lt] obliged to forbear from assuming an adversarial posture" against her lawyers. (*Id.*)

1. Continuous representation doctrine, however, plainly is not premised on the radical notion that, simply because lawsuits are disruptive, courts will waive statutory deadlines for clients, allowing them to litigate decades-old, stale disputes, with all of the attendant unfairness to defendants that statutes of limitations are specifically designed to prevent. If avoiding awkwardness in ongoing relationships

sufficed to eviscerate statutorily mandated limitations periods, then the judiciary would simply exempt *all* professional relationships—and, for that matter, all suits against employers or ongoing service providers—from the statute. But this Court has made clear that the potential disruption of ongoing professional relationships does *not* suffice to exempt clients or patients from statutory deadlines.

Rather, tolling applies only to a subset of client-professional disputes, *viz.*, disputes concerning the ongoing provision of professional services which the client is unable to competently monitor and which might well be remedied more efficaciously absent a lawsuit. For this reason, this Court has repeatedly, squarely held that "a continuing professional relationship" does *not* trigger tolling; there must be ongoing representation "as to the particular problems … that gave rise to plaintiff's … claims." *Williamson v. PricewaterhouseCoopers LLP*, 9 N.Y.3d 1, 11 (2007); *accord Shumsky v. Eisenstein*, 96 N.Y.2d 164, 167-68 (2001) ("continuing representation" must "pertai[n] specifically to the matter in which the attorney committed the alleged malpractice").

In contrast, the Estate's "avoiding disruption" policy argument would extend tolling to *any* claim by a client against a professional, since *any* such suit would disrupt the ongoing relationship. Again, this is obviously wrong because the law concededly does not extend tolling to many such disruptive lawsuits. On the Estate's expansive view, for example, tolling would apply to a claim alleging an

overbilling of fees, because the client would not want to upset the professional by complaining. That is not the law. *Woyciesjes v. Schering-Plough Corp.*, 151 A.D.2d 1014, 1014-15 (4th Dep't 1989) (rejecting "contentions that the continuous representation doctrine is applicable" to claim alleging that lawyer "improperly charged [client] a fee of 50%"); *Glavey v. Latzman*, No. 570379/03, 2003 WL 23095173, 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"); *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").

Likewise, if the Estate were correct, tolling would apply to a malpractice claim even after the underlying matter ends, so long as the professional continues to represent the client on an *unrelated* matter. After all, if there exists any ongoing relationship, a lawsuit would "disrup[t]" it, and the client may thus feel "obliged to forbear" from suing. (Estate Br. 50.) Again, however, that is manifestly not the law. *McCoy*, 99 N.Y.2d at 306 (no tolling based on "unrelated" representation).

For that matter, if the Estate's view of the doctrine's purposes were correct, tolling would equally apply to a claim that the professional rear-ended the client in a car accident, or that the client slipped on a wet floor in the professional's office. Those claims, too, would be disruptive. But nobody believes *that* is the law.

2. The doctrine's *genuine* rationales are the two that this Court has repeatedly articulated, which mandate its limited scope, and which the Estate just ignores. *First*, the doctrine's fundamental premise is "that a person seeking professional assistance … 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); *Glamm v. Allen*, 57 N.Y.2d 87, 93-94 (1982); *Shumsky*, 96 N.Y.2d at 167; *Williamson*, 9 N.Y.3d at 9. Accordingly, tolling applies only as to matters that the client "cannot be expected … to oversee or supervise," *Greene*, 56 N.Y.2d at 94, *i.e.*, to claims "arising from the rendition of professional services," *Booth v. Kriegel*, 36 A.D.3d 312, 314 (1st Dep't 2006).

Second, tolling is necessary because it would be "absurd" to require a client "to interrupt *corrective* efforts" by suing a professional who is actively trying to resolve the problem which would trigger the suit. *Borgia v. City of N.Y.*, 12 N.Y.2d 151, 156 (1962) (emphasis added). The professional is "best placed" to "identify and correct his or her malpractice," *McDermott v. Torre*, 56 N.Y.2d 399, 408 (1982); forcing the client to sue before the professional has a chance to do so would "jeopardize [the client's] pending case" and thus be counterproductive, *Glamm*, 57 N.Y.2d at 94. Accordingly, tolling applies only "where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim." *Williamson*, 9 N.Y.3d at 9-10.

As the Estate fails to dispute, neither of these rationales applies to a claim alleging wrongful acceptance of gifts given by a client to her lawyers. Acceptance of the gifts was not an act of professional representation or services, and so requiring Alice to sue within six years would not have unrealistically burdened her with the need to review the expert judgments of her professional advisors in the midst of their representation. To the contrary, more than any other person, Alice herself inherently and obviously would have known whether her gifts were induced by "undue influence." Nor would it have interrupted any "corrective efforts," *Borgia*, 12 N.Y.2d at 156, since Alice and her Attorneys did not contemplate any future "corrective or remedial services" as to the gifts, *Williamson*, 9 N.Y.3d at 11.

3. It is particularly ironic—indeed, comic—that the Estate tries to justify tolling on the grounds that Alice would have been too frightened of upsetting her attorneys to complain. The record is wholly to the contrary. As Judge Levine found, Alice "frequently verbally abused the Attorneys and threatened to fire them if they dared to not carry out her commands," even for "seven continuous years" after the gifts, and even as the estate litigation was ongoing. (I:A127a) And Alice had no difficulty switching lawyers midstream; she fired two firms before hiring Graubard, and later fired Graubard too. (VII:A1153-54, 1186-87; I:A321a) This is the *polar opposite* of a client who, for "psychological and emotional" reasons, cannot adopt an "adversarial posture" toward her attorneys. (*Cf.* Estate Br. 50.)

B. Because the Attorneys Never Represented Alice with Respect to the Gifts, Continuous Representation Doctrine Is Inapposite.

The essential prerequisite to continuous representation tolling is a claim of misconduct concerning *the manner in which professional services were rendered*. As to such a claim, the statute is tolled until the challenged representation ends. *Williamson*, 9 N.Y.3d at 9, 11; *McCoy*, 99 N.Y.2d at 306; *Shumsky*, 96 N.Y.2d at 167-68; *Booth*, 36 A.D.3d at 314. Here, the Estate *concedes* that the Attorneys "never represented" Alice "concerning the gifts." (Estate Br. 52.) Receipt of the gifts was thus not an act of legal representation. (*Accord* I:A135a ("[A]ccepting the gifts … did not occur in the course of … rendering legal services to Alice.").) Continuous representation tolling is therefore categorically inapposite.

The Estate responds that the gifts were allegedly given out of appreciation for prior service in the estate litigation and so were "sufficiently related" to that litigation to trigger tolling. (Estate Br. 51-53.) But the unalterable facts are that the challenged act—accepting the gifts—was not an act of legal services, and that no future services were contemplated as to the gifts. The test is not whether a disputed financial transaction *between* the client and professional is "related to" the professional representation *of* the client (as all such transactions inherently would be), but whether the complaint is *about* such representation. Consequently, no case *anywhere* has applied tolling to a complaint other than about professional services; doing so would upend the law for all professional-client relationships.

1. The error in the Estate's argument is most obviously illustrated by considering its consequences. If tolling applied to a gift claim simply because the gifts were supposedly given "in connection with" ongoing litigation (Estate Br. 51), then it would surely also apply to a claim alleging overbilling "in connection with" a pending matter. As shown, however, the law is unambiguously to the contrary, as the Estate conceded below. *Woyciesjes*, 151 A.D.2d at 1014-15; *Glavey*, 2003 WL 23095673, at *1; *Burns*, 143 P.3d at 636. Indeed, the account stated doctrine *requires* clients to timely raise any objections to attorneys' invoices. *Rodkinson v. Haecker*, 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). Plainly, then, the law does not excuse clients from pursuing fee-related suits until the end of the representation—yet that is precisely the result of the Estate's flawed logic.

2. The Estate's argument relies exclusively on *Greene*, but that case—like every other case applying continuous representation tolling—alleged improper "perform[ance of] legal services." 56 N.Y.2d at 95. Specifically, "the defendants performed legal services on the plaintiff's behalf by creating the trust and continued to act as her attorney in all legal matters relating to its administration." *Id.* This Court applied tolling to the claim that the lawyers breached their fiduciary duties in creating the trust, because both its creation and continuing administration

were "part of a course of continuous representation concerning the same or a *related problem*." *Id.* (emphasis added); *accord Borgia*, 12 N.Y.2d at 157 (tolling for malpractice claim where plaintiff is treated "for the same or related illnesses").

Seizing on the word "related," the Estate misleadingly suggests that *Greene* endorses tolling for disputes over acts other than provision of professional services, so long as they are "related" to such representation. But *Greene* says nothing of the sort. Rather, it applied tolling to a dispute over *representation* (*i.e.*, rendition of professional services), and the ongoing services "concern[ed] the same or related problem" as the services being challenged. It in no way suggests that a dispute concerning something *other* than legal services falls within the doctrine. *Greene* thus merely clarifies that tolling continues until the end of a representation concerning matters "related to" the disputed legal services, even if the ongoing representation is not for precisely the "same" services giving rise to the dispute.

For this reason, *Greene* (like every other case) *affirmatively precludes* the Estate's theory, because it confirms again that tolling applies only to complaints about the wrongful provision of legal services and only when there is *continuous* provision of such services concerning the specific matter complained of. Since Alice's gift claim did not challenge *any* provision of legal services, much less any *continuing* legal services related to the gifts, *Greene* clearly rejects the notion that Alice's complaints about the gifts can be tolled until 2005. Therefore, again, the

Estate cannot cite a single case in which continuous representation tolling applied to a claim that did not allege impropriety in the rendition of professional services.[1]

3. This is no doctrinal oversight. Tolling applies only to claims alleging wrongful provision of professional services because that is the only situation in which tolling is appropriate or needed. As explained, the doctrine's premise is that clients do not have the expertise to question their advisors' *professional* judgments. But the law does not allow clients to defer to their lawyers on collateral financial matters such as fees for services. To the contrary, it requires clients to exercise independent judgment on those matters, because they are able to and because they are obviously not relying on the attorney's *professional* judgment when deciding how much to pay (or give) him. This common-sense principle applies with even greater force to gifts than to fees. While it could plausibly be argued that some unsophisticated clients are not fully informed about how attorneys are typically compensated, persons who are mentally competent—which all agree Alice was (I:A122a)—are fully aware of whether the gifts they make are voluntary.

[1] The only gift claim that the Estate cites, *Armstrong v. Morrow*, 163 N.W. 179 (Wisc. 1917), did not involve a statute of limitations or continuous representation tolling at all. Rather, it considered whether a client's delay, where the record showed that undue influence continued until his death, constituted *laches*. *See id.* at 182. Of course, "[l]aches and limitations are not the same." *Saratoga Cnty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003). The former is an equitable defense that the *defendant* must prove by, among other things, showing prejudice. *Id.* By contrast, the *plaintiff* must prove tolling, *Gravel v. Cicola*, 297 A.D.2d 620, 621 (2d Dep't 2002), and entirely different elements apply.

4. The Estate correctly observes that continuous representation tolling is not limited to negligence claims. (Estate Br. 51.) The Attorneys never contended otherwise. As explained, the critical distinction is between claims that allege wrongdoing in providing professional services (which are subject to tolling while professional representation on the same matter continues) versus claims that do not. The former category *includes* malpractice claims, however styled, *e.g.*, *Luk Lamellen U. Kupplungbau GmbH v. Lerner*, 166 A.D.2d 505, 506 (2d Dep't 1990) (patent attorney "made an error in the preparation of the patent application," and client sued for both malpractice and breach of contract), but also extends to other claims complaining about the provision of professional services. *Greene*, for example, involved a claim that lawyers had acted unfaithfully in preparing a trust instrument on the client's behalf and had then mismanaged the trust assets, which had been "entrust[ed] … to [the] attorney[s] for professional assistance." 56 N.Y.2d at 94. Similarly, in *Schlanger v. Flaton*, 218 A.D.2d 597 (1st Dep't 1995), the defendant, "acting as counsel," had "engaged in protecting his own interests at the expense of [the client]" in rendering legal services. *Id.* at 599. These cases stand for the unremarkable proposition that tolling is proper not only for claims asserting *negligent* provision of legal services, but also those asserting *intentionally disloyal* provision of legal services. The common denominator is that the claimed misconduct entails the *provision of professional services*, which is not true here.

II. THE GIFTS WERE CLEARLY VALID, AND JUDGE LEVINE CERTAINLY DID NOT ERR BY SO FINDING.

As the Estate agrees, there is no dispute concerning the general standard for validity of a client gift: It must be knowing and free of undue influence. (Estate Br. 22-25.) As the Estate further agrees, the fact-finder was Judge Levine, and the reviewing courts were bound to accept his findings and credibility determinations unless contrary to the record. (Estate Br. 54-56.) Judge Levine, of course, *upheld* the gifts as knowing and voluntary, based on unassailable evidence. (I:A122a, 124a) He credited undisputed testimony that the gifts were not solicited (I:A119a) and found that Alice's contemporaneous, handwritten notes (reproduced below) were "manifestly sincere and genuine expressions of Alice's deep appreciation," leaving no doubt that the gifts were voluntary (I:A124a). Moreover, the gifts were quite unsurprising in light of (1) the enormity of the victory that the Attorneys had obtained for Alice after years of toil under demanding conditions, (2) her immense wealth, and (3) the seven-figure gifts she had given others. (I:A125a, 126a) Even absent these explanatory factors, it was "highly improbable" in light of Alice's "dominating, micromanaging, vituperative" personality that *anyone* could have exerted undue influence upon her (I:A109a, 125a). To top it off, Alice did not complain for nearly seven years after giving the gifts, despite continuing to abuse the Attorneys, confirming that her claim was not genuine, but merely a recent fabrication used as "a defensive litigation tactic," as Judge Levine said (I:A127a).

ALICE LAWRENCE

November 30, 1998

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

ALICE LAWRENCE

November 30, 1998

For Elaine -

My friend - w/ chickens'
Friend

All of us thank you!

Appreciatively -

Alice

ALICE LAWRENCE

November 30, 1998

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 all your unprecedented efforts - all these years.

Affectionately,

Alice

[XV:A6024, 6027, 6030]

To defend the reversal of Judge Levine's report, the Estate must show that no rational fact-finder could have reached the conclusions and inferences he drew. Yet, if anything, the *opposite* is true. No reasonable fact-finder could have reached any *other* conclusion. The notion that Alice Lawrence was unduly influenced to make multimillion dollar gifts against her will is, candidly, mind-boggling.

The Estate presses three sets of arguments in support of the reversal of Judge Levine. *First*, its primary argument is that there exists a "bright-line rule" that if an attorney accepts a gift without urging the client to seek independent advice, the gift is necessarily void as a matter of law. Every legal authority says the opposite, however—that the absence of such advice is *not* dispositive. Here, the Attorneys did not need to urge independent advice to prove that Alice acted voluntarily, because of the overwhelming, undisputed evidence and because Alice concededly *did* receive independent advice before ratifying the gifts. *Second*, the Estate points out that the gifts were large and that the Attorneys did not tell their law partners or Alice's children about the gifts. But the Estate cannot explain why those facts are even *relevant* to undue influence here; at minimum, they are not so compelling as to render Judge Levine's conclusions legally deficient. *Third*, the Estate raises, as alternative grounds for affirmance, allegations that not even the Appellate Division credited, because they are so divorced from reality, so clearly foreclosed by the record, and so at odds with Judge Levine's unimpeachable findings.

A. There Is No "Bright-Line Rule" That a Gift Was the Product of Undue Influence if the Lawyer Did Not Urge Independent Advice.

The Estate's lead argument is that Judge Levine made an error of law: that EC 5-5, which suggested as an "aspirational" matter that lawyers urge independent advice before accepting gifts, N.Y. Lawyer's Code of Prof'l Resp., Preliminary Statement (2007), somehow reflects a "bright-line" common law "requirement," and so invalidates the gifts as a *per se* matter. (Estate Br. 27, 28.) That suggestion is facially meritless and contradicted by all legal authorities. Judge Levine stated the law perfectly; it is the Estate (and Appellate Division) that are wrong.

1. The Estate never even attempts to explain why, if urging independent advice was truly a "bright-line rule," the legal ethics rules categorized it as merely "aspirational." Ethics rules would obviously not *permit* what common law *forbids*. Moreover, the Estate agrees that the legal standard for a gift's validity is whether it was given without undue influence. *Nesbit v. Lockman*, 34 N.Y. 167, 170 (1866). (Estate Br. 24.) The Estate's position is therefore that failure to urge independent advice is undue influence *per se*. Again, the ethics rules would obviously never tolerate undue influence on a client, yet they do not mandate urging such advice.[2]

[2] The Estate points to a Bar Association "comment" on the new Rules of Professional Conduct, which suggests that lawyers "should" urge independent advice before accepting gifts. But comments, which "use the term 'should,'" expressly "do not add obligations to the Rules." N.Y. Rules of Prof'l Conduct, Preamble [6] (2010). And the Rules chose to say *only* that lawyers "shall not" solicit gifts or prepare self-benefiting gift instruments, thus specifically *excluding* the aspirational suggestion of independent advice from former EC 5-5. *Id.* Rule 1.8(c).

2. The Estate nevertheless argues that New York caselaw supports its "bright-line" position. But all of the cases actually prove just the opposite. That is not surprising, because it is self-evident that gifts can be purely voluntary when the donor has not been advised to seek independent counsel.

a. Attorneys who draft wills that name themselves as beneficiaries violate a *mandatory* rule of professional ethics. N.Y. Rules of Prof'l Conduct 1.8(c)(2) ("A lawyer *shall not* … prepare on behalf of a client an instrument giving the lawyer … any gift ….") (emphasis added). Yet, under *Matter of Putnam*, 257 N.Y. 140 (1931), there is no "bright-line rule" invalidating even such unethical bequests. Rather, the attorney may always rebut an inference of undue influence with evidence showing voluntariness. *E.g.*, *Matter of Delorey*, 141 A.D.2d 540, 540-42 (2d Dep't 1988) (allowing attorney to prove validity of will he drafted naming himself "sole legatee" even though he "never advised [client] to have the will drawn by someone other than himself"); *accord Matter of Will of Smith*, 95 N.Y. 516, 523-24 (1884) (agreeing that no undue influence shown despite the lack of "independent advice"). If there is no "bright-line rule" of undue influence even when client gifts are *drafted by the attorney personally* and *in violation of* ethics *requirements*, then *a fortiori* there is no such rule when a gift is *unsolicited* and concededly *permitted* by ethics rules.

The Estate claims that testamentary gifts are different because the attorney does not bear the burden of proof. (Estate Br. 37-38.) But *Putnam* specifically held that a "lawyer who drafts himself a bequest" must "show in the first instance that the gift was freely and willingly made." 257 N.Y. at 143. Just as with an *inter vivos* gift, such a bequest creates an "inference of undue influence" that the lawyer bears the burden to rebut. *Matter of Henderson*, 80 N.Y.2d 388, 392 (1992). In both contexts, he manifestly may do so *even if no independent advice was urged*.

The Estate relies heavily on *Henderson*, but that case held only that a *hearing* on undue influence was needed where a supposedly independent counsel had drafted the will but allegedly merely followed a memo drafted by the attorney-beneficiary. *Id.* at 393-94. The case therefore cannot and does not hold that independent advice is a *sine qua non* of a valid gift. This is particularly obvious because—as shown—even when *no* other lawyers are involved in the drafting process, as in *Delorey*, there is *still* no bright-line rule against a gift.

b. Further confirming the point are disciplinary cases like *Matter of Buchyn*, 300 A.D.2d 739 (3d Dep't 2002), which found noncompliance with EC 5-5 yet did *not* find that undue influence had been exerted. *Id.* at 740-41 (attorney accepted assets from a "feeble" old woman without urging independent advice, but this "does not lead to the necessary conclusion that undue influence was exerted"). Failure to urge independent advice is thus clearly not undue influence *per se*.

Again, the Estate objects that, in disciplinary cases, the burden of proof "is reversed." (Estate Br. 32-33.) But the burden played no role in *Buchyn*, because it was *undisputed* that no independent advice had been suggested. The Estate also observes that rescission of the gifts was not at issue in *Buchyn*. (Estate Br. 33.) The point, however, is that the court found no *undue influence*, *see* 300 A.D.2d at 741, which is the applicable legal standard here. *Buchyn* thus refutes the Estate's argument that failure to provide independent advice equals undue influence.

c. The Estate cites three cases arising in the context of *inter vivos* gifts to attorneys. *In re Schneiderman*, 105 A.D.3d 602 (1st Dep't 2013); *Radin v. Opperman*, 64 A.D.2d 820 (4th Dep't 1978); *Reoux v. Reoux*, 3 A.D.2d 560 (3d Dep't 1957). But each case contradicts the Estate's position, because they all make clear that the presence or absence of urging independent advice is simply a *factor relevant to* undue influence, not a "bright-line" requirement.

Thus, in *Schneiderman*, there was "no evidence" that independent advice had been provided, yet the court said the question of undue influence was still a "triable issue of fact." 105 A.D.3d at 602. This scarcely shows that independent advice is an "essential requirement." (Estate Br. 36.) It shows the opposite: that urging such advice is a *factor* that could be useful, but is not dispositive, in *disproving* an inference of undue influence. Likewise, *Radin* and *Reoux* cited the failure to urge independent advice *among numerous other factors* leading to the

conclusion that gifts were unduly influenced. In *Radin*, the lawyer transferred money to himself from an octogenarian who later 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 "forgetful" client "confined in a nursing home," and misadvised her that she had promised to give him half her property. 3 A.D.2d at 562-64. If failure to urge independent advice were in itself dispositive, as the Estate claims, those courts would have had no need to address these other facts and circumstances.

d. Outrageously, the Estate cites the *Veneski/Cousins* saga, which does not even address the validity of a gift, much less hold independent counsel to be an indispensable prerequisite to such. There, the lawyer "charged a brain-damaged client over $500,000 more than the statutory maximum in attorney's fees." *Matter of Cousins*, 80 A.D.3d 99, 104 (1st Dep't 2010). After the court rejected the lawyer's belated motion to approve those fees, *see Veneski v. Queens-Long Island Med. Grp.*, 15 Misc.3d 1108(A), 2007 N.Y. Slip Op. 50544(U), at *6 (Sup. Ct. Jan. 30, 2007), the lawyer returned to court and "tried to disguise those fees as a gift," *Cousins*, 80 A.D.3d at 104. Needless to say, the court was not convinced: The lawyer had told the client that he "was 'owed'" the amount "as 'attorney's fees'"; the client initially so described the fees "on the memo line of the $454,000 check"; no circumstances existed that "would explain a gift of that

amount"; the lawyer had moved the court to approve the amount as fees; and, finally, the lawyer had taken no "precautions one would expect a lawyer to take when accepting a 'gift' of this magnitude from a client in circumstances such as this" (such as urging independent advice). *Id.* at 103. Far from invalidating a gift because of a lack of independent advice, the court held that the money paid by the client was not a gift, had never been intended as a gift, and that it was "incredible" that the lawyer "even sought to claim" the money was a gift. *Veneski v. Queens-Long Island Med. Grp.*, 18 Misc.3d 1118(A), 2007 WL 4754349, at *3 (Sup. Ct. Dec. 12, 2007).

3. Lacking caselaw, the Estate argues that secondary sources state its claimed bright-line rule. (Estate Br. 38-39.) They, too, say just the opposite.

American Jurisprudence calls independent advice just "a circumstance to be considered in determining whether the gift should be avoided because of undue influence or fraud." 38 Am. Jur. 2d *Gifts* § 33. It specifically observes, contrary to the Estate's position, that independent advice is *not* critical "where the beneficiary or donee presents substantial evidence that a gift was made in good faith and was not the result of undue influence." *Id.* "[I]ndependent advice to a donor *is not essential* to uphold a transfer." *Id.* at n.3 (emphasis added).

The *American Law Reports* explains that, "in the American jurisdictions, the attorney may … rebut the presumption of undue influence arising out of the

confidential relationship of attorney and client." 24 A.L.R.2d 1288, § 2. Along with factors including the donor's "mental weakness" and whether the gift would "impoverish" the donor, the donor's receipt of independent advice is simply a "factor" that may bear on the overall analysis—nothing more. *Id.*

As for the Restatement, it candidly admits that its rule is "stricter than the general law," as it "prohibits a lawyer from accepting a gift from a client … *even if the lawyer has not engaged in undue influence*." Restatement (3d) of the Law Governing Lawyers, § 127 cmt. a (2000) (emphasis added). That is not the law in New York; as the Estate agrees, undue influence is the test. (Estate Br. 24.)

4. Finally, the Estate cites cases from *other* jurisdictions. In fact, other states fully agree that while independent advice is a "consideration" in undue-influence inquiries, it is "not essential to uphold a transfer." *First Nat'l Bank v. Curran*, 206 N.W.2d 317, 323 (Iowa 1973); *accord Lindley v. Lindley*, 356 P.2d 455, 467-68 (N.M. 1960) ("We do not believe that every nontestamentary gift between persons in confidential relationship must automatically fail because of lack of independent advice. … We agree that the record here does contain substantial evidence to support the finding that there was in fact no undue influence in connection with these gifts, even conceding the lack of independent advice …."); *Israel v. Sommer*, 292 Mass. 113, 123 (1935) (holding that lawyer

may rebut "presumed influence" arising from attorney-client relation by showing "independent legal advice from another, or in some other manner").[3]

5. No "bright-line rule" exists because any such rule would make no sense. It is self-evident that a donor may give a perfectly voluntary and knowing gift whether or not she received, or was urged to receive, independent advice. In no meaningful sense can failure to urge such advice, standing alone, create "a moral coercion, which … constrained the [donor] to do that which was against [her] free will," *Children's Aid Soc'y v. Loveridge*, 70 N.Y. 387, 394 (1877). That is why, despite finding noncompliance with EC 5-5, Judge Levine *never* found that *any* of the Attorneys had violated *any* Disciplinary Rules or ethical requirements as to the gifts—the Estate's repeated innuendo notwithstanding—and instead found that they had been given voluntarily, not induced by undue influence.

[3] The cases cited by the Estate are inapposite and do not remotely support its "bright-line" test for competent donors like Alice. Several involved donors who were not *mentally competent* to give gifts or leave bequests. *E.g.*, *Reilly v. McAuliffe*, 331 Mass. 144, 147-48 (1954) (octogenerian "enfeebled by both age and disease" and on "strong dosage" of painkillers modified will days before her death, to disinherit relatives and leave bulk of estate to attorney; court concluded donor was not mentally competent, even though independent counsel *had* been involved); *Toomey v. Moore*, 213 Or. 422, 429-32 (1958) (donor "suffering from senile dementia" purported to "dives[t] herself … of the ownership and control of her modest home and comparatively meager resources"). In others, the donors did not *understand* the documents that they were signing. *E.g.*, *Webster v. Kelly*, 274 Mass. 564, 571-72 (1931) (donor "intended to give [lawyer] only an estate to take effect at her death," but on his proposal transferred the deed, which gave lawyer irrevocable "present vested title to the property"—a distinction that donor did not understand); *Marron v. Bowen*, 235 Iowa 108, 111, 114 (1944) (lawyer prepared deed that transferred donor's property to himself, and then "took it to her bedside and had her sign it"; donor subsequently deeded the same property to a "beloved cousin" and thus clearly "did not know the nature of [the] instrument" she had been told to sign). Of course, in this case neither Alice's mental competency nor her full understanding of the gifts has ever been in doubt.

The Estate argues, however, that a bright-line rule would be "preventive," *i.e.*, prophylactic. (Estate Br. 28.) But no rule of law or ethics requires attorneys to take all prophylactic steps in order to prove the absence of "undue influence." They are required simply to refrain from undue influence. Whether prophylactic preventive measures should be adopted (as Judge Levine suggested) is a question for the Legislature (as Judge Levine recognized), not a basis for retroactively imposing a crushing financial blow (XVII:A7408) on Attorneys who clearly adhered to the extant common law standard. (I:A128 n.12)

It would be particularly inappropriate to impose liability under the Estate's newly invented standard in this case, where the undisputed evidence showed that Alice "had extensive phone conversations" about the gifts with her principal advisor, Jay Wallberg, days after they were given, and "re-confirmed her intent to make the gifts" by signing and filing a gift tax return that she instructed Wallberg to prepare. (I:A126a, 124a) Even assuming *arguendo* that a gift somehow cannot be voluntary unless the donor receives third-party advice, that prophylactic standard has thus been satisfied here. Obviously, a gift is just as voluntary whether the third-party advice stems from the attorney's suggestion or the client's own actions. Thus, where, as here, a donor has *received* third-party advice, whether the attorney *urged* such advice is not even a factor cognizably affecting the voluntariness inquiry—yet the Estate would irrationally make it dispositive.

B. The Estate Fails To Explain Why the Gifts' Size, or the Attorneys' Non-Disclosure to Their Law Partners or to Alice's Children, Is Even *Probative* of Undue Influence.

Apart from the Attorneys' non-compliance with aspirational guidelines, the only other facts invoked by the Appellate Division were the size of the gifts and the Attorneys' decision not to discuss them with their law partners or with Alice's children. (XVII: A7394) The Estate defends the overturning of Judge Levine's report based on the supposed relevance of those facts. (Estate Br. 39-44.) Neither has *any* bearing on undue influence, much less enough to defeat the undisputed evidence of voluntariness and Judge Levine's findings to that effect.

1. Size. As Judge Levine found, the gifts' size reflected the significance to Alice of the victory the Attorneys had won on her behalf—not only $124 million to Alice and her family (VI: A671), but, more importantly, her "freedom" from the "whims" of her despised brother-in-law, who had controlled the properties owned by Sylvan's estate (I:A101a). (*See* I:A124a-125a) For a deeply appreciative client worth hundreds of millions of dollars who had just been given her "freedom" by lawyers who spent a combined four decades pursuing that goal, gifting them each a tiny percentage of her fortune (a fraction of 1% of her net worth) is hardly eyebrow-raising. That is particularly true given the seven-figure gifts she gave to others, like her doctor, business partner, and handyman (*see* I:A125a)—who, contrary to the Surrogate (Estate Br. 41), were *also* paid for their services.

The Estate does not dispute that the gifts were not particularly large relative to *Alice's* net worth—indeed, she died leaving an estate worth nearly $350 million (XV:A5899)—but objects that the gifts were too large relative "to the *Attorneys'* compensation." (Estate Br. 40 (emphasis added).) The Estate apparently seeks a *per se* rule under which a gift could be perfectly valid if given to a very wealthy attorney, but would be invalidated if given to lawyers of more modest means, like the Attorneys here. That is not only nonsensical—after all, the undue-influence inquiry is supposed to evaluate whether the *donor* acted voluntarily—but it also establishes an indefensibly preferential regime where common law standards are more lenient for the wealthiest 1% and more stringent for the average professional.

The Estate cites three cases for this perverse proposition. Unsurprisingly, none supports it. *Henderson* said only that a hearing should be held on undue influence, noting among other things that the donor left "some 47%" of her estate to her lawyer and his family, in the process "virtual[ly] exclu[ding] a natural object of [her] bounty." 80 N.Y.2d at 394 & n.2. By contrast, the gifts here "had only a minor impact on Alice's fortune" (I:A126a), as Judge Levine found *after* a lengthy hearing. The Estate also cites *Radin*—the case in which the lawyer transferred $29,000 from the client's account to his own, after which the client "notified the bank not to honor any withdrawals from his accounts unless he personally presented the bankbook," 64 A.D.2d at 820—but that case did not focus on the

transfers' size at all, much less on their size relative to the attorney's income. As for *Veneski*, it did not even *involve* a gift, as already explained, but was rather a transparent effort to recharacterize unlawful *fees* as a gift. *See supra* at 24-25.[4]

In short, there is no rule, case, or other legal authority that invalidates a gift to an attorney simply by reason of its size relative to the recipient's wealth. In this case, the gifts' size does not give rise to any suspicion, for the reasons persuasively explained by Judge Levine. The supposedly "extraordinary" size of the gifts thus provides no basis for any rational fact-finder to infer undue influence—and surely provides no basis for overturning the fact-finder's unimpeachable contrary finding.

2. "Secrecy." The Estate concedes that Alice openly discussed the gifts with her best friend (Kling) and her financial advisor (Wallberg). (Estate Br. 42.) The Estate further concedes that two of the Attorneys discussed the gifts with Wallberg or his associate as well. (Estate Br. 43.) Particularly given these undisputed facts, Judge Levine found that "[t]he evidence does not support any shroud of secrecy." (I:A127a n.11) Yet the Estate nonetheless argues that there was a "veil of secrecy" because the Attorneys did not boast about the gifts to their law firm partners or gossip about them to Alice's children. (Estate Br. 41.)

[4] The Restatement, which the Estate cites, specifically says that "the means of both the lawyer *and the client* must be considered." Restatement (3d) of the Law Governing Lawyers, § 127 cmt. f (2000) (emphasis added). Moreover, the Estate again fails to acknowledge that the Restatement—by its own admission—sets forth *its own* proposed rules for gifts, and does not restate the law of undue influence that all concede is applicable in New York. *Id.* cmt. a.

What the Estate never explains is *why* those facts have *any* relevance to the legal question at issue—namely, whether Alice had been unduly influenced. The Estate quotes the Surrogate's speculation that the gifts would have been "of great interest" to those third-parties. (Estate Br. 41 (quoting I:A111a).) Even if so, what does that have to do with Alice's state of mind when she gave the gifts? Likewise, the Estate speculates that the third parties might have "taken action of some sort." (Estate Br. 44.) Action of what sort? The Attorneys' law partners might have been resentful, but this has nothing whatsoever to do with whether Alice had given the gifts knowingly and voluntarily. As for Alice's children, when one of them did learn of the gifts, she did not even mention them to her mother; as she testified: "It wasn't my position to do so. She gave money to whom she gave money to. It's her money." (VII: A1530)[5]

In short, there is simply nothing to the Estate's illogical and counter-factual conjecture that the Attorneys would have told their firm or Alice's children about the gifts, but refrained from doing so to forestall some "investigation" which would somehow cause the famously domineering Alice to "admit" undue influence that she would not have otherwise revealed. And even if this ludicrous scenario could,

[5] The Estate also complains that Reich did not tell her husband about the gifts. (Estate Br. 12.) Reich testified that she maintains her own finances, separate and apart from her husband, and has done so for decades. (VII:A1301) The notion that a woman in the twenty-first century cannot be financially independent of her husband is noxious.

in isolation, somehow suggest that the Attorneys' "silence" implies a guilty cover-up, any such inference is irreconcilable with the undisputed fact that the Attorneys took affirmative steps which ensured that others did or could know about the "secret" gifts; *i.e.*, discussing them with Alice's closest advisor, Wallberg, and creating contemporaneous documentation of the gifts through personal "thank you" notes.[6] (VI:A895-96; XV:A6032-34) Finally, attributing the Attorneys' "silence" to guilty knowledge contradicts the *undisputed* testimony that their silence vis-a-vis others was directly attributable to Alice's own explicit instructions. (I:A115a)[7]

In a feeble effort to enhance the significance of not informing the children about the gifts, the Estate claims that the Referee found that the Attorneys "breached their fiduciary duties" to Alice's children by not doing so. (Estate Br. 16.) This is both a knowing falsehood and irrelevant. Actually, as the Estate well knows, Judge Levine found that "failure to disclose the gifts … did not create a conflict," because Alice's children had "completely abdicated their decision-

[6] The Estate says that the Attorneys did not technically *disclose* the gifts to Wallberg, because he "was already aware of the gifts" based on his discussions with Alice. (Estate Br. 43.) But the relevant points are that the Attorneys did not keep the gifts secret from Wallberg and knew Wallberg was aware of them. These facts establish that the Attorneys did not conceal the gifts from Alice's closest confidant, and that their failure to inform others could not have been intended to keep the gifts secret, since the Attorneys knew that Wallberg was aware of them.

[7] That undisputed testimony was also corroborated by other evidence. (*Cf.* Estate Br. 43.) The envelope transmitting the checks to Chill and addressed to him by name, handwritten by Alice, was atypically marked "personal" whereas she ordinarily sent mail to Graubard, marked to Chill's attention with no other notation. (XV:A6021-22) Further, Alice's son testified that she was a "very private person." (VII:A1238) And, of course, Alice could have disclosed the gifts herself, but did not—except when she chose to do so as a tactical weapon in this litigation.

making role in the litigation with Seymour" (I:A131a); and neither the Surrogate nor the Appellate Division disagreed. As such, the notion that disclosure of the gifts, notwithstanding Alice's request to the contrary, was "required by law" (Estate Br. 43), is ludicrous. In all events, as Judge Levine observed, any "possible breaches of fiduciary duty toward the Lawrence Children … is scant, if any, evidence of undue influence applied to Alice." (I:A127 n.11.)

Once again, the legal authorities cited by the Estate do not support its legal argument. They demonstrate only the indisputable point that obvious attempts to hide the exploitation of highly vulnerable clients from their close advisors bolsters suspicion about alleged gift transactions. *E.g.*, *Matter of Howland*, 9 A.D.2d 197, 199-200 (3d Dep't 1959) ("infirm and eccentric" elderly woman conveyed to her lawyer a home she had bequeathed to another, with conveyance prepared by lawyer's secretary's husband "in an automobile" and kept secret until "after [client's] death"); *In re Van Den Heuvel's Will*, 76 Misc. 137, 148-55 (Surr. Ct. 1912) (client suffering from "senile dementia" executed new will and drafter kept it "profoundly secret" until her death, including from client's personal lawyer); *McDonald v. Hewlett*, 102 Cal. App. 2d 680, 682-87 (1951) (client suffering from "large tumor" that "affected his vision and his brain" signed, "in a dazed stupor" at hospital, a document drafted by lawyer that gave lawyer control over his property;

lawyer then demanded $40,000 from client; when new lawyers sought return of money, lawyer did not claim it had been a gift "until after [client] died").

In all of these cases, disclosure before the donors' deaths would have led to investigation into whether the gifts had been knowing and voluntary (which they quite plainly were not), and so the donees' secrecy suggested an intent to conceal the dubious circumstances of the supposed gifts.[8] By contrast, in this case the gifts were memorialized by Alice's handwritten notes—as well as the Attorneys' own thank-you notes (*see* VI:A895-96; XV:A6032-34)—and they were clearly known to and understood by Alice (who wrote and sent them) and her closest advisor (who discussed them with her and two of the Attorneys). These undisputed facts are irreconcilable with any notion that the Attorneys tried to "hide" dubious gifts.

In short, *post hoc* non-disclosure of the gifts to Graubard or Alice's children has no bearing whatsoever on whether Alice gave the gifts voluntarily, as all of the evidence demonstrated that she did. It was therefore legal error for the Appellate Division to rely on such non-disclosure as preclusive of the gifts' validity—and doubly wrong to reverse Judge Levine based on this irrelevancy.

[8] The Estate also cites *Matter of David Gross*, Dkt. No. DRB-09-186 (Sup. Ct. N.J. Disciplinary Review Board Dec. 18, 2009), *modified*, 202 N.J. 39 (2010), but that case has nothing to do with whether a donor was unduly influenced. The issue there was whether a lawyer complied with his firm's policy on sharing gifts with the firm. The fact that the lawyer hid the gift from the firm, destroyed documentation regarding it, and lied about receiving it was evidence that he had knowingly violated the firm's policy; it had nothing to do with undue influence on the donor, which was not even an issue in the case.

C. The Estate's Alternative Grounds for Affirmance Are Meritless, Illogical, and Squarely Contrary to the Record.

The Appellate Division relied on only the three factors above—EC 5-5, the gifts' size, and "secrecy"—as legally preclusive of a valid gift. (XVII:A7394) Because, as shown, none of these facts requires that result, much less renders impermissible Judge Levine's contrary conclusion, the Appellate Division erred as a matter of law. Recognizing the deficiency of the decision below, the Estate offers that this Court could affirm on alternative grounds. (Estate Br. 44.) It then resorts to arguments so unsupported by logic or the record that not even the court below relied on them. This Court obviously should not do so either.

1. Knowledge of Gift Tax. The Estate suggests that this Court could affirm rejection of the gifts as insufficiently "knowing," because the Attorneys did not warn Alice about gift taxes. (App. Br. 44.) But no rule or case anywhere has ever required such unsolicited (and inherently conflicted and uninformed) tax advice; and none could have been given, as the Attorneys did not know the amounts of the gifts before receiving them. Anyway, Judge Levine found that Alice *was* aware of the gift tax, because she previously had (i) filed gift tax returns; (ii) paid substantial gift taxes; (iii) been explained the gift tax rules; and (iv) made financial decisions based on gift tax concerns. (I:A123a) The Surrogate identified testimony that Alice was unhappy about the tax's *size*. (I:A81a) Being unhappy about the *amount* of a tax, of course, hardly suggests ignorance that it is *owed*.

Furthermore, Judge Levine's *alternative* finding moots this issue. As the testimony showed and Judge Levine found, Wallberg "told Alice that if she did not want to pay the gift tax, she could claim that the transfers were bonus payments rather than gifts," which would "result in her not having to pay gift tax." (I:A123a) Yet, despite being given that option, *Alice paid the tax*, "re-confirm[ing] her intent to make the gifts to the Attorneys with a full understanding of the gift tax consequences." (I:A124a) So, whatever her knowledge when the gifts were made, it is undisputed that Alice had full understanding of the tax consequences when she reaffirmed her intention to treat the transfers as gifts and pay the gift tax thereon.

The Estate's only response to this dispositive, unchallenged factual finding is to say that a gift tax return is not conclusive proof of a gift's validity. (Estate Br. 46.) That may be true where (as in the Estate's cases) it is the lawyer-donee who arranges for the filing of the gift tax return on behalf of the mentally unstable or impressionable client. *E.g.*, *Cuthbert v. Heidsieck*, 364 S.W.2d 583, 587 (Mo. 1963) (gift tax return was "planned by defendant" and was "executed as a result of undue influence" over client who lacked "mental alertness"). But here, there is no dispute that Alice knowingly chose to report the gifts and pay the tax. Moreover, the Attorneys played no role in that process; it was *Wallberg* who, at Alice's own instruction, prepared and signed the gift tax return, "declar[ing]," on pain of perjury, "that the transfers to the Attorneys were *bona fide* gifts." (I:A127a)

2. Bonus to Graubard. The Estate quotes the Surrogate's statement, not relied upon by the Appellate Division, that the $400,000 bonus that Alice gave to Graubard at the same time as she gave gifts to the Attorneys suggests that the gifts had been extracted via pressure. (Estate Br. 46.) To the contrary, the bonus to the firm vividly *confirms* the voluntary nature of the gifts to the Attorneys. Alice's cover note that accompanied the firm's solicited bonus was sarcastic (XV:A6035), in stark contrast to the effusive, heartfelt notes of "spontaneity and sincerity" (I:A125a) that accompanied the gifts to the Attorneys. What this proves, of course, is that Alice was perfectly willing to speak her mind—making her notes to the Attorneys the incredibly compelling proof of voluntariness that Judge Levine found them to be. (I:A125a) There is no rational argument that the Graubard bonus supports any inference of undue influence as to the gifts.

3. Credibility. In a gross mischaracterization, the Estate tries to combat its lack of evidence by asserting that *the Attorneys* were "not credible." (Estate Br. 6, 47.) In fact, Judge Levine relied on the Attorneys' testimony throughout his report. (*E.g.*, I:A123a-127a, 131a, 132a, 138a, 140a, 141a, 154a, 155a, 171a, 177a, 180a-185a.) The *sole* exception as to the gifts was Chill's testimony that he told Alice to consult other counsel. (I:A117a)[9] But, despite rejecting this testimony,

[9] The Attorneys have already explained why Chill's testimony was actually perfectly credible. (*See* Attys. Br. 51 n.4.)

the Referee *still* concluded that Alice acted voluntarily. (I:A124a) Judge Levine's *own* credibility determinations obviously provide no basis to overturn *his* report.

4. Alleged Solicitation. The Estate *never* argued to the Referee, to the Surrogate, or to the Appellate Division that the gifts had been solicited. As Judge Levine noted: "[T]he Estate and the Lawrence Children do not claim that the Attorneys violated the no-solicitation requirement of EC 5-5 as to the gifts." (I:A119a) Nonetheless, its brief to this Court now poses just that argument as a question: "Were the Gifts Solicited?" (Estate Br. 47.) The answer is plainly no. Judge Levine squarely so found, noting that *all of the evidence* "corroborate[s] Chill's testimony that the gifts were not solicited." (I:A119a) That testimony was undisputed, and that finding—never challenged by the Estate—is now binding.

Consistent with its approach of relying on speculation and innuendo rather than the record evidence, the Estate submits that Alice's *complaint and affidavit* alleged solicitation. These documents and their self-serving hearsay allegations were never admitted into evidence at trial (V:A17-18) and have no probative value.

(continued…)

The Estate also cites an adverse credibility finding as to Mallis on an unrelated issue. (Estate Br. 17.) As the Estate is well aware, however, that finding is without factual foundation. At the hearing in this case, Mallis analyzed Judge Levine's December 2004 decision on the *95 Wall Street* matter. In his report, Judge Levine *sua sponte* found that Mallis's analysis at trial had been conceived only after the present litigation commenced. In fact, unbeknownst to Judge Levine, but known to the Estate, Mallis's analysis was set forth in an affidavit he submitted to the Surrogate on February 7, 2005, long before this litigation began. (XVII: A6797-6800)

Their presentation here is a backhanded way for the Estate to put before this Court a narrative that is not in evidence. Moreover, it is indisputable that this narrative is a brazen falsehood, which is precisely why the Attorneys sought for *two years* to take Alice's deposition—and also why she refused, to the day she died, to appear for deposition, thereby blocking cross-examination as to her knowingly false allegations. Judge Levine found Alice's two-year course of resisting deposition—replete with violations of court orders, frivolous motions, and lies to the court—to be "willful and contumacious" and sanctionable. (I:A234a) The Estate has never proffered any cogent explanation for Alice's vehement, no-holds-barred refusal to appear for deposition and does not do so before this Court either.

5. The Speculation that Alice's Notes Were "To Placate" Her Lawyers. The Estate speculates that Alice's handwritten notes can be explained away as just an effort "to placate her attorneys." (Estate Br. 54 n.98.) The same reasoning, it says, also explains why Alice did not complain to *anyone* about the gifts for nearly *seven years* after making them, until her fee dispute with Graubard. (Estate Br. 49.)

The Estate's argument is preposterous. The Estate cannot explain why Alice would have had to "placate" the Attorneys by sending heartfelt notes along with her gifts. Moreover, as Judge Levine found, the notes "speak in Alice's voice," as "manifestly sincere and genuine expressions of [her] deep appreciation." (I:A124a) Their authenticity was not challenged at trial. (I:A124a) Most

fundamentally, Alice felt no need to "placate" *anybody*, particularly her lawyers. The undisputed evidence, Judge Levine found, depicted Alice as "independent, tough, aggressive, [and] experienced in dealing with attorneys." (I:A153a) She often "terminated the services of many professionals … when she felt that they were not following her directions" (I:A109a). "The record is replete," said Judge Levine, "with examples of her dominating, micromanaging, vituperative behavior," and the Attorneys were no exception: Alice was "was tough and aggressive" and "[f]requently … would threaten to fire Graubard." (I:A109a) Even in the seven years *after* giving the gifts, Alice "frequently verbally abused the Attorneys and threatened to fire them if they dared to not carry out her commands." (I:A127a) Thus, it is sheer fantasy, devoid of record evidence, for the Estate to argue that Alice was unaware of, or afraid to mention, the Attorneys' supposed solicitation for seven years and, by coincidence, snapped out of this fugue state when she was sued for reneging on her fee agreement.

The record thus directly and powerfully refutes any notion that Alice held her tongue, or wrote grateful notes, out of some reluctance to upset the Attorneys. Realizing this, the Estate objects that the legal standard is not any "looser for clients who are domineering, mean and abusive." (Estate Br. 26.) To be sure, the standard, for all client gifts, is whether they were induced by undue influence. (*Accord* Estate Br. 24.) The obvious point, however, is that some clients are more

susceptible to undue influence than others. As such, every case addressing the validity of a client gift focuses closely on the client's mental and physical state and capacity to be swayed by others. Those that have invalidated gifts all involved vulnerable, highly impressionable clients. *E.g.*, *Snook v. Sullivan*, 53 A.D. 602, 605 (4th Dep't 1900) (client in "feeble health" and "easily became nervous and excitable over business transactions"); *Matter of Clines*, 226 A.D.2d 269, 270 (1st Dep't 1996) (client "diagnosed with Organic Brain Syndrome"); *Howland*, 9 A.D.2d at 199 (client "infirm and eccentric"); *Van Den Heuvel's Will*, 76 Misc. at 148-55 (client suffered from "senile dementia"); *McDonald*, 102 Cal. App. 2d at 682 (client suffered from "large tumor" that "affected his vision and his brain"); *Reoux*, 3 A.D.2d at 562-64 (client "forgetful" and "ill"). By contrast, where—as here—the client was known to be "strong-willed" and "not a person who could be manipulated," courts have rejected claims of undue influence. *Rudolf Nureyev Dance Found. v. Noureeva-Francois*, 7 F. Supp. 2d 402, 404 (S.D.N.Y. 1998).

6. Discredited Testimony and "Facts" Contrary to the Record. The Estate also relies on "facts" with no record support, often *specifically contrary* to those found by Judge Levine, such as testimony that he *expressly discredited*. As even the Estate agrees that Judge Levine's credibility findings were never questioned (Estate Br. 56), its use of this testimony is a blatantly improper effort to mislead this Court about the state of the factual record.

For example, the Estate says that Alice referred to Chill's "Svengali-like influence over her when she equivocated over paying the gift tax." (Estate Br. 12.) And the Estate claims that "one of the Attorneys" said that they had "got Alice to write" the handwritten notes accompanying the gifts. (Estate Br. 12.) Both these statements come from the testimony of Alice's advisor (and the co-executor of her estate), Jay Wallberg. (VIII:A1912-14, 1931-32) Noting his 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 rejected* Wallberg's testimony on these precise points as not credible. (I:A124a n.10, 155a, 156a n.21) That the Estate nevertheless continues to invoke them, without even acknowledging the never-overturned adverse credibility findings, is just another example of how it plays fast-and-loose with the facts, hoping to sufficiently smear the Attorneys so as to bias this Court against them.

The Estate also recites, as fact, that "[a]fter writing the gift checks, Alice expressed remorse to a close friend." (Estate Br. 12.) It cites a portion of the trial testimony by Alice's best friend and business partner, Barbara Kling, who stated that she "think[s]" Alice told her—*before* mailing the gifts—that she "didn't think that these checks were the right thing to do, but she did write them." (VIII:A2107) Yet, again, Judge Levine discredited Kling's testimony because of her clear bias: "Wallberg's testimony showed an interest in helping the Estate, *as did Kling's*."

(I:A156a n.21 (emphasis added)) Again, the Estate treats her testimony as fact, without even informing the Court of this adverse credibility finding.[10]

At least Kling and Wallberg testified. The Estate also relies on allegations made in Alice's *complaint*, to the effect that Chill came to her home and demanded bonuses. (Estate Br. 15.) Alice refused to be deposed about those allegations—"demonstrat[ing] a consistent pattern of deliberate, reasoned refusal to comply with disclosure orders" (I:A233a)—and the Estate never even tried to prove them. For good reason: All of the evidence showed that her allegations were baseless lies. (I:A119a) The Estate's effort to pass off these facially erroneous, unadmitted, hearsay allegations as facts is not only improper, but sanctionable.

* * *

The decision of a fact-finder—here, Judge Levine—"should not be disturbed upon appeal unless it is obvious that [his] conclusions could not [have] be[en] 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." *409-411 Sixth St., LLC v. Mogi*, 22 N.Y.3d 875, 876 (N.Y. 2013) (mem.). Yet, here, the *only* fair interpretation of the evidence leads directly to the

[10] To the extent that the Surrogate relied on discredited testimony of Kling and Wallberg, she did so not by reversing Judge Levine's credibility findings—as the Estate concedes (Estate Br. 56)—but rather on the patently erroneous premise that Judge Levine "did not make a finding to the effect that the witness's veracity or accuracy of recall were to be doubted." (I:A78a) The Attorneys pointed out the Surrogate's erroneous reading of Judge Levine's credibility findings to the Appellate Division, which did not rest on the discredited testimony.

precise conclusion that Judge Levine reached. Neither the factors relied upon by the Appellate Division, nor the other facts cited by the Estate, establish undue influence, certainly not as a matter of law, and are legally insufficient to overturn Judge Levine's findings.[11]

CONCLUSION

The decision below, if affirmed, would impose a massive injustice and severe financial hardship on Attorneys who did nothing to deserve it. It would also bestow on a fabulously wealthy estate an utterly undeserved windfall, adding to the miscarriage of justice that would ensue absent reversal. 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.

[11] *See* Karger, *The Powers of the New York Court of Appeals*, §§ 13.2, 13.3 (3d ed. 2005).

Respectfully Submitted,

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