RISK AND REWARDS: CONTINGENCY FEES IN SURROGATE'S COURT

New York Law Journal
September 22, 2015

Practices & Industries

Trusts & Estates

While most practitioners rarely worry about the contingency fee arrangements they have with their clients, Surrogate's Court practitioners should be aware of the potential vulnerabilities of such arrangements. The difference stems from the authority granted to Surrogates under the Surrogate Court Procedure Act's Section 2110 (SCPA 2110).

Under SCPA 2110, the Surrogate may, at any time, review the reasonableness of legal fees paid to an attorney. In assessing reasonableness, the Surrogate is required to consider the size of the estate, the professional standing of the attorney, the complexity of the issues involved, the results achieved, and the actual time spent performing the legal services. See *Matter of Potts*, 213 A.D. 59 (4th Dept. 1925), aff'd 15 N.Y.2d 588 (1925).

Even if the client executes a retainer agreement, the Surrogate is not bound to set legal fees based on that agreement. Rather, the Surrogate has the authority to fix fees based on quantum meruit (what an attorney has earned). Additionally, the Surrogate may review the agreement for unconscionability:

Given the courts' role in closely scrutinizing contingent fee agreements between attorneys and their clients, even if such an agreement is not determined to be unconscionable as of its inception, that is not the end of a court's analysis. [The] case law clearly provides that circumstances arising after contract formation can render a contingent fee agreement—not unconscionable when entered into—unenforceable where the amount of the fee, combined with the large percentage of the recovery it represents, seems disproportionate to the value of the services rendered. (internal citations omitted).

Lawrence v. Miller, 11 N.Y.3d 588 (2008). Notably, in the context of contingency fee agreements, the Surrogate's Court practitioner has another factor to consider—the risk involved with the representation.

Talbot Case

One example of the peril presented by contingency fee arrangements is found in *Matter of Jo D. Talbot*, 122 A.D.3d 867 (2d Dept. 2014), which serves as a good example of why Surrogate's Court practitioners cannot get too comfortable with contingent fee arrangements. In *Talbot*, the client signed a retainer agreement

providing that her attorney would receive one-third of the funds the client received from the estate. The client was the primary beneficiary of the estate and faced possible objections to the will she propounded.

The attorney settled the case with the potential objectants thereby securing estate funds for his client. Issue was never joined and no significant litigation occurred. Thereafter, the attorney was paid $585,000 from estate funds for his legal services pursuant to the contingency fee retainer. But the saga was not over. Two years later, the client commenced a proceeding pursuant to SCPA 2110 seeking to fix the legal fees in a lower amount.

The Surrogate found the original fee to be reasonable compensation for the legal services provided. In affirming, the Appellate Division, Second Department, found the attorney fees to be reasonable under the standard enumerated in *Potts*. Additionally, the Second Department noted that the attorney undertook the representation knowing there was a significant risk that the propounded will would not be granted probate.

Evaluating Risk

As the Talbot opinion makes clear, the element of risk must be evaluated by a court overseeing the enforcement of a contingency fee retainer agreement. Significantly, the issue of risk was also considered in detail by the Court of Appeals in *Lawrence v. Miller*, 24 N.Y.3d 320 (2014). The full facts of *Lawrence* are too voluminous to set forth in this article. Briefly, the attorneys and client entered into a 40 percent contingency fee retainer agreement after more than a decade of abiding by an hourly fee arrangement. Shortly after entering into the contingency fee agreement, the attorneys discovered documents devastating to their adversaries.

The litigation quickly settled for approximately $100 million, and the attorneys sought to collect their $40 million. Both the Surrogate's Court and the Second Department found the agreement to be unconscionable. The Surrogate's Court fixed fees based on the theory of quantum meruit, while the Second Department found the fees should have been fixed based on the hourly fee retainer agreement.

The Court of Appeals reversed and enforced the contingency fee agreement. In evaluating the unconscionability of the agreement, the court considered, inter alia, the risk undertaken by the attorneys and whether it was a good policy choice to invalidate a contingency fee arrangement:

In fact, the contingency system cannot work if lawyers do not sometimes get very lucrative fees, for that is what makes them willing to take the risk—a risk that often becomes reality—that they will do much work and earn nothing. If courts become too preoccupied with the ratio of fees to hours, contingency fee lawyers may run up hours to justify their fees, or may lose interest in getting the largest possible recoveries for their clients…unreasonably excessive fee[s] depend[] on a number of factors, primarily, the risk to the attorneys and the value of their services in proportion to the overall fee. Here [the law firm] undertook significant risk entering into a contingency fee arrangement with [the client]. The risk to an attorney in any retainer agreement is that the client may terminate it at any time, leaving the lawyer no cause of action for breach of contract but only the right to recover on quantum meruit for services previously rendered. This risk is amplified in the context of a client who frequently fires professionals (including attorneys), as the [client] had done in the past and threatened to do once again.

Lawrence, 24 N.Y.3d at 339-340 (internal citations omitted).

Accordingly, the new factor of risk has emerged as an additional element with which attorneys should be concerned if they make contingent fee arrangements. Risk will certainly be considered by a Surrogate, along with the other *Matter of Potts* factors, in fixing attorney fees and determining whether a contingency fee agreement should be enforced.