

# Does the Death of a Client Necessarily Terminate an Attorney-Client Relationship?

## *Introduction*

If a client dies before the attorney has completely performed his services for his client, will the attorney realize compensation for future legal services which he has rendered to his client? The subject of this comment concerns the question of termination of an attorney-client relationship by the death of the client. There are numerous concepts which can be used to decide the question. In this article we are particularly interested in the contracts an attorney and client may create that state an entire fee—a sum certain or a contingent fee—for doing the completed work.

## *The Impact of Agency Law Principles Upon the Continuation of an Attorney-Client Relationship*

The attorney-client relationship has often been described as one of agency<sup>1</sup> and therefore governed by rules attributable to the law of agency.<sup>2</sup> One of the basic tenets of agency law is that the agent's authority to transact business or manage affairs for his principal ceases upon the death of the principal, irrespective of whether or not the agent receives notice of the principal's death.<sup>3</sup> It follows

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1. Agency may be severely defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

2. See, e.g., *State ex rel. White v. Terte*, 293 S.W.2d 610, (Mo. App. 1956): "The general rule is that the relationship between an attorney and a client in a lawsuit is one of agency . . . ." cf. *Hoppe v. Klapperich*, 224 Minn. 224, 28 N.W.2d 780 (1947) at 791.

An attorney in the discharge of his professional duties is in a restricted sense, an agent of his client, but this agency is distinguishable from other agencies, in that the lawyer as a professional representative of his client is vested with certain powers and duties entirely different from and superior to those of an ordinary agent, and these powers and duties are derived not from the agency relationship with this client, but from his quasi-judicial status as an officer of the court, who is charged with a definite responsibility in the administration of justice in the interest of the public welfare.

*Id.*, 28 N.W.2d at 791.

3. W.E. SELL, AGENCY § 223 (1975).

that in those jurisdictions where the continuing existence of an attorney-client relationship is viewed as one governed by the principles of agency law, the death of an attorney's client immediately terminates that relationship.<sup>4</sup> In view of the fact that an attorney and a client will frequently enter into a written contract whereby the attorney is to receive either (1) a sum certain as payment for his representation of his client's interest in certain legal matters or litigation,<sup>5</sup> or (2) a percentage of any settlement or judgment which he may obtain from his client's opponent,<sup>6</sup> if the client should die before his attorney recovers a judgment or completes other legal business for the client, the attorney would, under the principles of pure agency law, necessarily fail to recover any percentage of the settlement or judgment or sum certain which he might have obtained under the agreement. Courts in a variety of jurisdictions have sought to mitigate the financial impact of such an occurrence upon the attorney's pocketbook by declaring that an attorney-client relationship is not dissolved by the client's death if the attorney can demonstrate either (1) that in representing his deceased client in a suit, he is acting as an officer of the court;<sup>7</sup> (2) that the client did not retain the control and direction of the attorney in the performance of his services;<sup>8</sup> (3) that his deceased client's personal representative ratified his continued representation of the decedent's estate in the management of decedent's cause;<sup>9</sup> or (4) that his power to act as agent for his client-principal is coupled with an interest.<sup>10</sup>

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4. *Rickenbaugh v. Asbury*, 28 Ala. App. 375, 185 So. 181 (1938); *Swartfager v. Wells*, 53 Cal. App. 2d 522, 128 P.2d 128 (1942); *Rundles v. Jones*, 3 Ind. 37 (1851).

5. F. B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 18-20 (1964).

6. *Id.*

7. *LeBaron v. Moni*, 53 R.I. 385, 167 A. 108 (1933).

8. *Coleman v. Durden*, 338 A.2d 570 (Del. 1975).

9. *Bergum v. Palmborg*, 239 Minn. 569, 58 N.W.2d 722 (1953).

10. *Vincent v. Vincent*, 16 Wash. App. 213, 554 P.2d 374 (1976).

The most widely quoted definition of a power coupled with an interest is that of chief Justice Marshall in *Hunt v. Rousmanier*, 21 U.S. 76, 89, 8 Wheat. 174, 203-04 (1823).

This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an 'interest,' it survives the person giving it, and may be executed after his death . . . . [W]hat is meant by the expression, 'a power coupled with an interest?' [Is it] an interest in the subject on which the power is to be exercised? or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be

*LesCarbeau v. Rodrigues*<sup>11</sup> offers a prime, and perhaps the sole example of the "officer of the court" exception to the general agency rule that the death of a client immediately terminates an attorney-client relationship. The Rhode Island Supreme Court upheld an attorney's authority to file a motion for dismissal of a claim against his deceased client's estate even though no administrator for the estate had been appointed and afforded an opportunity to ratify the attorney's actions, noting that "courts can pass upon questions raised and listen to suggestions as to their disposal from an attorney who is an officer of the court."<sup>12</sup>

The "direction and control of performance" exception to the agency rule that a client's death immediately terminates an existing attorney-client relationship appears most frequently in those cases in which a third party, who employs an attorney to defend a relative against criminal or civil charges or to defend a liability insurance policy holder against a suit for personal injuries, dies, and the attorney attempts to demonstrate to a court's satisfaction that he should be permitted to continue his defense of the relative of the third party or the policyholder. Thus, in the unusual case of *Rainey v. Lafayette*

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engrafted on an estate in the thing . . . 'A power coupled with an interest,' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot, in accurate law language, be said to be 'coupled' with it . . . The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid, if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him, by a conveyance in his own name. He is no longer substitute, acting in the place and name of another, but is a principal, acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded.

11. 109 R.I. 407, 286 A.2d 246 (1972).

12. *Id.*, 286 A.2d at 247.

*Loan & Trust Company*,<sup>13</sup> the widow of a murdered husband engaged the services of plaintiff-attorney Rainey to assist a local district attorney's office in the prosecution of her husband's accused killer "until the case was finished, until it was brought to a conclusion."<sup>14</sup> Rainey subsequently assisted the local district attorney in the prosecution of homicide charges against one Ryan, who had been accused of killing the widow's husband.<sup>15</sup> The Appellate Court of Indiana concluded that Rainey was entitled to receive compensation from the widow's estate for his fulfillment of the terms of the agreement between the widow and himself.<sup>16</sup>

The case in which Rainey was to act as an attorney was not . . . a case to be conducted in [the widow's] behalf; nor did she retain the direction and control of the performance of the [legal] services which, as stated, were to be performed for the state of Indiana. The character of the services was such that complete performance was possible without the presence or direction of [the widow]. It necessarily follows that her death did not terminate [Rainey's authority to represent her interests in the state's prosecution of Ryan], and that the trial court erred in limiting Rainey's recovery to that part of his account representing services rendered prior to [the widow's] death.<sup>17</sup>

Again, in *Coleman v. Durden*,<sup>18</sup> an insurance company retained an attorney to represent one of its policyholders in an action against the policyholder by an injured plaintiff. It was held that the policyholder's death before his liability to plaintiff was adjudicated did not extinguish the relationship of attorney and client between the attorney and the deceased policyholder since the policyholder-client did not retain the "control and direction of the attorney in the performance of his services . . . ."<sup>19</sup> The attorney, therefore, had authority to file an appeal from an adverse judgment against deceased insured.<sup>20</sup>

The "ratification exception" to the general agency rule that the death of a client automatically terminates an attorney-client relationship is usually invoked when an attorney's client dies during the attorney's trial or appellate prosecution of the client's cause and the

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13. 92 Ind. App. 344, 172 N.E. 128 (1930).

14. *Id.*

15. *Id.*

16. *Id.*, 172 N.E. at 129.

17. *Id.*, 172 N.E. at 129.

18. 338 A.2d 570 (Del. 1975).

19. *Id.*

20. *Id.*, 338 A.2d at 571.



client's personal representative expressly or impliedly permits decedent's counsel to continue to represent the interests of the decedent's estate in the prosecution of the deceased's cause. *Bergum v. Pulmborg*<sup>21</sup> is fairly representative of this exception. Defendant had been granted a judgment notwithstanding the verdict.<sup>22</sup> Thereafter, plaintiff served a notice of appeal upon defendant's counsel before discovering that defendant had died before such service was perfected.<sup>23</sup> Defendant's executrix was substituted for defendant in the appeal of plaintiff's suit and she, in turn, retained one of her husband's attorneys to defend his estate.<sup>24</sup> Counsel for the executrix then petitioned the Minnesota Supreme Court for an extension of time in which to file his answering brief on behalf of his deceased client's estate.<sup>25</sup> The petition was denied, but executrix's counsel proceeded to serve upon plaintiff's attorneys a motion to dismiss plaintiff's appeal to the Minnesota Supreme Court on the ground that the court lacked jurisdiction to hear the appeal, alleging that defendant's executrix had never been served with the plaintiff's notice of appeal; that defendant's death had extinguished the authority of his counsel to act on behalf of his estate; that plaintiff's service of notice of appeal upon defendant's counsel was an ineffectual notice of appeal to defendant's executrix because counsel for the executrix became eligible for service of the notice only after defendant's executrix had been substituted for defendant in the instant suit; and that counsel for the executrix had never been served with notice of plaintiff's appeal after he had been employed by the executrix to represent her decedent's estate on plaintiff's appeal.<sup>26</sup>

The Minnesota Supreme Court denied defendant's motion to dismiss stating that the executrix, in directing her attorney to prepare an appellate brief for defendant's estate and to petition the court for an extension of time in which to file this brief with the court, had ratified the previous action taken by defendant's counsel in representing the defendant and had elected to permit defendant's counsel to continue to represent the deceased defendant's estate on

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21. 239 Minn. 569, 58 N.W.2d 722 (1953).

22. *Id.*, 58 N.W.2d at 722.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

plaintiff's appeal from a judgment for defendant.<sup>27</sup> The filing of the appellate brief and the petition for an extension of time in which to file it with the court were not "consistent with defendant's present contention that no proper service of the notice of appeal had been made."<sup>28</sup> The executrix's instructions to her counsel and his compliance therewith "constituted an adoption and ratification of the services and the work performed in her name for the appeal, even though she had not given specific approval of the service [of appeal by plaintiff upon the deceased's attorney]."<sup>29</sup> It followed that the plaintiff's service of notice of appeal on defendant's attorney after the death of defendant was sufficient notice to defendant's estate to require the estate to represent his interests on plaintiff's appeal of a judgment adverse to plaintiff, and that the executrix's ratification of decedent's counsel's prior representation of defendant effectively rebutted the presumption that defendant's attorney had no authority to accept service of the notice of appeal for defendant for his estate after his death.

The "power coupled with an interest" exception to the general agency rule that the death of a client automatically terminates a previously existing attorney-client relationship usually appears as a correlative in court decisions which have concluded that an attorney did *not* have a sufficient interest in his client's case to prevent the demise of his client from terminating the attorney-client relationship between them. One of the more lucid explanations of this exception may be found in *O'Connell v. Superior Court in and for the City and County of San Francisco*,<sup>30</sup> wherein it was noted that:

The decisions agree that for a power [of an attorney to represent his client in certain matters] to be coupled with an interest, so as to be irrevocable, there must be a specific, present, and co-existing interest in the subject of the power or agency . . . . [T]he interest which the attorney in fact must have in the subject of the power in order to render the power irrevocable is such a beneficial interest in the thing itself, apart from the proceeds, that if the power were revoked he would be deprived of a substantial right. In other words, the relation of the attorney in fact to the subject matter must be such that a revocation of the power would be inequitable.<sup>31</sup>

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27. *Id.*, 58 N.W.2d at 723.

28. *Id.*

29. *Id.*

30. 2 Cal. 2d 418, 41 P.2d 334 (1935).

31. *Id.*, 41 P.2d at 335-36.

The California Supreme Court in *O'Connell* concluded, however, that such a power and "beneficial interest" did not coexist so as to prevent a client from rescinding his attorney's authority to prosecute his claim where the written contract of employment entered into between the client and the attorney provided (1) that the attorney was to receive one-half "of all that he may collect or recover by suit or compromise,"<sup>32</sup> and (2) that the client would assign one-half of his interest in certain lands to the attorney as compensation for his prosecution of the claim.<sup>33</sup> The court observed that such a clause, instead of creating an interest in the subject matter of the agency or power, merely gave the attorney an interest in the potential proceeds arising from the subject matter as compensation for the discharge of that agency or power. Since the attorney would not be entitled to any interest in the proceeds until he had completed his obligations to the client, thereby exhausting the agency or power, it would be impossible for the "interest" and the agency or power to coexist.<sup>34</sup>

In *Villhauer v. City of Toledo*,<sup>35</sup> John Villhauer, represented by attorneys Dodge and Raymond, recovered a judgment against defendant city for damages incurred in changing the grade of a street abutting Villhauer's property.<sup>36</sup> Villhauer died after the judgement had been appealed and before it had been affirmed in his favor.<sup>37</sup> After affirmance of the judgment, Dodge and Raymond authorized the city to pay the amount of the judgment to Raymond.<sup>38</sup> Plaintiff, as administratrix of Villhauer's estate, brought suit to recover from defendant the amount it had paid over to Raymond in satisfaction of the judgment on the theory that her husband's death terminated the authority of Dodge and Raymond to defend his judgment and "that any payment thereafter made by the defendant to Dodge and Raymond was unauthorized and would not bind the plaintiff . . . ." <sup>39</sup> Plaintiff was permitted to recover only that portion of the judgment which was in excess of the contract price which Villhauer had agreed that Dodge and Raymond should receive as compensa-

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32. *Id.*, 41 P.2d at 335.

33. *Id.*

34. *Id.*, 41 P.2d at 336.

35. 5 Ohio Dec. 8, 32 Cin. L. Bul. 154 (1894).

36. *Id.* at 9, 32 Cin. L. Bul. at 154.

37. *Id.*

38. *Id.*

39. *Id.* at 9, 32 Cin. L. Bul. at 155.

tion for their efforts to recover a judgment for Villhauer. Although they had no authority as agents of their client to collect the judgment on his behalf, after his death they retained a right to receive compensation for legal services which they had previously conferred upon Villhauer by virtue of the contract of compensation entered into by Villhauer and Dodge and Raymond.<sup>40</sup> The court specifically rejected the idea that Dodge and Raymond, as Villhauer's attorneys, had a power to accept the judgment on behalf of their deceased client and collect their legal fees from it on the grounds that this power was coupled with an interest in either the subject matter of Villhauer's suit or in the judgment itself.<sup>41</sup>

No interest was assigned to them [*i.e.*, Dodge and Raymond], either in the claim which they were employed to prosecute or in the judgment that was recovered; and the contract of employment being simply a stipulation as to the compensation which they should receive for their services, cannot be regarded as amounting to an equitable assignment either of the claim or of the judgment. Their compensation was not payable upon the simple recovery of the judgment, but only when the judgment or some part of it should be paid, and their interest was only in the proceeds or avails of the judgment; and if they collected the judgment, these proceeds or avails could only be recognized through the exercise by them of their authority as attorneys. Dodge [and] Raymond could not act in their own names in collecting . . . or . . . discharging the judgment. They could only act as attorneys for Villhauer during his life, or . . . for his legal representative after his death. They had no interest [in the suit or judgment] which they could assert in their own names . . . .<sup>42</sup>

Insofar as the concept of a "power coupled with an interest" has been forwarded by attorneys in attempts to defeat judicial imposition of the agency rule that a client's death instantly terminates an attorney-client relationship, *Lewis v. Canadian Pacific Railway*<sup>43</sup> is fairly representative of the lack of judicial favor with which this exception has been greeted in American courts. Plaintiff-attorney Lewis had been engaged by Braun to recover from defendant Canadian Pacific Railway Company certain shares of stocks and accumu-

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40. *Id.* at 12, 32 Cin. L. Bul. at 157.

41. *Id.* at 13, 32 Cin. L. Bul. at 156, 157.

42. *Id.* at 12, 32 Cin. L. Bul. at 156.

43. 39 F.2d 834 (7th Cir. 1930).



lated interest and dividends thereon that had been impounded by the Canadian government during World War I. Braun and his wife executed a written agreement with Lewis which stated that Lewis would serve Braun as his attorney "for the purpose of having [Braun's shares of defendant's outstanding stock and interest and dividends accumulated thereon] and transferred [to Braun] . . . such other steps as [were] necessary to put the property in [Braun's] name."<sup>44</sup> If Braun died before the shares, dividends, and interest were paid over to him, then Lewis was "to take such course and action with the shares and money as [Braun's] will would provide or any directions [Braun might] have given to [his] wife or any other person in writing as to [his] property."<sup>45</sup> Lewis subsequently filed suit against defendant naming Mrs. Braun as coplaintiff with himself to compel the transfer of Braun's shares of Canadian Pacific stock and the payment of accrued interest and dividends thereon to Braun's wife, who had been appointed administratrix of Braun's estate upon his death. Braun had left no directions as to the disposition of the shares, dividends, and interest in the event that he died before they were resolved.<sup>46</sup> Mrs. Braun appeared specifically before the court trying the claim to request that her name be stricken as a coplaintiff from Lewis' complaint, stating that she had not, as administratrix or individually, authorized or ratified Lewis' suit.<sup>47</sup> The United States Court of Appeals for the Seventh Circuit upheld the district court's decision both to grant Mrs. Braun's request and to dismiss Lewis' complaint:<sup>48</sup>

[I]f Braun left no directions by will or other writing [as to the disposition of the shares and dividends thereon if recovered after his death], then there was no authority to act after his death, unless the written agreement [authorizing Lewis to act as Braun's attorney] conveyed or granted to Lewis some interest in the subject matter [of the suit]. We think it conveyed no such interest. There is no granting or conveying clause, so far as Mr. Lewis is concerned . . . . [T]he matter of fees and payment for services of Mr. Lewis was to be arranged at some proper time in the future.

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44. *Id.* at 835-36.

45. *Id.* at 836.

46. *Id.* at 836, 838.

47. *Id.* at 836.

48. *Id.* at 839.

. . . [Mrs. Braun] had no interest whatever in the shares of stock or dividends, and, if the authority granted by her to Lewis is to be measured by her interest therein, she gave none.<sup>49</sup>

The attorney-client relationship is not governed solely by principles of agency law but is dependent in large measure for its continuing efficacy upon contract law principles. Most courts have permitted an attorney whose client has died in the course of litigation to recover as compensation for legal services which he has previously conferred upon the client an amount equal to that specified in the contract of employment or an amount corresponding to the reasonable value of the legal services which he has bestowed upon his client up to the time of the latter's demise.<sup>50</sup>

For example, in a subsequent action brought by the above-discussed attorney Lewis before the Illinois Supreme Court, *Lewis v. Braun*,<sup>51</sup> Lewis argued for an equitable lien in his favor upon the stock certificates in question in the previous suits as compensation for his efforts and time spent fulfilling his side of the employment contract. The Illinois Supreme Court disagreed with the reasoning employed by the federal court in the earlier decision, and held that Lewis was entitled to the requested lien in order to effectuate the payment of his contractual fees. Instead of analyzing the "power coupled with an interest" rule the court looked to the exact terms of the contract, and how the terms dealt with the contingency of Braun's death. In so doing it was noted that the Seventh Circuit's opinion in *Lewis v. Canadian Pacific Railway* was premised upon the erroneous assumption that the contract terminated at Braun's death.<sup>52</sup>

By looking to the actual terms of the contract, it was apparent to the Illinois Supreme Court that Lewis had the right and duty to continue in such manner as "in his judgement is best" for "the collection of money or the transfer of shares" after Braun's death. Therefore, the entire discussion as regards the "power coupled with an interest" was irrelevant.<sup>53</sup> Having met the requirements for the

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49. *Id.* at 838.

50. This writer has uncovered no case in which a court saw fit to deny an attorney *any* compensation for his prior representation of his deceased client's interests or those of his estate.

51. 356 Ill. 467, 191 N.E. 56 (1934).

52. *Id.* at 475, 191 N.E. at 59.

53. *Id.*, 191 N.E. at 60.

creation of an equitable lien (attorney and client entering into a contract for a contingent fee imposed upon the recovery of certain money or things; a lien attaches to the res of the agreement for the attorney's compensation for services rendered),<sup>54</sup> Lewis was entitled to a judicial decree of his interest in the Canadian Railway Stock.

These two cases offer an excellent example of how different courts can approach an identical set of facts, using separate and distinct analytical tools, and reach opposite results.

Typical of those cases permitting an attorney to recover the total contractual sum specified in his employment or compensation contract as payment for legal services which he has performed for his client before the client's death is *Wylie v. Coxe*.<sup>55</sup> The United States Supreme Court in *Wylie* concluded that an attorney who had contracted with a relative of a deceased client to prosecute the client's claim for remuneration for property losses he sustained at the hands of the Mexican government during the Mexican-American War was entitled to receive compensation equal to five percent of the recovery which he secured for his client from the client's estate—the compensation having been previously agreed upon by the relative and the attorney in a contingent fee contract—even though the client had died before the attorney had secured indemnification for the client's property losses.<sup>56</sup> In so holding, the Court noted that the deceased client's administrator had no power to annul the contingent fee contract entered into between the relative of the client, acting as agent for the now deceased client, and the attorney if the contract was bona fide and if the attorney had faithfully fulfilled his obligation under the contract.<sup>57</sup>

Some courts have permitted an attorney to recover from a deceased client's estate an amount specified in a contract as compensation for legal services which he has previously rendered the client only upon a finding that the contract by its terms provided that the attorney was to conduct his client's suit to final judgment or that the attorney would be compensated only for the management of his client's entire case,<sup>58</sup> that the contract was not personal in nature,<sup>59</sup>

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54. *Id.* at 480, 191 N.E. at 62.

55. 56 U.S. (15 How.) 415 (1853).

56. *Id.* at 418-19.

57. *Id.* at 419.

58. *See, e.g., In re Lanza's Estate*, 229 Cal. App. 2d 720, 40 Cal. Rptr. 528 (1964).

59. *See, e.g., Spurr v. Pryor & Stokes*, 104 Okla. 68, 230 P. 267 (1924).

or that the terms of the contract had been so substantially performed<sup>60</sup> that it could not be dissolved by the death of the client.<sup>61</sup> In *In re Lanza's Estate*,<sup>62</sup> an attorney contracted with Lanza to provide the latter with all tax services which he might require, including advice on tax planning vis-a-vis employment contracts and preparation of tax returns, and legal representation in any tax-related litigation involving Lanza.<sup>63</sup> The attorney's fees for such services were fixed at two and one-half percent of all monies earned by Lanza under contracts of employment in existence at the time of the agreement between Lanza and the attorney or which would subsequently be entered into by Lanza.<sup>64</sup> This agreement was to remain in force until terminated by either party after sixty days written notice.<sup>65</sup> Although the California Court of Appeals ruled that the contract required "personal cooperation on the part of the client" and was thus terminated as a matter of law by the client's death,<sup>66</sup> it observed:

As a general rule the authority of an attorney to act for his client normally ends with the client's death . . . an exception to this rule is where the attorney has entered into a special contract of employment, such as a specific contract to conduct a suit to final judgment, or an agreement on a fee for the entire case.<sup>67</sup>

Although, in general, "a contractual obligation survives the death of the obligor,"<sup>68</sup> if substantial performance of the terms of a contract cannot be realized absent the continuing physical presence

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60. "When a contract has been made for an agreed exchange of two performances, one of which is to be rendered first, the rendition of this one substantially in full is a constructive condition precedent to the duty of the other party to render his part of the exchange." If the constructive condition precedent has been satisfied by the first party, the second party is immediately obligated to render his performance under the terms of the contract. A court may award a party who has substantially performed his promises under a contract the full contract price as payment for his performance of his contractual promises less damages for his failure to render the complete and perfect performance contemplated by the terms of the contract. A. CORBIN, CORBIN ON CONTRACTS 700-01 (1952).

61. See, e.g., *In re Levine's Estate*, 247 App. Div. 19, 286 N.Y.S. 513 (1936).

62. 229 Cal. App. 2d 720, 40 Cal. Rptr. 528 (1964).

63. *Id.* at 722, 40 Cal. Rptr. at 530.

64. *Id.*

65. *Id.*

66. *Id.* at 724-25, 40 Cal. Rptr. at 531.

67. *Id.* at 724, 40 Cal. Rptr. at 531.

68. J. MURRAY, MURRAY ON CONTRACTS § 200 (2d rev. ed. 1974).



of one of the parties to the contract, the death of that party excuses the other party's duty to perform his contractual obligations.<sup>69</sup> Courts have occasionally held that a contract of employment or compensation entered into between an attorney and a client stipulating that the attorney was to receive a certain sum or a fixed percentage of any recovery which he might obtain in a particular lawsuit was a contract which immediately dissolved upon the client's death because the continuing physical presence of the client was necessary to insure substantial performance of the terms of the contract.<sup>70</sup> But there are decisions to the contrary. In *Spurr v. Pryor & Stokes*,<sup>71</sup> Spurr employed attorneys Pryor and Stokes to defend him and one of his employees on charges of unlawfully selling intoxicating liquor. In an examining trial, Spurr and his employee were bound over to await the disposition of their case by a federal district court.<sup>72</sup> Spurr died before his district court trial took place and his wife was appointed executrix of his estate.<sup>73</sup> Pryor and Stokes secured an acquittal for Spurr's employee of charges of unlawfully selling intoxicating liquor.<sup>74</sup> Spurr's executrix then refused to compensate Pryor and Stokes for their representation of Spurr and his employee, alleging that she had withdrawn their authority to represent her deceased husband's estate in the trial of Spurr's employee and that, therefore, Spurr's estate was not obliged to compensate Pryor and Stokes for their defense of the employee.<sup>75</sup> The Supreme Court of Oklahoma, however, held, *inter alia*, that Spurr's estate was liable to Pryor and Stokes for an amount equal to the contract price agreed upon by Spurr and Pryor and Stokes for the latter's defense of Spurr's employee, since the subject matter of the contract (i.e., Pryor and Stokes' defense of Spurr's employee) was not "personal" in nature.<sup>76</sup>

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69. *Id.*

70. *See, e.g., In re Lanza's Estate*, 229 Cal. App. 2d 720, 40 Cal. Rptr. 528 (1964).

71. 104 Okla. 68, 230 P. 267 (1924).

72. *Id.*, 230 P. at 267.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*, 230 P. at 267-68.

The contract of employment for the benefit of [Spurr's employee] placed the direction, management, and control of the defense with [Pryor and Stokes]. Neither the terms of the contract [of employment] nor its subject matter required the aid or presence of the principal [i.e., Spurr] to enable [Pryor and Stokes] to give the required services. If the principal does not retain the control and direction of the

On occasion, courts have even hinted that the doctrine of substantial performance, applied mainly in cases involving construction contracts,<sup>77</sup> might be applied to a contractual relationship between an attorney and his client to prevent the client's unforeseen death from preventing the attorney's recovery of the contract price as compensation for completed or substantially completed legal services which he has previously rendered to the client. Thus, in *In re Levine's Estate*,<sup>78</sup> Levine had employed plaintiff attorneys' predecessor in interest to file protests in the United States Customs Court in connection with alleged overpayments of customs duties by Levine with respect to certain millinery goods which he had imported.<sup>79</sup> Levine later signed a written retainer with plaintiff attorneys authorizing them to recover all excessive duties taxed upon the goods, against the imposition of which the attorneys had filed protests or might thereafter file protests on behalf of Levine.<sup>80</sup> If the duties were recovered, plaintiffs would be entitled to receive fifty percent of the recovery as compensation for their services.<sup>81</sup> Recovery of the excessive duties was had in October, 1933, but Levine, unbeknownst to plaintiffs, had died in May, 1933.<sup>82</sup> A New York Supreme Court concluded that plaintiffs were entitled to receive fifty percent of the recovered duties as compensation for legal services which they had bestowed upon Levine and his estate.<sup>83</sup>

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agent in the performance of [legal] services, the death of the former does not terminate the contract of employment . . . . The contract will continue as a binding obligation on the personal representative of the deceased, unless by its express limitation, or the nature of the subject-matter, the contrary is made to appear . . . . [However, if the time for the performance of the contract is not fixed] and it would require an indefinite period of time to complete the contract, or the nature of the subject-matter shows that it is personal, the death of the principal will terminate the contract . . . . If the contract is not of a personal nature, the death of the principal does not terminate the contract unless made so by the express provisions of the contract . . . . The contract of employment involved in this case survived and was binding on [Spurr's executrix] as the personal representative of the deceased. *Id.*, 230 P. at 67-68; *accord*, *Loden v. Fish*, 20 S.W.2d 208 (Tex. Civ. App. 1929).

77. A. CORBIN, *supra* note 57, at § 701.

78. 247 App. Div. 19, 286 N.Y.S. 513 (1936).

79. *Id.* at 20-21, 286 N.Y.S. at 514-15.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 23, 286 N.Y.S. at 517.

It is undoubtedly the law that the authority of an attorney to act for his client ceases upon the death of the client . . . and the agency is terminated even though no notice of the death be given to the attorney . . . . However, it has also been held that an attorney's right to compensation will not be affected by the death of his client where it has become vested by substantial performance.<sup>84</sup>

Few cases have dealt with the issue of whether or not an attorney may recover the reasonable value of legal services which he has conferred upon a client before the latter's death when there is neither a written contract between them providing that the client's suit shall be prosecuted to a final judgment nor a finding that the attorney is deemed to have such an interest in the suit that the contract between the attorney and the client is considered to remain enforceable after the client has died. In *In re Robbins*,<sup>85</sup> decedent Robbins had executed a retainer agreement with plaintiff-attorney Ferris authorizing Ferris to obtain compensation for those portions of his property which were to be taken, pursuant to eminent domain proceedings, by the city of New York for the purpose of opening new streets in the borough of Brooklyn.<sup>86</sup> Ferris was to receive for his services ten percent of the compensation which might ultimately be awarded to Robbins as recompense for the public appropriation of his property.<sup>87</sup> Robbins died before such proceedings were initiated by a New York Board of Commissioners.<sup>88</sup> Robbins' executors refused to accept Ferris' offer to represent the estate in condemnation proceedings before the board concerning the aforementioned property, even after Ferris had produced for their inspection the retainer agreement executed by himself and the decedent, stating that "his authority and rights under his retainer were determined by the death of his client . . . ." <sup>89</sup> Consequently, Ferris did not represent Robbins' estate at the board's condemnation proceedings, but he thereafter asserted a lien against the sum awarded to Robbins' estate as compensation for the public taking of portions of Robbins' land.<sup>90</sup> A New York court held that Ferris possessed no lien against

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84. *Id.* at 22, 286 N.Y.S. at 516.

85. 61 Misc. 114, 112 N.Y.S. 1032 (1908).

86. *Id.* at 115, 112 N.Y.S. at 1033.

87. *Id.*

88. *Id.* at 116, 112 N.Y.S. at 1034.

89. *Id.*

90. *Id.* at 117, 112 N.Y.S. at 1034-35.

the the proceeds received by Robbins' executors for the public seizure of certain portions of Robbins' property because there had been no performance by the attorney of his contractual duties under the retainer agreement at the time of Robbins' death, and since the contract dissolved at that time any performance under it thereafter would have been gratuitous in nature.<sup>91</sup> An attorney entered into such a contract of employment and compensation with full knowledge that the death of his client would dissolve the contract, in which case the attorney would not be able to claim the contractual fees as compensation for any legal services which he had bestowed upon the client before the client's death.<sup>92</sup> Instead, the attorney would be entitled to receive a payment equivalent to the reasonable value of those services which he had already conferred upon his client at the time of the latter's death.<sup>93</sup> Ferris, however, had not performed any of the legal services which he had promised to perform in his retainer on behalf of Robbins before the latter's death and was, therefore, not entitled to receive any compensation from the proceeds of the eminent domain proceedings.<sup>94</sup>

No cases have been found in which an attorney has been denied any remuneration on a theory of an implied contract for the reasonable value of legal services he has previously conferred upon a deceased client, although recompense has been denied in cases where the attorney has sought to recover the complete contract price he and his client had previously agreed to in a written employment agreement. In *Wilson v. Brooklyn Trust Company*,<sup>95</sup> plaintiff Wilson, an attorney, sought to recover the value of legal services which he had rendered on behalf of one Beattie pursuant to a written agreement of retainer executed by both Wilson and Beattie. Beattie had died before Wilson had totally completed his performance under the contract.<sup>96</sup> A lower court awarded Wilson attorney's fees in excess of the contract price for the legal services which Wilson had performed for the benefit of Beattie.<sup>97</sup> A New York Supreme Court reversed this award<sup>98</sup> stating that,

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91. *Id.* at 118, 112 N.Y.S. at 1035.

92. *Id.* at 119, 112 N.Y.S. at 1036.

93. *Id.*

94. *Id.* at 120, 112 N.Y.S. at 1036.

95. 24 N.Y.S. 2d 161 (1940).

96. *Id.*

97. *Id.*

98. *Id.*



The authority of an attorney to act for his client ceases upon the client's death . . . and with the contract of retainer so terminated a cause of action accrues to the attorney for the reasonable value of his services, not exceeding, however, the contract price . . . . The contract price, while fixing the limit of the attorney's recovery, is not the measure of the value of the services performed. After termination of the contract, "its terms no longer serve to establish the sole standard for the attorney's compensation. Together with other elements they may, however, be taken into consideration as a guide for ascertaining *quantum meruit*."<sup>99</sup>

In *Avery v. Jacob*,<sup>100</sup> plaintiff Avery, an attorney, sought to recover from the estate of Mrs. Elizabeth Carter a sum equal to the reasonable value of legal services rendered by him to Mrs. Carter in connection with a suit which he had brought at her instance against a county sheriff to recover damages for the latter's sale of goods to which Mrs. Carter had delivered legal title either from her husband or from consignors.<sup>101</sup> Mrs. Carter's executors attempted to show that a series of letters between the decedent and plaintiff had created a contingent fee contract whereby the plaintiff was to receive twenty-five percent of any recovery which might ultimately be had in the suit as payment for legal services which he might render to Mrs. Carter in the prosecution of the action. The executors further alleged that since Avery had refused to continue to represent Mrs. Carter's estate in the action after her death, as her executors had demanded, unless he was promptly paid five hundred dollars for legal services which he had previously bestowed upon Mrs. Carter, he, having failed to secure a judgment in favor of Mrs. Carter's estate, should receive nothing for his representation of Mrs. Carter in her suit.<sup>102</sup> A New York court, however, found that no such contract had ever been agreed upon by Avery and Mrs. Carter because Avery withdrew his offer to Mrs. Carter to accept twenty-five percent of any recovery which might ultimately be realized from her suit as compensation before she made a valid acceptance.<sup>103</sup> Hence, Avery was entitled to compensation equaling the reasonable value

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99. *Id.* at 161-62 (citations omitted).

100. 15 N.Y.S. 564 (1891).

101. *Id.* at 569.

102. *Id.* at 568.

103. *Id.* at 569.

of the legal services which he had performed on Mrs. Carter's behalf before her death.<sup>104</sup>

### *Conclusion*

It would appear that the success or failure of an attorney's suit to recover either the reasonable value of legal services he has previously conferred upon a deceased client or the total contract price for such services as fixed in a contract of employment or compensation executed by the attorney and the client before the client's death depends largely upon whether the court trying the attorney's claim views its disposition as governed by the law of agency or the law of contracts. The attorney should not be entitled to recover as the reasonable value of legal services he has rendered on behalf of his deceased client the entire contract price for these services according to the principles of agency law unless the contract for legal services as compensation for same falls within one of the enumerated exceptions to the general agency rule that the death of an attorney's client immediately terminates any extant attorney-client relationship. Conversely, a court which adopts the position that legal problems arising in the context of an attorney-client relationship should be solved by resort to the principles of the law of contracts will, barring other unusual circumstances, frequently permit an attorney who has substantially performed legal services on behalf of a deceased client pursuant to a contract previously entered into between the attorney and his client, to recover the total contractual value of the services he would have bestowed upon the client had the client been alive at the time final judgment was rendered on his claim or defense, or the reasonable value of the services which he had performed for his client up to the time of the latter's death, irrespective of whether or not such services constituted a substantial performance of the terms of the contract. An attorney's recovery of the complete contract price or a reasonable portion of the value of those legal services which he has rendered to his client before the client's death may seemingly be barred only if the court trying the attorney's claim finds that the contract, express or implied, by which the attorney was to perform specified legal services for the client or was to receive compensation for same, was a contract by which reciprocal performance could not be effectuated without the con-

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104. *Id.* at 573.

tinuing existence of both parties to the contract, i.e., a personal contract. From the preceding it follows that the attorney seeking to recover remuneration for legal services which he has conferred upon a client up to the time of the client's unexpected demise will encounter fewer barriers to his recovery if he (1) persuades the court adjudicating his claim for compensation that the claim is based upon a contract, express or implied, entered into between the client and the attorney which provides the exclusive, or at the least, a reasonable standard for determining the amount of recompense to which the attorney is entitled and (2) also convinces the court that the client's executor or administrator is as qualified as the client would be to pay the attorney compensation for his performance of legal services on behalf of the client and thereby complete the client's performance of the terms of the contract of employment or compensation initiated by the attorney and the client.

*Jim Wiley*