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CASE NOTES

California Cases

EXECUTORS AND ADMINISTRATORS: EXCEPTION TO THE RULE AGAINST SELF-DEALING

A strict rule of the common law forbids the executor of a will to engage his own services as an attorney and to receive compensation therefor in addition to his fees as executor.¹ California, already having one exception to this rule,² recently added a second in *Estate of Thompson*.³

During decedent Thompson's lifetime, petitioner had acted as her attorney. By a second codicil to her will, decedent stated:⁴

I hereby nominate and appoint . . . [petitioner] to be the sole Executor of this my Last Will and Testament, he to serve without bond for every purpose

She further directed:⁵

. . . [T]hat in the event [he] acts as Executor hereunder, and also acts as his own attorney . . . he shall be allowed his fees as Executor, together with the fees which may be allowable to the attorney for the Executor.

Thompson died. Petitioner was appointed executor and administered the estate which was valued at slightly less than \$100,000. Petitioner also acted as attorney throughout the probate proceedings. He sought an allowance of statutory fees as executor,⁶ an allowance for extraordinary services to the estate⁷ and, in addition, compensation for legal services rendered. The Superior Court for Los Angeles County allowed petitioner the executor's fees as well as the extraordinary fees. While finding that the legal services rendered to the estate were correctly valued, the court held the provision in the will for the additional payment of attorney's fees was "invalid, and, therefore, [petitioner] . . . is not entitled to receive compensation for services rendered by him as attorney for executor."⁸ The appellate court dismissed petitioner's appeal on the grounds that it was against the self-dealing rule for an executor to act as his own attorney and receive compensation from the estate for both services.⁹ The case was brought on petition to the Supreme Court of California. The court unanimously held, in reversing the District Court of Appeal, that the testatrix's "direction in disposing of her estate should be given effect as she has provided."¹⁰

¹ *Estate of Parker*, 200 Cal. 132, 251 Pac. 907 (1926); cases collected 49 A.L.R. 1033 (1927), 36 A.L.R. 748 (1925), 18 A.L.R. 635 (1922); *Jones v. Peabody*, 182 Wash. 148, 45 P.2d 915 (1935). "In *Stanes v. Parker*, 9 Beav. 385, 50 Eng. Reprint. 392 (1846) the court observed arguendo: 'The safety of the public has been justly thought to require the rule now clearly established, that, although a trustee, being a solicitor, may appoint another solicitor to execute the professional business relating to the trust, yet, if he does it himself, he shall not be allowed to charge for his professional services.'" 18 A.L.R. 636 (1922).

² See *Estate of Lankershim*, 6 Cal. 2d 568, 58 P.2d 1282 (1936).

³ 50 Cal. 2d 613, 328 P.2d 1 (1958).

⁴ *Estate of Thompson*, 320 P.2d 604, 606 (Cal. 1958) (vacated by principal case).

⁵ 320 P.2d at 606.

⁶ CAL. PROB. CODE § 901.

⁷ CAL. PROB. CODE § 902.

⁸ See note 4 *supra*.

⁹ 320 P.2d at 608, 609.

¹⁰ 50 Cal. 2d at 617, 328 P.2d at 3.

The mere fact that an executor is an attorney does not *require* him to render services to the estate outside of the duties normally expected of an executor.¹¹ He may employ another attorney to assist in the legal details of the estate,¹² subject to judicial review as to the necessity for the services.¹³ Each may receive a fee for his services.¹⁴ But it is a deeply engrained rule of the common law that the executor-attorney may not recover a fee for service he renders as attorney if he also receives a fee as executor.¹⁵ Also, in the absence of an agreement that the executor-attorney will not share in the fee, a law firm of which the executor is a member may not receive compensation for professional legal counsel rendered to the estate.¹⁶ California has followed this general rule.¹⁷

The rule is a component of the executor's duty of loyalty as a fiduciary, and the reason for the rule is the public policy of not allowing a fiduciary to enter into a transaction where there is a *possibility* of self-dealing.¹⁸ An executor, therefore, should not place himself in a position which involves conflicting interests. As executor, his duty is to secure the best legal service at the lowest fee. Appointing himself as attorney is regarded as a doubtful execution of this duty, for as an executor he cannot objectively evaluate his skills and fees as an attorney in comparison to other attorneys. As a result, a provision in a will nominating an attorney for the estate, whether the attorney nominated is the executor or not, is not binding on the executor.¹⁹ But, if the executor were to appoint himself attorney and receive a fee for each position, the dual status would put him in a position of conflicting interests. This *could* lead him to act in a manner contrary to the duty of loyalty he owes the estate²⁰ in order to secure a personal profit.²¹ This is the very situation which the rule against self-dealing seeks to avoid, and, therefore, courts apply the rule as a rule of penalty and do not look into the fairness of the individual transaction. If a fiduciary violates the rule, the party he represents may charge the fiduciary as a constructive trustee of the property in question.²²

In construing a will, a basic and elementary rule requires adherence to the testator's intention.²³ The problem faced by the court in *Thompson* is that of giving

¹¹ Estate of Graham, 187 Cal. 222, 201 Pac. 456 (1921); 21 CAL. JUR. 2d *Executors and Administrators* § 897 (1955).

¹² *Ibid.* See also Jones v. Peabody, 182 Wash. 148, 45 P.2d 915 (1935).

¹³ Estate of Graham, 187 Cal. 222, 201 Pac. 456 (1921).

¹⁴ 33 C.J.S. *Executors and Administrators* § 223 (1942).

¹⁵ See note 1 *supra*.

¹⁶ Estate of Parker, 200 Cal. 132, 251 Pac. 907 (1926); Estate of Shillaber, 1 Cof. Prob. Dec. 101 (Cal. 1886); 33 C.J.S. *Executors and Administrators* § 223 (1942); 24 C.J. *Executors and Administrators* § 547 (1921).

¹⁷ Estate of Lair, 70 Cal. App.2d 330, 161 P.2d 288 (1945); Estate of Scherer, 58 Cal. App. 2d 133, 136 P.2d 103 (1943); *In re Coursen's Estate*, 6 Cal. Unrep. 756, 133 Cal. XIX, 65 Pac. 965 (1901); Estate of Love, 1 Cof. Prob. Dec. 537 (Cal. 1883); 21 CAL. JUR. 2d *Executors and Administrators* § 897 (1955).

¹⁸ 21 AM. JUR. *Executors and Administrators* § 532 (1939).

¹⁹ Highfield v. Bozio, 188 Cal. 727, 207 Pac. 242 (1922); *In re Ogier*, 101 Cal. 381, 35 Pac. 900, 40 Am. St. Rep. 61 (1894); cases collected 107 A.L.R. 924 (1937), 49 A.L.R. 102 (1927), 18 A.L.R. 635 (1922). As to such a nominated attorney's rights against the estate see 166 A.L.R. 491 (1947).

²⁰ Estate of Parker, 200 Cal. 132, 251 Pac. 907 (1926); Estate of Scherer, 58 Cal. App.2d 133, 136 P.2d 103 (1943); Annot., 18 A.L.R. 635 (1922).

²¹ Estate of Pesula, 150 Cal. App. 2d 462, 310 P.2d 39 (1957); 33 C.J.S. *Executors and Administrators* § 239 (1942).

²² BOGERT, TRUSTS AND TRUSTEES §§ 481, 543 (1935).

²³ CAL. PROB. CODE § 101; Estate of Wilson, 184 Cal. 63, 193 Pac. 581 (1920); Estate of Spreckles, 162 Cal. 559, 567, 123 Pac. 371, 374 (1912); Estate of Murphy, 157 Cal. 63, 106 Pac. 230 (1909); Note, 1958 Wis. L. Rev. 322 (1958).

effect and fulfillment to the testatrix's intent where the intent itself is clear²⁴ but contravenes a positive rule of law or public policy.²⁵ In *Thompson* the public policy is the rule against self-dealing. The upper court might well have affirmed the lower court and simply applied the self-dealing rule as a rule of penalty, thereby denying petitioner any compensation for his legal services. However, in trying to carry out the testatrix's intent, the upper court has necessarily carved out a judicial exception to the self-dealing rule where the facts indicate that the transaction has been fair and the completed transaction mirrors the testatrix's expressed desire.

An executorship is not a trust in the strict sense.²⁶ But there are basic similarities which provide a foundation for drawing an analogy. Both the executor and the trustee are fiduciaries.²⁷ Courts require both to act with the highest good faith in dealing with property entrusted to them.²⁸ The basic problem of self-dealing arises in both the trust and executorship.²⁹ Concerning the trustee, Professor Bogert states:³⁰

While it would seem a clear case of conflict of interest for a trustee to employ himself to do work for the trust (as, for example, to render legal services . . .), there has been a strong modern tendency to sanction the award to such an employee of reasonable compensation for his services where the transaction has been fair [M]odern American authorities often allow a trustee who is a lawyer to collect at least a reasonable sum for legal services rendered to the trust.

Thompson appears to be a step in this direction insofar as the executor is concerned. Further fortifying this position Professor Scott has suggested:³¹

By the terms of the trust the trustee may be permitted to do what in the absence of such a provision in the trust instrument would be a violation of his duty of loyalty.

In California, Civil Code Section 2229 seemingly lays down a policy which prevents the use by a trustee of trust property in any manner for his own profit. This basic policy consideration would prima facie appear to be determinative and negate the above tendencies in California, but in *Thompson* the court feels that the specific intention of the testatrix deserves greater weight. The court says, summarily:³²

The basic policy . . . prohibits such transactions . . . but this policy is deemed to have been overridden where in conflict with a specific direction in the governing instrument.

The New York court³³ has gone beyond the result of *Thompson* with the aid of statute.³⁴ New York followed the general rule regarding "self-employment" by

²⁴ 50 Cal. 2d at 617, 328 P.2d at 3.

²⁵ Estate of Young, 123 Cal. 337, 55 Pac. 1011 (1899); 57 AM. JUR. WILLS § 1134 (1948); A.L.R. DIGEST WILLS § 146.5.

²⁶ County of Los Angeles v. Morrison, 15 Cal. 2d 368, 101 P.2d 470 (1940); Estate of Shaw, 85 Cal. App. 518, 260 Pac. 351 (1927); RESTATEMENT, TRUSTS § 6 (1935); 20 CAL. JUR. 2d EXECUTORS AND ADMINISTRATORS §§14, 15, 223 (1955); BOGERT, TRUSTS §§ 15, 95 (3d ed. 1952).

²⁷ BOGERT, *id.* § 15.

²⁸ CAL. CIV. CODE § 2228.

²⁹ See note 26 *supra*.

³⁰ BOGERT, *op. cit. supra*, note 26 at 395.

³¹ 2 SCOTT, TRUSTS § 170.9 (p. 1213) (2d ed. 1956). See also RESTATEMENT, TRUSTS § 170, comment s (1935).

³² 50 Cal. 2d at 616, 328 P.2d at 3.

³³ *In re Runk*, 181 App. Div. 461, 168 N.Y.S. 970, (*aff'd*, 224 N.Y. 570, 120 N.E. 875) (1918).

³⁴ N.Y. SURROGATE'S COURT ACT § 285, *Commissions of Executor, Administrator or Guardian* (Derivation: N.Y. CCP § 2753).

an executor-attorney until this statute lifted the policy ban. In substance the statute provides that, if an executor, administrator or testamentary trustee is an attorney and counselor at law of New York and renders legal services in connection with his official duties, he should be allowed just and reasonable special compensation for such legal services.

Several jurisdictions allow the attorney-executor to charge for his professional legal counsel as "extraordinary services."³⁵ "Extraordinary services" are more generally found where an executor manages and deals in property³⁶ or operates a farm³⁷ or a business³⁸ for the decedent.³⁹ Although the California Probate Code expressly allows an executor a special fee for extraordinary services,⁴⁰ this section has not been extended to additional compensation for his rendition of legal services.⁴¹

In California a previous exception to the rule against self-dealing was announced in *Estate of Lankershim*.⁴² In that case an attorney had been decedent's counsel. The attorney and a bank were appointed special administrators of the estate. The bank requested the attorney to accept employment as attorney in probate proceedings. It was agreed that the bank would do all the work of administration and the attorney would receive only the fees of an attorney for the estate. Again, there is a situation where, applying the strict rule of self-dealing, a court might deny the legal fees by enforcing the self-dealing rule as a rule of penalty without looking into the fairness of the transaction. But, as happened in that particular case, the agreement was declared and communicated to the beneficiaries, who raised no objection. The trial court, upon filing of the final account, allowed the bank administrative fees and the attorney legal fees. On appeal the appellant beneficiaries contended that because the attorney was one of the special administrators, he could not, as a matter of law, receive any compensation for legal services. The court held that the case was an exception to the rule against self-dealing, saying:⁴³

The previous relations of . . . [the attorney] with the decedent and with the appellants had made him the one person peculiarly and completely familiar with the property and business affairs of an estate amounting to nearly \$7,000,000 [I]n the particular case it was . . . greatly to the interest of the estate to have the duties of legal counsel performed by . . . [him] [I]t was openly stated to the parties in interest . . . that . . . [the attorney] proposed to waive all claim to fees as special administrator and look only to such allowance as might be made for his services as an attorney for the administrators We are of the opinion that appellants are now *estopped* by their own conduct. [Emphasis added.]⁴⁴

³⁵ *Jones v. Peabody*, 182 Wash. 148, 45 P.2d 915 (1935); *In re Wilson's Estate*, 83 Neb. 252, 119 N.W. 522 (1909); *In re Ryan's Estate*, 117 Wis. 480, 94 N.W. 342 (1903); *In re Mabley's Estate*, 74 Mich. 143, 41 N.W. 835 (1899).

³⁶ *Estate of Lampman*, 15 Cal. 2d 212, 100 P.2d 488 (1940).

³⁷ *Estate of Broome*, 162 Cal. 258, 122 Pac. 470 (1912).

³⁸ *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S.W. 75 (1887).

³⁹ 15a WORDS AND PHRASES, *Extraordinary Services* (pp. 697-99) (1950); cases collected 66 A.L.R. 512 (1930).

⁴⁰ CAL. PROB. CODE § 902.

⁴¹ *Estate of Parker*, 200 Cal. 132, 251 Pac. 907 (1926); *Estate of Carr*, 175 Cal. 387, 165 Pac. 958 (1917); *In re Coursen's Estate*, 6 Cal. Unrep. 756, 133 Cal. XIX, 65 Pac. 965 (1901); *Estate of Scherer*, 58 Cal. App. 2d 133, 136 P.2d 103 (1943).

⁴² 6 Cal. 2d 568, 58 P.2d 1282 (1936).

⁴³ 6 Cal. 2d at 573, 58 P.2d at 1284, 1285.

⁴⁴ This second exception to the rule against self-dealing also is analogous to the same type of fact situation in the law of trusts. There, also, an estoppel may arise preventing the beneficiary of a trust from enforcing the rule. BOCERT, TRUSTS § 95 at 396-397 (3d ed. 1952).