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Contracts - Attorney and Client - Contingent Fees - Divorce Actions - Validity

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CONTRACTS—ATTORNEY AND CLIENT—CONTINGENT FEES—DIVORCE ACTIONS—VALIDITY. Plaintiff attorney was engaged by defendant to prosecute a divorce action. It was agreed that the attorney's compensation would be one-third of any alimony the court might award. Although conceding that the contigent fee contract was void as against public policy, the plaintiff in this suit sought to recover the reasonable value of his services. The court *held* that the entire arrangement was tainted with illegality and hence the plaintiff could not recover on quantum meruit. *McCarthy v. Santangelo,* 78 A.2d 240 (Conn. 1951).

At common law, contracts between attorney and client providing for the payment of contingent fees were not allowed in any type of action. However, today in ordinary civil cases, they are not only allowed but are favored in most states, since contingent fees enable a person without means but with a just cause to employ an attorney to protect his rights.[1] But the rule is otherwise in suits for divorce, separation, and annulment, where contingent fee contracts are almost universally held void.[2] A few cases find such contracts void for champerty.[3] More frequently they are held void as against public policy, since the law favors a lifetime marital status, while a contingent fee contract induces an attorney to secure a divorce rather than effect a reconciliation. It is said that there is no reason to allow contingent fees in such cases, since the court can allow reasonable attorney's fees;[5] also, alimony is not assignable and is intended to provide for the sustenance of the former wife.[6]

Contingent fee contracts in divorce and annulment cases generally provide that the client cannot settle, dismiss, or compromise the proceedings before the decree is granted, without the attorney's consent. Such provisions are universally held void as against public policy, since they would deprive the litigant of control over the proceedings and also because the law favors reconciliation.[7]

In cases where an attorney conducts a suit for divorce without any agreement as to compensation, he is allowed to recover the reasonable value of his services;[8] and he may likewise recover where there exists a voidable contract for compensation in which the party capable of avoiding has elected to do so.[9] Under the prevailing rule, the courts generally treat contingent fee contracts in actions for divorce or separation as if there were no agreement or as if a voidable

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[1] *See* Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 910 (1900); Baca v. Padilla, 26 N.M. 223, 190 Pac. 730 (1920).

[2] McConnell v. McConnell, 98 Ark. 193, 136 S.W. 931 (1911); Newman v. Freitas, 129 Cal. 283, 61 Pac. 907 (1900); Parsons v. Segno, 187 Cal. 260, 201 Pac. 580 (1921); Coleman v. Sisson, 71 Mont. 435, 230 Pac. 582 (1924).

[3] Brindley v. Brindley, 121 Ala. 429, 25 So. 751 (1899); Donaldson v. Eaton & Estes, 136 Ia. 650, 114 N.W. 19 (1907).

[4] Barngrover v. Pettigrew, 128 Ia. 533, 104 N.W. 904 (1905); *In re* Slyvester's Estate, 195 Ia. 1329, 192 N.W. 442 (1923).

[5] McCurdy v. Dillon, 135 Mich. 678, 98 N.W. 746, 748 (1904).

[6] Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886).

[7] See, *e.g.*, Comor v. McGuire, 121 Kan. 820, 250 Pac. 345 (1926); Dannenberg v. Dannenberg, 151 Kan. 600, 100 P.2d 667 (1940).

[8] Hicks v. Stewart & Templeton, 53 Tex. Cr. App. 401, 118 S.W. 206 (1909); Fleming v Phinizy, 35 Ga. App. 792, 134 S.E. 814 (1926).

[9] Crow v. Yokum, 11 Rob. 506 (La. 1845); Overstreet v. Barr, 255 Ky. 82, 72 S.W.2d 1014 (1934).

contract had existed, and thus allow recovery on quantum meruit for the reasonable value of the legal services rendered.[10]

The instant case reaches a result contrary to the weight of authority by a confused application of doctrines of equity and contract. Although finding that the express contract was void, the court indicates that its terms are, nevertheless, valid to determine the services and expenditures for which recovery may be had; and by some twist of reasoning the illegal taint of the express contract is transferred so as to defeat an action to recover for the reasonable value of services rendered in good faith. It is submitted that the void original contingent fee contract is totally ineffective and should have no bearing upon plaintiff's right to recover in quantum meruit.[11][12]

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CONTRACTS—THIRD PARTY BENEFICIARIES—DONEE, CREDITOR, AND INCIDENTAL BENEFICIARIES. Plaintiff leased part of a building as a storage space for stock. The lessor subsequently contracted to have an automatic sprinkler system signalling device installed in the building by the defendant. Because of faulty operation of the system and leakage, the plaintiff's stock was damaged. Upon suit it was *held* that plaintiff was an incidental beneficiary as distinguished from a donee or creditor beneficiary and could not recover. There was no intent of the contracting parties to recognize the plaintiff as the primary person to be benefited. *Marlboro Shirt Co. v. American Dist. Tel. Co.*, 77 A.2d 776 (Md. 1951).

The majority of the courts hold that a third party donee or creditor beneficiary may sue on a contract made for his benefit,[1] but that an incidental beneficiary cannot sue on the contract.[2] This positive rule allowing a third party to sue is based on the proposition that the law operates on the act of the parties, thus creating the duty, establishing the privity and implying the promise and obligations on which the action is founded.[3] The third party's right of action is not, however, dependent upon the consideration running directly from him.[4]

The majority rule has been embodied in the statutes of several states, including North Dakota,[5] and with regard to these statutes,

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[10] McCurdy v. Dillon, 135 Mich. 678, 98 N.W. 746 (1904); Klampe v. Klampe, 137 Minn. 227, 163 N.W. 295 (1917); Lynde v. Lynde, 64 N.J. Eq. 736, 52 Atl. 694 (1902). *Contra*: Barngrover v. Pettigrew, 128 Ia. 533, 104 N.W. 904 (1905).

[11] 78 A.2d at 242 (1951): "We . . . remand . . . for further proceedings . . . The plaintiff should have an opportunity to present evidence of the services and expenditures . . . for which the original undertaking did not provide."

[12] *Cf.* Baca v. Padilla, 26 N.M. 223, 190 Pac. 730 (1920).

[1] Mackubin v. Curtiss-Wright Corporation, 190 Md. 52, 57 A.2d 318 (1948); Williston, Contracts §356 (rev. ed. 1936).

[2] Kelly v. Richards, 95 Utah 560, 83 P.2d 731 (1938).

[3] Packer v. Board of Retirement, 203 P.2d 784 (Cal. 1949), *rev'd. on other grounds*, 217 P.2d 660 (1950); Tweddale v. Tweddale, 116 Wis. 517, 93 N.W. 440 (1903); Small v. Schaefer, 24 Md. 143, 159 (1866).

[4] McDonald v. Finseth, 32 N.D. 400, 155 N.W. 863 (1916); *In re* McCanna's Estate, 230 Wis. 561, 284 N.W. 502 (1939).

[5] N.D. Rev. Code §9-0204 (1943): "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it."