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Quantum Meruit Recovery in Divorce Litigation

QUANTUM MERUIT RECOVERY IN DIVORCE LITIGATION

Contingent fees, which are neither unreasonable[1] nor contrary to public policy,[2] are recognized as valid in all types of litigation except divorce proceedings. Contingent fees are illegal in divorce proceedings[3] because of the policy that reconciliation should be encouraged by the courts. Therefore a fee based on the amount of the separation award runs counter to that policy.[4] Additionally, the justification for contingent fee arrangements, that it allows one who could not otherwise afford counsel to procure adequate representation by an attractive fee arrangement,[5] is not applicable to divorce proceedings. In divorce litigation the husband is held accountable for the reasonable value of the services performed by counsel on behalf of the spouse.[6]

When the contingent fee contract in divorce proceedings is declared void for illegality, there is a conflict as to whether the attorney may nevertheless, recover in quantum meruit the reasonable value of the services rendered.[7] Only fourteen jurisdictions have dealt with the problem and a slight majority allow recovery in quantum meruit,[8]

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[1]Jeffries v. Mutual Life Ins. Co., 110 U.S. 305 (1884); Shouse v. Consolidated Flour Mills Co., 128 Kan. 174, 277 Pac. 54 (1929); Jones v. Jones, 333 Mo. 478, 63 S.W.2d 146 (1933). Contingent fees have never been recognized as valid in any type of litigation in two jurisdictions: Sherwin Williams Co. v. J. Mannos & Sons, Inc. 287 Mass. 304, 191 N.E. 438 (1934); Wild v. Simpson, 2 K.B. 544 (C.A. 1919).

[2]*E.g.*, if the attorney-client contract prohibited the client from settling the suit. Moran v. Simpson, 42 N.D. 575, 173 N.W. 769 (1919), the fee was contingent upon successful prosecution of a criminal action. Baca v. Padilla, 26 N.M. 223, 190 Pac. 730 (1920).

[3]See *e.g.* Newman v. Freitas, 129 Cal. 283, 61 Pac. 907 (1900); Jordon v. Kittle, 88 Ind. App. 275, 150 N.E. 817 (1926); Ownby v. Prisock, 243 Miss. 203, 138 So. 2d 279 (1962).

[4]Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886); Evans v. Hartley, 57 Ga. App. 598, 196 S.E. 273 (1938).

[5]Lipscomb v. Adams, 193 Mo. 530, 91 S.W. 1046 (1906).

[6]See *e.g.* IND. ANN. STAT. § 3-1216 (Burns repl. 1962); ORE. REV. STAT. 107.090, 107.100 (Supp. 1966).

[7]Ownby v. Prisock, 243 Miss. 203, 138 So.2d 279 (1962). *Contra*, Baskerville v. Baskerville, 246 Minn. 496, 75 N.W.2d 762 (1956).

[8]McConnell v. McConnell, 98 Ark. 193, 136 S.W. 931 (1911). Wiley v. Silsbee, 1 Cal. App. 2d 520, 36 P.2d 854 (1934); Wall v. Lindner, 410 P.2d 186 (Colo. 1966); Evans v. Hartley, 57 Ga. App. 598, 196 S.E. 273 (1938); In re Sylvester, 195 Iowa 1329, 192 N.W. 442 (1923); McCurdy v. Dillon, 135 Mich. 678, 98 N.W. 746 (1904) (distinguishing Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886)); Ownby v. Prisock, 243 Miss. 203, 138 So. 2d 279 (1962); Lynde v. Lynde, 64 N.J. Eq. 736,

while a minority hold that a contingent fee contract so taints the attorney-client relationship that the attorney is not entitled to any recovery.[9]

In *Hay v. Erwin*,[10] the Supreme Court of Oregon adopted the majority view and allowed recovery in quantum meruit. *Erwin* was a declaratory judgment action to determine the amount of fee due to an attorney working on a contingent fee basis in a divorce action. In March 1962, Erwin, as attorney, filed for divorce on behalf of Mrs. George Van Vleet. In June 1963, while the divorce suit was pending, Erwin requested Mrs. Van Vleet to sign a letter of agreement whereby she agreed to pay Erwin a contingent fee based on any sums recovered.[11] In September 1963, Mrs. Van Vleet and her husband entered into a complete property settlement, and a decree of divorce was awarded in October 1963. Erwin contended that he was entitled to a fee of $50,000 based upon the contingent fee agreement. Pursuant to the decree of divorce the funds constituting the settlement were deposited in court. The Clerk of the County Court, brought this declaratory judgment action to determine how the funds should be distributed. The trial court voided the contingent fee arrangement

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52 Atl. 694 (1902); Van Vleck v. Van Vleck, 21 App. Div. 272, 47 N.Y. Supp. 470 (1897); Overstreet v. Barr, 255 Ky. 82, 72 S.W.2d 1014 (1934).

The case of Lynde v. Lynde, 64 N.J. Eq. 736, 52 Atl. 694 (1902) is of particular interest. This case reached the U.S. Supreme Court on the question of whether New York was required to enforce a New Jersey judgment as to future alimony. Lynde v. Lynde, 181 U.S. 183 (1901). It was held that the award for future alimony was not a final judgment, being subject to modification in New Jersey and that the provisions of the decree relating to bond, sequestration and injunction were in the nature of execution, not of judgment and could have no extraterritorial effect. In connection with this divorce litigation, the attorney, Westervelt, instituted a total of ten suits and appeals dating from 1896 to 1901. A settlement was finally made in the amount of $41,000.00. Asserting a contingent fee agreement Westervelt notified Mrs. Lynde that her share would be about $19,000.00. Mrs. Lynde objected and invoked the aid of the court. The court adopted the majority view and remanded for a determination of what would constitute a reasonable fee for the services rendered by Westervelt.

[9]Brindley v. Brindley, 121 Ala. 429, 25 So. 751 (1899); McCarthy v. Santangelo, 137 Conn. 410, 78 A.2d 240 (1951); Baskerville v. Baskerville, 246 Minn. 496, 75 N.W.2d 762 (1956), overruling Klampe v. Klampe, 137 Minn. 227, 163 N.W. 295 (1932); Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886); Wagner v. Shelly, 241 Mo. App. 259, 235 S.W.2d 414 (1950). See Sobieski v. Moresco, 143 So. 2d 62 (Fla. Dist. Ct. App. 1962); National Bank v. Holland, 190 Pa. Super. 501, 154 A.2d 252 (1959); Roller v. Murray, 112 Va. 780, 72 S.E. 665 (1911).

[10]419 P.2d 32 (Ore. 1966).

[11]The agreement provided for the following payment: a) 33 1/3% of all property or monetary award if the case is settled before trial b) 40% of all property or monetary award if the case is tried c) 50% of all property or monetary award if the case is appealed. Brief for appellant at 10, Hay v. Erwin, 419 P.2d 32 (Ore. 1966).

and found that Erwin was entitled to a reasonable fee for his services, in the amount of $30,000.

The attorney argued that the public policy against contingent fees did not apply in the present case because the attorney-client contract was not entered into until a year and three months after the divorce suit was filed, thus the contract was not "promotive of divorce or discouraging to reconciliation."[12] The court rejected this argument, and adopted the

> "[G]eneral rule that, where a contract made between an attorney and client for the prosecution of an action is champertous,[13] the attorney may recover from the client on the point of *quantum meruit* for services rendered, in the same manner as if the unlawful agreement had never existed...."[14]

Thus, *Erwin* rejected the view that " 'the taint of illegality permeates the entire lawyer-client relationship in a divorce action so that every objection to permitting a recovery on the express agreement applies with equal force to an attempted recovery in quantum meruit.' "[15]

Under the majority view, as adopted in *Erwin,* the attorney is denied his contingent fee because such a fee violates the policy favoring reconciliation. The wisdom of requiring the attorney to promote reconciliation is doubtful. An attorney is neither disposed toward nor qualified to act as a marriage counselor. Good divorces are better than bad marriages[16] and the attorney may firmly believe that it is in the best interest of the client not to pursue reconciliation.[17] As a general public policy, reconciliation is a desirable goal, but in a

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[12]An analogous situation was considered by the New York County Bar Association, which held that it was proper for a lawyer to accept a percentage of the alimony accrued prior to his retainer but improper as to alimony accruing subsequent to his retainer. Smedley, PROFESSIONAL RESPONSIBILITY PROBLEMS IN FAMILY LAW, 57. The distinction being that the lawyer's interest in the accrued alimony is not such as to inhibit reconciliation. *Erwin* declined to draw the distinction between accrued and future alimony, and chose to find contingent fee contracts in divorce litigation *void per se,* perhaps with the view that the prophylactic result would be to discourage such future agreements.

[13]Black's Law Dictionary 292 (4th ed. 1951). "The purchase of an interest in a thing in dispute with the object of maintaining and taking part in the litigation."

[14]419 P.2d at 34.

[15]*Ibid,* citing Baskerville v. Baskerville, 246 Minn. 496, 75 N.W.2d 762, 773 (1956).

[16]Harper and Harper, *Lawyers and Marriage Counselling,* 1 J. Family Law 73, 74 (1961).

[17]There is a trend toward recognition that it is sometimes in the best interests of society that parties be separated rather than reconciled. This is best illustrated by the modern trend toward liberalization of the divorce laws. N.Y. DOM. REL. § 200.

given instance it may not be in the best interest of one or both of the parties, and it is the client the attorney represents.[18] Reconciliatory pursuits are more properly left to marriage counselling agencies working in conjunction with the courts.[19]

But even assuming that an attorney should be required to work for reconciliation, the majority view adopted in *Erwin,* fails to adequately promote this policy. Under the *Erwin* view an attorney is able to contract for an attractive contingent fee arrangement with full knowledge that if the client should object, the attorney may at least recover in quantum meruit. Such action on the part of the attorney does a disservice to the legal profession since it is unethical.[20] Little public trust and confidence can be engendered in the bench and bar if an attorney is permitted to enter into an illegal agreement, and is nonetheless permitted a reasonable recovery. The *Erwin* view seems unsatisfactory but the minority view also has undesirable effects.

The leading case denying recovery in quantum meruit is *McCarthy v. Santangelo.*[21] In that case the attorney entered into an agreement whereby his compensation was to be one-third of any alimony the court might award. The attorney conceded the agreement was void as against public policy but nevertheless sought recovery in quantum meruit. McCarthy recognized that the services rendered were faithful and diligent, but pointed out that "the agreement created an inducement to him to advise, for his own financial gain, the immediate institution of an action for divorce, without giving thought or attention to the possibility of reconciliation."[22] Consequently, the entire agreement was tainted by the illegality, and the attorney was not allowed to recover in quantum meruit.

The minority view, as exemplified by *McCarthy,* tacitly applies the equitable doctrine of "clean hands" and bars the attorney from recovering in quantum meruit.[23] The doctrine means that equity will not

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[18]"An attorney is obligated to advise his client as to the best interests of the client as seen by the attorney. In many divorce cases... the best interest of one or the other or even of both parties will be promoted by the divorce. If the attorney honestly believed that the best interest of his client would be prejudiced by a reconciliation, it was, in the opinion of the committee, entirely proper for him to advise his client to that effect." Smedley, supra note 12, at 30.

[19]N.Y. DOM. REL. § 215; S.C. CODE ANN. § 20-110, § 20-110.1 (1962).
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[20]State v. Dunker, 160 Neb. 779, 71 N.W.2d 502 (1955); In re Smith, 42 Wash. 2d 188, 254 P.2d 464 (1953).

[21]137 Conn. 410, 78 A.2d 240 (1951).

[22]*Id.* at 242.

[23]The *Erwin* line of cases rejects this view by holding that where the only basis for the contract's illegality rests upon the method of determining compensation,

lend its aid to one who has been guilty of unlawful or inequitable conduct in the matter in which he is seeking relief.[24] Courts adhering to the minority rule hold that the policy which dictates denial of recovery on the contract itself similarly demands a denial of quantum meruit recovery.[25]

> [T]he law will not imply a promise to pay for services which are in derogation of public policy, any more than it will enforce a specific contract having that object in view; and when a plaintiff can not establish his cause of action without relying on an illegal contract, or on services which by their very nature contravene public policy, he cannot recover.[26]

McCarthy, thus provides a strong prophylactic remedy for contingent fee contracts in divorce actions, but it also unjustly enriches the client who is not thereby required to pay for services received. The client fully expected to pay for the attorney's services, and if they were performed faithfully[27] the client has received what he bargained for.[28] The wrong done was not to the client, but to the legal profession, and the general public, the former by being subjected to dishonor and embarrassment, and the latter by its loss of confidence in our judicial

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this form of illegality is not deemed to permeate the entire contract. Hay v. Edwin, 419 P.2d 32, 34 (Ore. 1966); *Accord,* McConnell v. McConnell, 98 Ark. 193, 136 S.W. 931 (1911); Wiley v. Silsbee, 1 Cal. App. 2d 520, 36 P.2d 854 (1934); In re Sylvester, 195 Iowa 1329, 192 N.W. 442 (1923).

[24]Taylor v. Grant, 204 Ore. 10, 279 P.2d 479 (1955). The doctrine has nothing to do with the rights or liabilities of the parties but rather with the public interest and the maintenance of the integrity of the courts. Gaudioso v. Mellon, 269 F.2d 873 (3rd Cir. 1959). McClintock, EQUITY 62 (2d ed. 1948), says: "No general statement as to what will amount to unclean hands can be made, other than that it is conduct which the court regards as inequitable. Almost always the violation of any statute will make a party's hands unclean." He also says: "A party to a contract which is void for illegality cannot, of course, obtain relief with respect thereto in equity any more than he can at law; in either forum the parties will be left in the situation in which they have placed themselves...." *Id.* at 60.

[25]McCarthy v. Santangelo, 137 Conn. 410, 78 A.2d 240 (1951).

[26]Barngrover v. Pettigrew, 128 Iowa 533, 104 N.W. 904 (1905).

[27]Faithful and diligent service in this context refers not to the fact he may have been mistaken about the illegality of the contract, but rather to a finding that the attorney, notwithstanding the contract, properly represented the interests of his client. See McCarthy v. Santangelo, 137 Conn. 410, 78 A.2d 240 (1951).

[28]See "The underlying theory of the doctrine is that, where one expends money and labor in the improvement of the property of another on faith of an unenforceable contract, he is, upon repudiation of the agreement... entitled to be reimbursed...." Hardgrove v. Bowman, 10 Wash. 2d 136, 116 P.2d 336, 337 (1941). "Doctrine of 'unjust enrichment' is that person shall not be allowed to profit or enrich himself inequitably at another's expense." McCreary v. Shields, 333 Mich. 290, 52 N.W.2d 853, 855 (1952).

system. It seems just that both groups should, in some manner, be compensated.[29]

The courts might preserve the strong prophylactic effect of *McCarthy,* while eliminating its unjust enrichment aspect, by requiring the client to pay a reasonable fee for the services to the courts, rather than to the attorney. The attorney is an officer of the court and could be deemed estopped, by his misconduct, from benefiting from the transaction. Funds so collected could be used to help finance marriage counseling, legal assistance programs, or other worthwhile endeavors.[30]

This solution seems more equitable than the existing law and would provide the needed prophylaxsis since attorney's would be less likely to enter into such agreements knowing they may recover nothing for their services.

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[29]Wilhelm v. Rush, 18 Cal. App. 2d 366, 63 P.2d 1158 (1937); Sobieski v. Maresco, 143 So. 2d 62 (Fla. Dist. Ct. App. 1962); State v. Dunker, 160 Neb. 779, 71 N.W.2d 502 (1955).

[30]While enacting legislation might be desirable it does not appear to be essential for the implementation of such a policy. An attorney is an officer of the court, and contingent fees are subject to the supervision of the court. National Bank v. Holland, 190 Pa. Super. 501, 154 A.2d 252 (1959). "They, [attorneys] like judges, clerks, and sheriffs, are a part of the machinery of the law created for the administration of justice.... If payment is made by him to the opposing solicitor, it is made to an officer of the court, and in a broad sense is paid into court,-as truly so as if paid to the clerk." Lynde v. Lynde, 64 N.J. Eq. 736, 52 Atl. 694, 697 (1902).