

## COMMENTS

### LEGAL ETHICS—CONFLICTING INTERESTS—ATTORNEY ACTING AS TRUSTEE AND COUNSEL FOR EXECUTOR

An attorney, appointed a trustee by the will of a testator, rendered legal services to the executrix at her request. The attorney having completed the services, the executrix, with the approval of all residuary legatees, applied to the probate judge for approval of the payment of the attorney's fees. The probate judge took the position that the attorney was representing conflicting interests and denied payment. This decision, on appeal to the circuit court, was reversed. On further appeal to the Supreme Court of Missouri, held: circuit court decision affirmed. The legal services rendered an estate in administration by an attorney-trustee are chargeable against the estate and not merely against the trust. Since there had been no separation of the trust fund from the general fund at the time that the services were rendered, the attorney had not violated Missouri Supreme Court Rule 4.06<sup>1</sup> by representing conflicting interests.<sup>2</sup>

The court reasoned by analogy that since an executor may lawfully act as a testamentary trustee, an attorney who acts as advisor to an executor may also act as a testamentary trustee in the same estate. That an executor may also serve as a testamentary trustee is well settled,<sup>3</sup> but with regard to the precise issue in the instant case the authorities are silent. The analogy of the court is not completely convincing, however, because it deals with the

1. Missouri Supreme Court Rule 4.06 is the same as Canon 6 of the Canons of Professional Ethics of the American Bar Association. The appropriate part of the canon reads:

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this section, a lawyer represents conflicting interests, when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

2. *In re Schield's Estate*, 250 S.W.2d 151 (Mo. 1952).

3. *Irvin v. Larson*, 94 F.2d 187 (5th Cir. 1938); *Goodsell v. McElroy Bros. Co.*, 86 Conn. 402, 85 Atl. 509 (1912); *State v. Beardsley*, 77 Fla. 803, 82 So. 794 (1919); *Sides v. Shewmaker*, 188 Ga. 672, 4 S.E.2d 829 (1939); *Jones v. Broadbent*, 21 Idaho 555, 123 Pac. 476 (1912); *Massachusetts Institute of Technology v. Attorney General*, 235 Mass. 288, 126 N.E. 521 (1920); *In re Shelton's Estate*, 338 Mo. 1000, 93 S.W.2d 684 (1936); *West v. Bailey*, 196 Mo. 517, 94 S.W. 273 (1906); *State v. Fidelity & Casualty Co. of New York*, 82 S.W.2d 123 (Mo. App. 1935); *In re Adams*, 32 R.I. 41, 78 Atl. 524 (1911). See also 3 BOGERT, TRUSTS & TRUSTEES 1837 (1935); Note, *Determining the Status of An Executor Who Is Also a Trustee*, 49 HARV. L. REV. 116 (1936).

question of whether *any* person may act as executor and trustee in the same estate, and the problem in the principal case is one of professional ethics.

Perhaps a closer analogy may be drawn to the decisions on the question of whether an attorney who is an executor or trustee may perform legal services for the estate or trust respectively without representing conflicting interests. The older rule is that he may not because it is one of the duties of the fiduciary to see that no excessive or improper charge is made by persons employed by the estate, and the duties of the fiduciary in such a situation are contrary to his personal interests in determining the size of the fee.<sup>4</sup> The modern trend, however, is toward permitting the executor or trustee to receive fees as both fiduciary and attorney.<sup>5</sup> Some states have merely modified the older rule by permitting such fiduciary a larger fee than an executor or trustee who employs other counsel, which in effect is similar to permitting fees for both services.<sup>6</sup>

In addition, it seems clear that in Missouri the trustee has no duty to make an accounting and ascertain the net income, if any, that might have accrued during the period of the executor's administration<sup>7</sup>—except possibly when he knows or should know of a misappropriation by the executor.<sup>8</sup> The trustee's duties begin when he accepts the trust and receives the corpus of the estate from the executor, and consequently the trustee cannot be held responsible for the actions of the executor.<sup>9</sup> The Missouri court evidently believes that the accounting which must be made to the probate court by the executor<sup>10</sup> is a sufficient check on him. Thus, if the trustee is under no initial duty to ascertain the correctness of the executor's accounts, it is unlikely that an action

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4. Willard v. Bassett, 27 Ill. 37 (1861); Mayer v. Galluchat, 6 Rihc. Eq. (S.C.) 1 (1853); Broughton v. Broughton, 5 De G. M. & G. 160, 43 Eng. Rep. 831 (1855).

5. Taylor v. Denny, 118 Md. 124, 84 Atl. 369 (1912); Shelton v. McHanet, 343 Mo. 119, 119 S.W.2d 951 (1938).

6. Nelson v. Schoonover, 89 Kan. 779, 132 Pac. 1183 (1913); Kentucky National Bank v. Stone, 11 Ken. L. Rep. 948 (1890); Holding v. Allen, 150 Tenn. 669, 266 S.W. 772 (1924); Morris v. Ellis, 62 S.W. 250 (Tenn. Ch. App. 1901); Noble v. Whitten, 38 Wash. 262, 80 Pac. 451 (1905).

7. Selleck v. Hawley, 331 Mo. 1038, 56 S.W.2d 387 (1932); *In re Holmes' Estate*, 328 Mo. 143, 40 S.W.2d 616 (1931).

8. See 3 BOGERT, *op. cit. supra* note 3, at 1836.

9. Selleck v. Hawley, 331 Mo. 1038, 56 S.W.2d 387 (1932); *In re Holmes' Estate*, 328 Mo. 143, 40 S.W.2d 616 (1931).

10. Mo. REV. STAT. §§ 465.030, 465.130 (1949).

would arise in which the executor and the trustee would be opposing parties.

These considerations indicate the validity of the court's decision on the facts of the principal case. Other factors, however, point to at least two situations where a conflict of interest could arise in such a factual setting. It has been stated that the trustee does have a duty to take over the assets from the executor as soon as the terms of the will and the probate law allow and will be liable to the trust beneficiaries if he permits the executor to retain possession longer than is required for the closing up of the estate and if a loss thereby results.<sup>11</sup> This rule might put the trustee under an obligation to sue the executor, in which case the attorney-trustee in the instant case would find himself representing conflicting interests. Furthermore, it has been held that where the trustee knows or should reasonably know that the executor has misappropriated the funds of the estate, the trustee owes the beneficiary a duty to sue the executor for damages for failure to deliver over to the trust the proper amount and kind of property.<sup>12</sup> Here again there is a possibility of conflict, for there can be little doubt that the attorney-trustee in the principal case would be on notice of any misappropriation of funds made by the executrix since he had advised her in the administration of the estate. The fact that a conflict might arise was admitted in the principal case but that possibility was dismissed with the statement that the mere fact of a possibility of conflict was beside the point.

The principal case is consistent with the trend toward relaxation of the harshness of the rule against representing conflicting interests.<sup>13</sup> Moreover, in the light of practicality, the court's decision that the mere fact of a possibility of representing conflicting interests should not be sufficient to implicate an attorney under Rule 4.06 seems logical, for it is always possible for two of an attorney's clients to become opposing parties in a future suit. Should an actual controversy arise between them, the attorney could and should remove himself from the suit at that time. This reasoning suggests the soundness of the ruling in the principal case.

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11. See 3 BOGERT, *op. cit. supra* note 3 at 1836.

12. *In re Rosenfeldt's Will*, 185 Minn. 425, 241 N.W. 573 (1932); *accord, In re Kline's Estate*, 280 Pa. 41, 124 Atl. 280 (1924).

13. See notes 4, 5, 6 *supra*.