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IN THE COURT OF APPEALS OF IOWA

STUART W. CONNER, and)
BARNES, WADSWORTH,)
ELDERKIN, LOCHER and)
PIRNIE,)

Appellees - Plaintiffs,)

v.)

MARY C. BOWLING,)

Appellant - Defendant.)

Filed April 28, 1973

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2-59986

Appeal from Fayette District Court - Frank D. Elwood, Judge.

Both plaintiffs - lawyers and defendant - client appeal from judgment in action to recover for legal services. Affirmed on plaintiffs' appeal. Affirmed as modified on defendant's appeal.

Brent R. Cromley, of Hutton, Sheehy & Cromley, of Billings, Montana, and Thomas E. Murphy, of Sumner, for appellant - defendant.

John K. Von Lackum, of Wadsworth, Elderkin, Pinnie & Von Lackum, of Cedar Rapids, and Richard F. Nazette, of Nazette, Hendrickson & Merner, of Cedar Rapids, for appellees - plaintiffs.

Heard by Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

CARTER, J.

Defendant, Mary Bowling, appeals from judgment for plaintiffs for the value of legal services performed by them on her behalf. Plaintiffs' cross-appeal seeking an increase recovery for their services. We affirm on plaintiffs' appeal and affirm with modification as to interest on defendant's appeal.

Plaintiffs are a Montana lawyer and a firm of Iowa lawyers who performed legal services for defendant, Mary Bowling. Their suit to recover attorney fees was originally docketed in equity and contained a request to foreclose an attorney's lien on property in the hands of Mary Bowling and other persons who had been made parties defendant. Prior to trial, defendant, Mary Bowling, deposited the sum of \$30,000 with the clerk of the district court as security for any potential judgment and thereafter plaintiffs ceased to rely upon the purported attorney's lien. At that juncture, the other parties defendant were deleted from the action. We will refer to Mary Bowling as "defendant" throughout this opinion.

As a further result of the abandonment of any attempt at lien foreclosure, the court directed, following a pretrial conference, that the action "be tried as a law action." No objection was made to this procedure and the matter was so tried. When a case is tried as a law action in the court below, the reviewing court will treat the matter as in the same forum. *Flynn v. Michigan-Wisconsin Pipeline Co.*, 161 N.W.2d 56, 60 (Iowa 1968). Accordingly, our review is on error and the trial court's findings of fact are binding upon us to the extent they find support in the evidence. Rule 4, Rules of Appellate Procedure.

The principal area of disagreement between the parties is the legal effect to be accorded a written fee agreement drafted by defendant's Montana lawyer and executed on August 11, 1970, by defendant and a member of the Iowa law firm engaged by the Montana lawyer to assist him in her representation. The principal provisions of said agreement are as follows:

The Client hereby employs the attorneys as legal counsel to render all necessary legal services to the Client in connection with an existing separate maintenance suit against Client's husband, John, and a future dissolution of marriage action, if Client pursues such course of action.

As the sole compensation for said services by said Attorneys, the Client will pay said Attorneys out of the proceeds of any recovery, whether recovery is by litigation or settlement prior to the institution of a law suit, one-fourth of the fair market value of all moneys and other personal and real property secured for Client. Such percentage shall be computed on the value of property secured for the Client even though such property may now be held in joint tenancy by Mary and John Bowling or in other ownership in which Mary Bowling has an interest.

Plaintiffs' petition, as amended, was based on this agreement, with an alternative claim alleged based upon quantum meruit. The trial court refused to apply the percentage fee agreement and determined plaintiffs' claim on a quantum meruit basis.

I. On plaintiffs' appeal they urge that the contingent fee agreement was valid and should be applied to determine the amount owed them for services performed. In response, defendant contends that said fee agreement is violative of the generally recognized prohibition against contingent fee agreements in actions involving domestic relations and is thereby rendered unenforceable. DR2-106(c) of the current Iowa Code of Professional Responsibility provides:

A lawyer shall not enter into an arrangement for, charge or collect a contingent fee for representing a defendant in a criminal case, or either party in any action involving domestic relations.

Manifestly, the proscriptions contained in the quoted disciplinary rule are extremely broad and seemingly touch upon all aspects of domestic relations cases. However, this provision of the Code of Professional Responsibility was adopted in this state after the contract in question was entered into by the parties.

Prior to the enactment of DR2-106(c) the matter of contingent legal fees in domestic relations matters was the subject of judicial decision. In its decision in *In re Sylvester's Estate*, 195 Iowa 1329, 1333, 192 N.W. 422 (1923), the supreme court of this state determined that:

[A]n agreement to pay an attorney's fee contingent upon the procurement of a divorce and the adjustment of property rights in connection therewith... is one that involves a matter of public policy. The proper maintenance of the marriage relation is a matter of public concern.

In general, a contract the object of which is the procurement of a divorce is against public policy and void.

The plaintiffs, in the present case, contend that this judicial pronouncement is the one that controls their case and that it does not apply to the types of services which they were to perform and did perform on defendant's behalf. They assert that while the written agreement refers to "an existing separate maintenance suit," this in fact was not a pending action but one which had gone to final decree. They further urge that defendant engaged their services for purposes of collecting support owed her and her minor child under that decree; forcing defendant's husband to make mortgage payments

on certain farm real estate he owned jointly with her under said decree; and saving such real estate or an interest therein for defendant's benefit.

As such, plaintiffs contend their services were not rendered for the procurement of a divorce or dissolution but were instead "akin to a collection matter." The trial court found the facts to be that plaintiffs were engaged primarily "to recover, save, and deliver to the defendant all salvageable property; reconciliation and the saving of the marriage was not then apparently feasible; ultimate services rendered with respect to the dissolution, actually commenced by the defendant's then husband, John Bowling, became, in effect, a mere incident of the goal to be accomplished." The court below nevertheless concluded that because the primary portion of the assets against which plaintiffs now seek to enforce their 25% contingent fee claim were obtained by defendant as a result of a dissolution of marriage decree, the contingent fee agreement was unenforceable. The court then considered the alternative prayer of plaintiffs' petition based upon quantum meruit and made findings upon and entered judgment for the reasonable value of all legal services performed for defendant by plaintiffs, subject to certain credits.

In resolving the issues presented on plaintiffs' appeal, we accept their contention that the broad language of DR2-106(c) does not govern the present controversy arising from an agreement entered into before that disciplinary rule was adopted in this state. We also agree that the existing case law at the time of the making of the agreement in the present case did not render invalid contingent fee agreements with respect to efforts to recover property or support between husband and wife separate from the procuring a divorce or dissolution of marriage, provided that such efforts were not "contingent upon the procurement of a divorce [or dissolution]." See *In re Sylvester's Estate*, supra, 195 Iowa at 1333. For a detailed discussion concurring with this view see *Burns v. Stewart*, 188 N.W.2d 760, 765-67 (Minn. 1971).

In application of these principles to the facts of the present dispute we are satisfied that there was a substantial body of services which might have been performed by plaintiffs in relation to enforcement of the August 8, 1969, separate maintenance decree separate from the procuring a divorce or dissolution of marriage, and which could thus properly have been made the subject of a contingent fee agreement. Such services would include the collection from defendant's husband of support for defendant

and her minor son under the separate maintenance decree which accrued at the rate of \$650 per month and was delinquent by approximately \$1950 at the time the plaintiffs' services were engaged; and/or any lump sum cash awards or transfer of property which might have been obtained in lieu of such support.¹ To the extent that the instant fee agreement pertained to the performance of said services, it was neither void nor unenforceable. To the extent it sought to go beyond this and include services rendered with respect to "a future dissolution of marriage action, if client pursues such course of action" that portion of the agreement is clearly violative of the controlling case law at the time it was entered into and therefore not subject to being enforced by the courts.

In spite of our conclusion that the agreement, as drafted, is partially invalid, the contingency upon which the improper portion was predicated never occurred. The defendant never pursued a course of action to seek a dissolution of marriage except as she was forced to respond to her husband's petition for dissolution of marriage. Ordinarily, an action on a contract is not barred by the illegality of the contract if the action is not one to enforce the illegal provision. *Kosuga v. Kelly*, 257 F.2d 48, 54 (7th Cir. 1958). This is the position of the Restatement of the Law of Contracts § 603, which provides:

A bargain that is illegal only because of a promise or a provision for a condition, disregard of which will not defeat the primary purpose of the bargain, can be enforced with the omission of the illegal portion by a party to the bargain who is not guilty of serious moral turpitude unless this result is prohibited by statute. Recovery is more readily allowed where there has been part performance of the legal portion of the bargain.

See also *Winans v. Asbury Park Nat'l Bank*, 13 N.J. Super. 577, 81 A.2d 33, 36 (1951).

¹ Although ordinarily an award of a gross sum or specific property is not obtainable in a proceeding for separate maintenance, this is not an absolute rule. See *Avery v. Avery*, 236 Iowa 9, 14, 17 N.W.2d 820, 823 (1945). Moreover, it was always possible (until the commencement of the dissolution action by defendant's husband) that such sums could have been obtained for defendant through negotiation without the aid of a dissolution proceeding.

We believe, consistent with the foregoing authorities, that the portion of the agreement properly tied to services to secure money or property separate from the procuring of a divorce or dissolution could have been enforced. Plaintiffs initially undertook to perform such services by contempt proceedings brought in the separate maintenance action. At about this same time, plaintiffs assisted in negotiating an agreement with the mortgage lender on the farm land of defendant and her husband seeking to prevent its loss through foreclosure. Of the 245.7 hours of legal services performed for defendant by plaintiffs, for which recovery was allowed in the trial court, 119.5 hours occurred prior to the commencement of the action for dissolution by defendant's husband. But when that dissolution proceeding was commenced on February 19, 1971, the dissolution court, pursuant to § 598.21, The Code, became vested with absolute control over the disposition of all of the property upon which plaintiffs' contingent fee claim might have been based. This circumstance rendered impossible any continued action by plaintiffs outside the context of a marriage dissolution proceeding. At the insistence of the trial court all of their efforts in this regard were thereafter pursued in the dissolution proceeding. This removed any effective opportunity to give pro tanto enforcement to the valid portion of the contingent fee agreement. Performance under that portion of the agreement was effectively frustrated. As a result of this culmination of events, we agree that the trial court properly concluded that fairness to both parties could best be effectuated by a quantum meruit recovery based upon all services performed. There was no error in so holding.

II. The conclusions reached in the preceding division dispose of the contention made on defendant's appeal that plaintiffs should not have been permitted any recovery for their services, even on a quantum meruit basis. This argument is based upon those authorities which hold that an attorney who makes a void contingent fee agreement for his compensation should not be permitted to recover on either express contract or quantum meruit. The authorities on this point are divided. Cases are collected in Annot. 100 A.L.R.2d 1378, 1390-91 (see also 1976 later case service to foregoing annotation at 649-50).

The Iowa court in *In re Sylvester's Estate*, supra, specifically declined to pass upon this problem.² Nor must we decide the issue. As indicated in our prior discussion under division I, the invalid portion of the contingent fee agreement in the present case never had any applicability because the condition on which that portion of the agreement was based never occurred. Under such circumstance we hold that a quantum meruit recovery was entirely appropriate.

III. On defendant's appeal challenge is also made to the amount determined by the trial court as the reasonable value of plaintiffs' services. These values were the subject of expert opinion testimony in the trial court. The amount of the recovery awarded fell well within the range of values presented in the evidence and the trial court's findings based on such testimony should not be disturbed on appeal. In so holding we have considered the evidence that initially plaintiffs offered to perform those services which were the subject of the percentage fee contract for \$30 per hour. Plaintiffs' quantum meruit recovery in the trial court was established at a higher rate. It is apparent, however, that defendant never accepted the offer based upon the \$30 hourly rate and such circumstance is therefore merely a piece of evidence to be considered with all the other evidence in arriving at the value of plaintiffs' services. The trial court's finding on this matter has the force of a jury verdict. *Klass v. Iowa Mutual Liability Insurance Co.*, 210 Iowa 78, 81, 230 N.W. 314 (1930); *Kratz v. Heins*, 169 N.W. 33 (Iowa 1918).

IV. Defendant's appeal also challenges the overruling by the trial court of her special appearance. Plaintiffs, throughout the litigation, have predicated their claim to in personam jurisdiction over defendant solely upon the provisions of § 617.3, The Code. Whether this statute supports such contention depends upon whether plaintiffs have established that their claim arises from or grows out of a contract made by defendant, a resident of Montana, with a resident of Iowa, which contract was to be performed in whole or in part by either party in Iowa. Examination of the record can lead to but one conclusion on this point. The defendant did in fact contract with all plaintiffs to

² The policy considerations involved, however, are similar to those presented in *Lawrence v. Tschirgi*, 244 Iowa 396, 57 N.W.2d 46 (1953) where the court permitted a quantum meruit recovery.

perform legal services in her behalf. Some of the plaintiffs were residents of Iowa and it was contemplated that most of the services to be performed would be performed in the state of Iowa. We find nothing in § 617.3 which requires that all parties plaintiff who bring suit on the contract must be residents of Iowa in order to sustain jurisdiction.

The contract to which we make reference and upon which the issue of jurisdiction is dependent involves more than the agreement to pay attorney fees. That agreement was only a part of the total contract between the parties. The partial invalidity of the fee portion of the contract does not affect the court's jurisdiction. The trial court found that the facts with respect to the making and performance of the contract support jurisdiction. Such findings have support in the record and are binding on appeal. See Douglas Machine & Engineering Co. v. Hyflow Blanking Press, Corp., 229 N.W.2d 784 (Iowa 1975).

V. The final issue presented by defendant's appeal is whether pre-judgment interest should be allowed on plaintiffs' recovery. We hold that because of plaintiffs' continued insistence on their right to recover on express contract for a percentage fee there was never any election on their part to accept the reasonable value of their services. Such election was necessary in order to pursue a claim for interest prior to the trial court's decision. See in this regard, Lemire v. Haley, 93 N.H. 206, 39 A.2d 10, 13 (1944); 47 C.J.S., Interest § 47 at 60.

Accordingly, we hold the trial court erred in permitting interest on the amount of the judgment prior October 4, 1976, the date of the trial court's decision. We modify the judgment so as to substitute the date of October 4, 1976, for the date of November 30, 1972, in that portion of the judgment relating to payment of interest. In addition, we direct that interest accrue at the legal rate of 7% per annum rather than the 5% annual rate specified in the trial court's decree. See Acts, 65th G.A. ch. 275, § 1, effective July 1, 1973. As so modified the judgment of the trial court is affirmed.

All motions of the defendant ordered submitted with this appeal are overruled. Costs on appeal shall be taxed one-half to plaintiffs and one-half to defendant, Mary C. Bowling.

AFFIRMED ON PLAINTIFFS' APPEAL.

AFFIRMED AS MODIFIED ON DEFENDANT'S APPEAL.

DONIELSON, J., dissents.

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DONIELSON, J. (dissenting)

I dissent. I cannot subscribe to an interpretation of the contingent fee agreement in question as anything other than one the object of which was the procurement of a divorce. See *In re Sylvester's Estate*, 195 Iowa 1329, 1333, 192 N.W. 422 (1923). As a result of this agreement, plaintiffs were to receive 25 percent of property recovered for defendant. In their amended petition, plaintiffs claimed fees and expenses based upon the contingent fee agreement and also requested recovery of \$20,629.51 based upon quantum meruit. The trial court denied plaintiffs recovery under the fee contract but awarded them \$15,629.51, less fees already paid by defendant, on the basis of quantum meruit.

The fee agreement provides in pertinent part:

The Client hereby employs the attorneys as legal counsel to render all necessary legal services to the Client in connection with an existing separate maintenance suit against Client's husband, John, and a future dissolution of marriage action, if Client pursues such course of action.

The legal proceedings envisioned by this agreement are the existing separate maintenance action and a prospective dissolution of marriage action. The contract drawn by the attorney clearly expresses this and this court should recognize the contract for what it is—a clearly and unequivocally expressed domestic relations contingent fee arrangement.

Although the agreement does refer to "an existing separate maintenance suit," the very terms of the agreement itself forbid any interpretation that the services rendered were "akin to a collection matter", nor do I think that such a conclusion is supported by the record. Further, I believe that, for purposes of public policy considerations, there is no difference between a separate maintenance suit and a dissolution action. Both constitute proscribed subjects of contingent fee arrangements, in accordance with the language and spirit of *In re Sylvester's Estate*, supra, and the more recent judicial enactment of this view in DR 2-106(c) of the current Iowa Code of Professional Responsibility.

Because of my interpretation of this fee agreement, I must also address the quantum meruit issue upon which the trial court based its decision and award. Although it is not clear from a reading of *In re Sylvester's Estate*, supra at 1341-1342, whether

quantum meruit is available when the underlying contingent fee agreement is found void as against public policy, the court in *Barngrover v. Pettigrew*, 128 Iowa 533, 535-536, 104 N.W. 904 (1905), did speak to a similar issue. There, a fee agreement was entered into which was conditioned upon the obtainment of a divorce. After holding that such an agreement is void, the court responded to the quantum meruit argument:

The appellants contend that, if the agreement be held to be invalid, they are still entitled to recover the reasonable value of their services on a quantum meruit. But the 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 cannot 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. *Fangborn v. Westlake*, 36 Iowa, 546; *Reynolds v. Nichols & Co.*, 12 Iowa, 338; *Miller v. Ammon*, 145 U.S. 421 (12 Sup. Ct. 884, 36 L.Ed. 759); *Pollock's Principles of Contracts*, 253-260. In the light of this well settled rule, it is manifest that there can be no recovery here on a quantum meruit; for the services rendered, as shown by the record, were along the line specified in the written agreement. (emphasis in original)

In *Baskerville v. Baskerville*, 246 Minn. 466, 75 N.W.2d 762, 773 (1956), a similar approach to the issue presented here was taken by the supreme court of Minnesota:

... Since contingent fee contracts in divorce actions are contrary to public policy they must be eradicated from our practice. We therefore expressly overrule the two *Klampe v. Klampe* cases, 137 Minn. 227, 163 N.W. 298, and 145 Minn. 404, 177 N.W. 629, insofar as they permit an attorney who is a party to a contingent fee contract in a divorce action to recover what his services are reasonably worth. Since the illegality of the contingent fee contract rests on the ground that it may govern a lawyer's action in a manner which thwarts public policy, 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. *McCarthy v. Santangelo*, 137 Conn. 410, 78 A.2d 240.

To permit a recovery in quantum meruit after a contingent fee arrangement of this type has been identified does not adequately implement the public policy considerations which we must consider. Further, to construe this clear and simple contract in a manner so as to justify recovery for all peripheral services is, indeed, strained to say the least. I view these services as arising unquestionably from the agreement itself. They are clearly within the obvious confines of the domestic relations action and the majority's view does not, in my estimation, contribute to the long-term best interests of the public or the bar. Accordingly, I would reverse the district court.