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Fiduciary Administration - Compensation - Extra Compensation and the Rule Against Self-Dealing

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FIDUCIARY ADMINISTRATION—COMPENSATION—EXTRA COMPENSATION AND THE RULE AGAINST SELF-DEALING—Respondent was a member of a firm of certified public accountants who were actively engaged in assisting decedent work out his income tax difficulties at the time of his death. Under decedent's will respondent was named executor and trustee along with decedent's lawyer and a trust company. The executors employed respondent's partnership to perform services in connection with the estate. The surviving widow and life beneficiary of the estate filed objections to the account of the executors, urging that the rule against self-dealing on the part of fiduciaries precluded respondent from recovering for services performed as an accountant in addition to his duties as an executor. On appeal from a decree of surrogate's court overruling this objection, *held,* affirmed, subject to modification. The respondent was entitled to extra compensation for his services as an accountant in addition to his compensation as executor and trustee, but only to the extent that the court considered reasonable and fair. *In re Tuttle's Will,* 4 App. Div. (2d) 310, 164 N.Y.S. (2d) 573 (1957).

The general rule in New York, as recognized by the principal case, is that compensation for executors and administrators is strictly limited to that provided by statute,[1] and it has even been suggested that "there can

[1] Collier v. Munn, 41 N.Y. 143 (1869); Pyle v. Pyle, 137 App. Div. 568, 122 N.Y.S. 256 (1910); In re Hayes' Estate, 102 N.Y.S. (2d) 111 (1951).

be no exception to this rule."[2] The rule is based on the public policy which prohibits a fiduciary from hiring himself to perform additional services for the estate, in order to prevent a conflict of interests which might lead to a breach of the duty of loyalty.[3] The duty of loyalty theory has been accepted by a number of other states in denying extra compensation,[4] even where the court recognized that the executor was the most competent person who could have been obtained to render the services.[5] The principal case states, however, that the courts of New York have avoided this general rule under "varying circumstances." Authority cited to illustrate these "varying circumstances" includes holdings that the general rule was not applicable where the will specifically provided for extra compensation,[6] where there was an agreement between the beneficiaries and the executor for extra services,[7] or where the services performed were entirely disconnected from the duties of the executor.[8] The principal case does not fall within these exceptions, however. The majority of cases relied upon by the court involved payment of a salary to an executor and trustee who had acted, over an extended time, as an officer of a corporation or business owned by the estate.[9] Since the court did not discuss this point, it is not clear whether it would recognize a distinction between the salary cases and the cases involving the rendering of professional services for clearing up immediate administrative problems for the estate, as in the principal case. It would appear, however, that

2 Matter of Popp, 123 App. Div. 2, 107 N.Y.S. 277 (1907). The rule is also applicable where it is the executor's firm that is employed, according to Parker v. Day, 155 N.Y. 383, 49 N.E. 1046 (1898).

3 Collier v. Munn, note 1 supra; Pyle v. Pyle, note 1 supra. Another basis for the rule, stated in Matter of Popp, note 2 supra, is that statutes providing compensation for executors and administrators are in derogation of the English common law rule, adopted in New York, against allowing any compensation whatever, and as such are to be strictly construed. But the English rule was not adopted by all states. See Turnbull v. Pomeroy, 140 Mass. 117, 3 N.E. 15 (1885).

4 Willard v. Bassett, 27 Ill. 37 (1861); Taylor v. Wright, 93 Ind. 121 (1883); Needham v. Needham, 34 Idaho 193, 200 P. 346 (1921); Estate of Parker, 200 Cal. 132, 251 P. 907 (1926); Lightner v. Boone, 221 N.C. 78, 19 S.E. (2d) 144 (1942).

5 Holding v. Allen, 150 Tenn. 669, 266 S.W. 772 (1924).

6 Matter of Froelich's Estate, 122 App. Div. 440, 107 N.Y.S. 173 (1907).

7 Matter of McCord's Will, 2 App. Div. 324, 37 N.Y.S. 852 (1896).

8 Lent v. Howard, 89 N.Y. 169 (1882). Executors and trustees managed farm property of the estate for 15 years and were allowed compensation therefor. Matter of Popp, note 2 supra, distinguished this case on the ground that the will imposed no duty to manage the property, but only to sell it, and thus the services rendered were entirely disconnected from fiduciary duties. As the Popp case pointed out, at 107 N.Y.S. 278, "It is not enough that he [the executor and trustee] does something . . . which he has a right to employ another to do and pay him for out of the estate." The facts of the principal case fall within the language quoted and, thus, would be subject to the general rule according to the Popp case.

9 Matter of Berri's Will, 130 Misc. 527, 224 N.Y.S. 466 (1927); Matter of Gerbereux's Will, 148 Misc. 461, 266 N.Y.S. 134 (1933); In re Smyth's Estate, 36 N.Y.S. (2d) 605 (1942); In re Gould's Estate, 116 N.Y.S. (2d) 269 (1952); Matter of Block, 186 Misc. 945, 60 N.Y.S. (2d) 639 (1946).

the New York courts have treated the salary cases differently from those involving professional services.[10] It has been in the area of professional services that those courts have been the most outspoken against extra compensation, particularly in the situations involving attorney-executors.[11] In only one case cited did the court allow extra compensation in a situation similar to that of the principal case.[12]

The principal case is significant in illustrating the impractical effect that might result if the court blindly applied the duty of loyalty theory to deny extra compensation. The court here emphasized the fact that the respondent had been actively engaged in attempting to extricate the testator from complex income tax problems at the time he was named executor.[13] To require the executors to employ a strange firm of accountants, unfamiliar with the estate's problems, would result in added costs to the estate and would prolong its administration. Professor Atkinson has suggested that while the duty of loyalty theory is good as a theory, in practice it results in inefficiency in administration of the estate.[14] As to the conflict of interests problem involved in allowing extra compensation, it has been said that requiring the court to pass upon claims for such compensation is sufficient protection to the beneficiaries.[15] The New York Surrogate's Court, in construing a statute providing for extra compensation for attorneys,[16] recognized the force of this argument by stating that the provisions of the statute did not depart from the public policy against self-dealing because it required that any claim for extra compensation be subject to the scrutiny of the court, which could discover and eliminate any improper or excessive charges.[17] The principal case illustrates the fact that this reasoning can also be applied where there is no statute providing for extra compensation.[18] There are decisions in other states that have recognized that there is no impropriety in allowing an executor to perform professional services for the estate.[19] Some states have enacted statutes allowing extra

10 Unfortunately, none of the salary cases found specifically discuss this distinction as being the ground for treating the salary cases as exceptional. It consistently appeared in those cases, however, that the court allowed extra compensation only where the executor had operated a business or corporation over an extended time.

11 Collier v. Munn, note 1 supra. But see New York Surrogate's Court Act (1920) §285, for statutory abrogation of the attorney-executor rule.

12 Matter of Adolf Wexler, 125 N.Y.L.J. 190 (1951). The surrogate's court allowed extra compensation to an accountant on facts similar to that of the principal case.

13 Matter of Adolf Wexler, note 12 supra, also emphasized that the accountant was an old friend of the decedent, highly familiar with his tax problems.

14 ATKINSON, WILLS, 2d ed., 656 (1953).

15 41 VA. L. REV. 119 at 135 (1955); ATKINSON, WILLS, 2d ed., 656 (1953).

16 New York Surrogate's Court Act (1920) §285.

17 In re Maas' Estate, 38 N.Y.S. (2d) 261 (1942).

18 Any interested party can file objections to the executor's account and the court did, in fact, cut down the amount claimed to about one-third the fee demanded.

19 Swank v. Reherd, 181 Va. 943, 27 S.E. (2d) 191 (1943); Jones v. Peabody, 182 Wash. 148, 45 P. (2d) 915 (1935), noted in 49 HARV. L. REV. 337 (1935).

compensation.[20] Such statutes may show the development of a belief that the rule against self-dealing is not necessarily violated by allowing the executor to perform extra services. The result in the principal case indicates that even in New York, where the courts have argued so strongly against extra compensation in the past, the court will not allow the duty of loyalty theory to stand in the way of efficient administration of the estate.

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[20] See ATKINSON, WILLS, 2d ed., 656 (1953) and 49 HARV. L. REV. 337 (1935).