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Miscellaneous—Power of Appellate Division to Control Attorney's Contingent Fees

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and fifty cents per week for the child's support. The Department then sought to obtain the difference from the child's stepmother. The question in *Department of Welfare of The City of New York v. Siebel,*[39] is twofold. The first concerns the interpretation of Section 56-a, *i.e.,* whether the word "or," between "parents of the child" and "other person legally chargeable" was intended to mean only one or the other in the alternative, or was it intended in the conjunctive. The second is whether Section 101 of the Domestic Relations Court Act of the City of New York means that the liability of the defendant should be jointly secondarily liable with the mother and grandparents.[40] The Domestic Relations Court of the City of New York entered an order directing defendant to pay twenty dollars per month. This was reversed by the Appellate Division, which in turn was reversed by the Court of Appeals,

The words "and" and "or," when used in a statute may be synonymous. The substitution of one for the other is frequently resorted to in the interpretation of statutes when the evident intention of the legislature requires it.[41] It has already been held in a lower court decision that where the father cannot adequately support the children, the mother, if able, must help to do so.[42] The Court here followed the lead of *Wignall v. Wignall,*[43] holding that the word "or" must be construed to mean "and" to validate the intent of the legislature. The defendant was thus chargeable with the child's support where the father was only partly able to support the child.

As to whether defendant was secondarily liable with the mother and grandparents, or only liable after the aforementioned two, the Court held that the legislature intended the former.

Holding as it has, the Court gives effect to the obvious intention of the legislative branch to ease the burden on governmental welfare agencies by expanding actions for contribution from financially able members of the child's family. Whether they are such members by blood or by choice should not be significant in this matter, the relationship, however established, should control.

POWER OF APPELLATE DIVISION TO CONTROL ATTORNEY'S CONTINGENT FEES

Section 83 of the New York Judiciary Law provides: "That the Supreme Court shall have power and control over attorneys and counselors-at-law . . . and the Appellate Division . . . in each Department is authorized to censure, suspend from practice or remove . . . any attorney and counselor-at-law . . .

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of Welfare may investigate the parents of the child, or other persons legally chargeable to see if they are able to contribute in whole or in part the expense incurred by the City of New York for the maintenance of that child, and, if so, should institute a proceeding against them.

39. 6 N.Y.2d 536, 190 N.Y.S.2d 683 (1959).

40. Section 101 of the Domestic Relations Court Act of the City of New York sets out those who are legally liable for support. They are the father, and under certain conditions, the mother, grandparents, and stepparents.

41. People v. Rice, 138 N.Y. 151, 33 N.E. 846 (1893).

42. Wignall v. Wignall, 163 Misc. 910, 298 N.Y. Supp. 251 (Dom. Rel. Ct. 1937).

43. *Ibid.*

who is guilty of professional misconduct, malpractice, fraud, deceit, . . . or any conduct prejudicial to the administration of justice."

Section 90(2) provides: "A majority of the Justices of the Appellate Division in each Department, by order of such majority, shall have the power from time to time, to adopt, amend or rescind any Special rule for such Department *not inconsistent with any statute or rule of civil practice.*" (Emphasis added).

The question presented in *Gair v. Peck*,[44] was whether the above statutory provisions empowered the Appellate Division, First Department, to adopt its Rule 4 relating to contingent fee agreements,[45] or whether that Court was prohibited from doing so by Section 474 of the Judiciary Law, which states: that "compensation of an attorney or counselor-at-law is governed by agreement, . . . not restrained by law." The Third Department had affirmed a judgment declaring that the First Department had no power to adopt Rule 4.[46]

In reversing this determination the Court of Appeals held, (5-2), that the Rule was a valid exercise of the Appellate Division's supervisory power over the conduct of attorneys, under Sections 83 and 90(2).

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44. 6 N.Y.2d 97, 188 N.Y.S.2d 491 (1959).

45. The relevant portions of this rule are as follows:

Rule 4. Contingent Fees in Claims and Actions for Personal Injury and Wrongful Death.

(a) In any claim or action for personal injury or wrongful death, whether determined by judgment or settlement, in which the compensation of claimant's or plaintiff's attorneys is contingent, that is, dependent in whole or in part upon the amount of the recovery, the receipt, retention or sharing by such attorneys pursuant to agreement or otherwise, of compensation which is equal to or less than the fees scheduled below is deemed to be fair and reasonable. The receipt, retention or sharing of compensation which is in excess of such scheduled fees shall constitute the excavation of unreasonable and unconscionable compensation in violation of Canons 12 and 13 of the Canons of Professional Ethics of the New York State Bar Association unless authorized by a written order of the court as hereinafter provided.

(b) The following is the schedule of reasonable fees referred to above; either,

(1)

(A) Fifty per cent. on the first one thousand dollars of the sum recovered,

(B) Forty per cent. on the next two thousand dollars of the sum recovered,

(C) Thirty-five per cent. on the next twenty-two thousand dollars of the sum recovered,

(D) Twenty-five per cent. on any amount over twenty-five thousand dollars of the sum recovered; or;

(2)

A percentage not exceeding thirty-three and a third per cent. of the sum recovered, if the initial contractual arrangement between the client and the attorneys so provides, in which event the procedure hereinafter provided for making application for additional compensation because of extraordinary circumstances shall not apply.

[Subdivision (d) provides for the procedure in making application for additional compensation because of extraordinary circumstances which make the schedule set out in (b)-1 inadequate.]

46. 5 A.D.2d 303, 171 N.Y.S.2d 594 (3d Dep't 1958), *aff'g* 6 Misc. 2d 739, 165 N.Y.S.2d 247.

Both lower courts had read Rule 4 as purporting to alter the substantive law governing the attorney-client relationship, and as such, attempting to regulate an attorney's compensation in a manner conflicting with Section 474. The Court of Appeals stated that this conclusion follows from a fallacious construction of Rule 4. The Rule does not change the substantive law in regard to the attorney client relationship, but merely supplies the procedure for the Appellate Division to determine whether an attorney is subject to discipline for exacting unconscionable fees. The lower courts, and the dissent by Judge Burke, assume that the Rule prohibits retainer agreements, which are otherwise enforceable under Section 474, and threatens disciplinary action against lawyers who make such agreements. The Court states that the scope of the Rule is limited "to making provision for disciplining attorneys for receiving more from their clients than could legally be collected under retainer agreements, even with the aid of Section 474 of the Judiciary Law."[47]

Notwithstanding Section 474, the courts have traditionally exercised a power of supervision over fees, as to their reasonableness.[48] In doing so, the courts have branded as unconscionable, those contingent fee agreements which they have deemed exorbitant. While a 50% fee may not be unconscionable *per se*, the amount may be so large that a contract, fair in its inception, becomes unfair in its enforcement, and the lawyer's retention of the percentage is unjust.[49] It is in such situations that the court, in the past, has deemed fees to be unenforceable. Rule 4 reaches only fees thus censurable prior to its adoption, and provides a procedural scheme by which the Court may determine if the contingent agreement is *prima facie* censurable.

The essence of Rule 4 is that in cases where an attorney seeks to impose a contingent percentage that is in excess of the scheduled maximum, he must indicate in the retainer agreement his reasons for doing so, and that application will be made to the court after a recovery is had, to justify this excess percentage. This makes adequate provision for unusual circumstances which may arise. The Court indicates that the Appellate Division could require that all attorneys file a closing statement itemizing time spent on the case and enumerating all other elements of expense, and that such a rule would be within the power of the Appellate Division under the Judiciary Law.[50] However, it has chosen to dispense with this requirement where the fee is below the per-

47. *Supra* note 44 at 105, 188 N.Y.S.2d 496, 497.

48. Ward v. Orsini, 243 N.Y. 123, 152 N.E. 696 (1926); Morehouse v. Brooklyn Heights Ry. Co., 185 N.Y. 520, 78 N.E. 179 (1906); see also, In re Dresnick, 2 A.D.2d 521, 157 N.Y.S.2d 23 (1st Dep't 1956), where the Court upheld Rule 1-B of the First Department, which prescribed a standard of conduct directly affecting the compensation of attorneys. That Rule prevented an attorney assigned as counsel in a criminal case, from accepting compensation except as authorized by Court. This regulation was held to be within the rule making power of the Appellate Division under Section 90(2). For a general discussion of the power of the Appellate Division under Section 83 see People v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).

49. In re Friedman, 136 App. Div. 75, 121 N.Y. Supp. 426, *aff'd* 199 N.Y. 537, 92 N.E. 1085 (1910).

50. People v. Culkin, *supra* note 48.

centage scheduled, and only require additional information where the fee is in excess of the schedule. This is merely a procedure by which the attorney can justify his relations with his client, where the circumstances call for such justification.

Thus, Rule 4 calls for a determination regarding the attorneys conduct, after the services contracted for have been rendered, but before the fee is paid. The fee scheduled is merely presumptive of what is an unconscionable fee in an individual case since an attorney may come into court and justify a fee in excess of the stated maximum. The effect of this procedure is to make an *ad hoc* determination, after the services are rendered, whether this fee could be collected in an action between attorney and client.

In the interest of better facilitating its administrative function, in regard to the disciplining attorneys, the Appellate Division has chosen to remove from its consideration contingent fee arrangements which are within the standards imposed. In so doing, it has not only narrowed the scope of its supervisory powers, but has concentrated them on an area where the need for such supervision has been greatly felt.

The Appellate Division's finding that this Rule is inconsistent with Section 474, as attempting to regulate the attorney-client relationship, is met by interpreting Rule 4 as codifying, in effect, the supervisory power of the courts as to the reasonableness of fees, which existed prior to Rule 4 and notwithstanding Section 474. The argument that the Appellate Division lacks power to discipline attorneys except in the individual case and after the event is obviated by the Court of Appeals by showing that Rule 4 applies after the services are rendered, albeit before payment, and that an individual attorney has opportunity to justify his fee by showing facts that rebut the *prima facie* determination that the fee is unconscionable.

Judge Burke, in dissenting, would be persuaded by the conclusion reached by several bar associations in studies made concerning court regulation of contingent fees. He would adopt their conclusion, and hold that the Court had no power to regulate fees, absent permissive legislation on the subject.[51]

In viewing the majority contention as to the false assumption made in the lower courts, that Rule 4 threatened disciplinary action against attorneys who made agreements that were otherwise enforceable under Section 474, Judge Burke would hold this lower assumption to be valid. His reasoning here is that Rule 4 proscribes fees in excess of 33⅓%, while the courts have previously allowed 50% recoveries. This conclusion, however, appears to be lacking in logical support. The majority would not read Rule 4 as conclusively branding 50% fees as being unconscionable under all the circumstances, but merely presumptively so, and the analysis by the court in cases involving a fee in excess of the maximum would be subject to the same considerations

51. 31 NEW YORK STATE BAR ASS'N. REP. 121 (1908); 80 ASS'N OF BAR OF CITY NEW YORK No. 649 (1943); ANN. REP. ASS'N OF BAR OF CITY OF NEW YORK (1938) 295-296.

as were those under court scrutiny before Rule 4. This can hardly be viewed as a statement that all fees in excess of 33⅓% are proscribed, rather, they are allowable to the same extent as previously. If one accepts Judge Burke's analysis that Rule 4 does prohibit agreements otherwise enforcible under Section 474, his conclusion is inescapable. However, in view of the majority articulation of the procedural nature of the Rule, his conclusion is not justified.

Judge Froessel, also dissenting, would find the presumption of unconscionableness, regarding excessive fee arrangements, to be a prior restraint on an attorney's contractual freedom under Section 474. However, in so denouncing the Rule he in fact admits the point relied upon by the majority, that these percentages are no more than presumptions. He feels that "the case law under Section 474 of the Judiciary Law indicates that the function of the Court is to determine whether the facts surrounding the agreement in any given case show that the attorney took advantage of the confidential relationship and perpetrated a fraud upon his client."[52] Query: is this function any different than that which would occur under Rule 4? It is submitted that the result under Rule 4 is the same as the functional role of the court prior to its adoption. The Court has eliminated fees within prescribed limits from its consideration; as to those above these limits, the Court retains its prior supervisory control in all its vigor, and has provided more effective machinery to effectuate this functional role.

"If the consequence of the enforcement of this simple and practical rule be to reduce the number of lawyers who are charging unconscionable fees, that can furnish no basis on which to impugn the rule as a fee regulating measure. All regulation of improper practices has its consequences or should have in curtailing the practices. . . . The practice of charging unlawful fees is bound to be curtailed by the exercise of disciplinary powers, whether the fees are found to be unconscionable before or after they are paid."[53]

Thus, Rule 4 is viewed not as a fee regulating provision, but rather as a traditional exercise of the courts' power to make rules for the conduct of those who practice before it.

52. *Supra* note 44 at 124, 188 N.Y.S.2d 513.
53. *Supra* note 44 at 109, 110, 188 N.Y.S.2d 491, 500.