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Decedents' Estates And Trusts—Limited Agreements May Violate Fiduciary's Duty of Trust

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contract for her services in running the inn. The Court of Appeals, however, elected not to soften the application of the rule but reiterated what was no doubt the same formula used in *Rhodes v. Stone*,⁴⁷ to wit, any service which would normally be performed by a wife under similar circumstances cannot be compensated for on the basis of an implied contract against the deceased.⁴⁸

It appears that the rational basis of such a rule would be that the relationship of husband and wife is inconsistent with an understanding of compensation for those services normally performed by one who legally assumes the role which the claimant, in cases of this nature, has willingly chosen. In effect, a woman living meretriciously with a man will be treated as if she were his legal wife in so far as recovery on an implied contract is concerned. However, unlike a legal wife, claimant is not given the statutory assurance of participating in deceased's estate, and because of this latter consequence, some doubt can be raised as to the soundness of the presumption lying at the foundation of the rationale.

It appears, however, that the Court's affirmance of the rule of *Rhodes v. Stone* in regard to claimant's recovery on the implied contract, as well as their reluctance to allow claimant's recovery on an express contract, was dictated by the overriding public policy of discouraging meretricious relationships. Although this may not have been the policy behind the *Rhodes* decision where the relationship was adulterous,⁴⁹ it is apparently the same policy the Legislature adopted in 1933 when it passed legislation declaring that common law marriages would no longer be recognized in New York State.⁵⁰ It is also interesting to note at this point that all but one (Pennsylvania) of the 12 states which follow a rule such as *Rhodes v. Stone* in one form or another, do not recognize common law marriages.⁵¹

LIMITED AGREEMENTS MAY VIOLATE FIDUCIARY'S DUTY OF TRUST

The confidential relationship of principal and agent, or attorney, requires the strictest scrutiny in cases of divided loyalty.⁵² It has been held that where a claimant is serving more than one master, or is subject to conflicting interest,

47. *Supra* note 41. Claimant was not permitted to collect anything on an implied contract even though, besides cleaning house, she performed the labor of an ordinary farm hand. They, no doubt, were considered to be the usual services of a farmer's wife.

48. If claimant had been working as an employee instead of a defacto wife, she would not have labored from 8 o'clock in the morning until after midnight without demanding pay or without being paid. The records of the inn do not show payments of wages to her, nor do the reports of the State Liquor Authority indicate that she was an employee, although she kept the books and did the paper work for the entire establishment. No entries were made of wages paid, accrued or owing. Claimant was not without experience in business affairs.

49. Common law marriages were recognized in New York at this time (1892). However, deceased was not legally separated from his wife while living with claimant.

50. *Adams v. Adams*, 188 Misc. 381, 67 N.Y.S.2d 752 (Sup. Ct. 1946).

51. *Supra* note 42.

52. *In re Willet's Estate*, 173 Misc. 199, 17 N.Y.S.2d 578 (Surr. Ct. 1939).

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he should be denied compensation.⁵³ It is no answer to show that fraud or unfairness were absent.

In *In re Jones' Estate*,⁵⁴ the administrator and the attorney for the life tenant had a written agreement to the effect that whichever of them obtained the highest bidder for the life tenant's property within a specified time and under specified circumstances would be entitled both to have the land sold to his bidder and to receive a five percent brokerage commission. The administrator, through his real estate concern, received an offer which was less than one received earlier by the attorney for the life tenant. Both offers were within the period specified by the agreement. However, shortly thereafter, and beyond the specified time, the administrator's offeror raised his bid.

The administrator brought this action pursuant to the Surrogates Court Act Section 215,⁵⁵ seeking advice as to the sale of the property. The administrator felt he could not reject or accept either offer, since if he accepted the highest offer within the period specified by the agreement he would not be getting the highest price available for the property which he was bound to do. The Surrogate found that since the agreement between the administrator and attorney for the life tenant was not exacted for the benefit of either offeror, neither acquired by virtue of the contract any rights against the promisor or promisee. Thus, the administrator was directed to sell the property for that offer which would yield the highest net amount to the estate.⁵⁶ Upon appeal the attorney for the life tenant waived his commission to aid his client. The Appellate Division reversed,⁵⁷ holding that since the attorney waived his commission, the property should be sold to his client, in as much as that offer yields the highest net amount to the estate.

Both lower courts agreed that the agreement of the administrator and the attorney for the life tenant was not enforceable by a third party and that what was controlling was the highest price available for the property. They did not, however, comment on the validity of the provision of the agreement for commission to the administrator. The Court of Appeals unanimously reversed the Appellate Division.⁵⁸ It agreed that it was the function of the administrator to sell the property to the highest bidder for the benefit of the estate. But it held that an agreement is not valid where the administrator limited the sale of property to the efforts of his own concern and that of the attorney for a life tenant, for by doing so the administrator placed himself in a position of con-

53. *Woods v. City Bank Co.*, 312 U.S. 262 (1941).

54. 8 N.Y.2d 24, 200 N.Y.S.2d 638 (1960).

55. Whenever the assets of an estate consist of real property which an executor . . . is authorized to sell . . . and the value of the same is uncertain or is dependent upon . . . the manner of sale . . . the administrator . . . may apply by petition to the surrogate having jurisdiction of the settlement of the estate, for advice and direction as to the propriety, price, manner, and time of sale thereof.

56. 19 Misc. 2d 234, 189 N.Y.S.2d 389 (Surr. Ct. 1959).

57. 9 A.D.2d 778, 193 N.Y.S.2d 604 (2d Dep't 1959).

58. *Supra* note 54.

flicting interests. And, by not acting solely for the benefit of the estate, the administrator breached his fiduciary obligation. Consequently, the agreement's provision for a five percent real estate commission was inapplicable. Without either the administrator or the attorney receiving a commission, the Court concluded that the administrator's offeror's bid was the highest and therefore directed that the property be sold to him.

DOMESTIC RELATIONS

WITHHOLDING OF SEXUAL RELATIONS AS CONSTITUTING ABANDONMENT

It has been held in this state that wilful refusal to have sexual relations in marriage, if without sufficient legal cause, constitutes abandonment,¹ and as such will support an action for separation under Section 1161 of the Civil Practice Act.²

In *Diemer v. Diemer*,³ the Court reexamined this holding and in addition, was forced to interpret what constitutes, first, a wilful refusal, and secondly, sufficient legal cause. This case involved cross actions for separation. The parties to the action had married in a Protestant Church about five years prior to this suit, in accordance with the husband's faith, although the wife was Roman Catholic. They were both approximately forty years of age at the time of their marriage and had considered and discussed the possible problems that might confront them. The husband made it entirely clear that he was firm in his faith and too old to change. His wife agreed with his position and expressed a desire to attend his church. This she did, and a year and a half after their marriage, she became a member of his congregation. Their marriage was happy and untroubled and the husband was admittedly, by the wife's own trial testimony, a fine man and a good husband. About three years after the marriage a child was born, and at about the same time the wife began to regret her loss of the Catholic faith. She consulted a priest, and was told that in the eyes of the Church, her marriage was invalid.

She then decided, and so informed her husband, that her marital relations would be denied to him until he remarried her in the Catholic Church. He refused but she remained firm in her denials. They continued to live together in this manner for several months until finally the husband realized his wife would not change her mind. He then left home and commenced this suit, continuing to support her and the child.

In trial court, he sued for separation on the grounds of cruel and inhuman treatment.⁴ The Court denied a legal separation but awarded custody of the

1. *Mirizio v. Mirizio*, 242 N.Y. 74, 150 N.E. 605 (1926).

2. N.Y. Civ. Prac. Act § 1161(3) states that an action for separation is maintainable for the abandonment of the plaintiff by the defendant.

3. 8 N.Y.2d 206, 203 N.Y.S.2d 829 (1960).

4. N.Y. Civ. Prac. Act § 1161(1) provides for a separation based on the cruel and inhuman treatment of plaintiff by defendant.