

## Contingent Fees in Domestic Relations Actions: The Minority Rule(s)

The general American rule is that a contract entered into by an attorney and a client in which the attorney's fee is conditioned upon his obtaining a divorce for the client or contingent upon the amount of alimony or property recovered is void as against public policy.<sup>1</sup> The rationale given in the leading case of *Jordan v. Westerman*<sup>2</sup> is society's interest in maintaining the family unit or, where differences have arisen, in effecting a reconciliation. It is also said that such an agreement gives to the attorney a personal interest in preventing a reconciliation; that alimony, being a personal right of the wife, cannot be assigned in advance and any attempt to do so is a usurpation of the court's power; that a fraud upon the court is perpetrated when alimony is requested without disclosing the existence of such an agreement; and, finally, that contingent fee arrangements are unnecessary in divorce actions where the wife's costs are routinely taxed to the husband.<sup>3</sup>

Since the cases adopting the rule of *Jordan v. Westerman* are extensively catalogued and analyzed,<sup>4</sup> and a survey of the literature generally reveals no such treatment of cases to the contrary, it might be assumed that the rule is universal. Such is not the case. Several decisions have permitted contingent fee contracts in domestic relations actions.

### *The Texas Practice: A Rule Without Reason?*

The courts of Texas have adopted a permissive attitude toward contingent fee contracts in matrimonial actions, although the legality of such arrangements has apparently never been decided by that state's highest court. The leading case of *Kull v. Brown*<sup>5</sup> was an action instituted by an attorney who had represented the wife in a divorce action and had secured a final judgment under a written

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1. *Jordan v. Westerman*, 62 Mich. 170, 28 N.W. 826 (1886); RESTATEMENT OF CONTRACTS § 542 (1932); 7 AM. JUR. 2d *Attorneys-at-Law* § 217 (1963); 17 C.J.S. *Contracts* § 235 (1939); CORBIN ON CONTRACTS § 1424 (1962); Annot., 30 A.L.R. 188 (1924) (cases collected).

2. 62 Mich. 170, 28 N.W. 826.

3. See 15 ALA. L. REV. 208, 209-10 (1963).

4. See, e.g., sources cited notes 1 and 3 *supra*.

5. 165 S.W.2d 511 (Tex. Civ. App. 1942).

employment contract by which he was to receive an undivided one-third interest in the share of the community property which was determined to be hers. The contract provided that the wife could not settle the cause of action without the consent of the attorney. After the judgment became final, the wife conveyed to her former husband, for consideration, all of her interest in what had been adjudicated to be her share of the community property. The attorney then sued the husband to recover an undivided one-third interest in the property conveyed. The trial court granted the full relief asked and the husband appealed, claiming that the contract in question was void as against public policy in that it purported to assign a present interest in a cause of action and that it provided that the claim could not be settled without the attorney's consent. In affirming the judgment, the Texas Court of Civil Appeals treated the attorney's interest as a future interest "conditioned upon the successful exercise of his agency."<sup>6</sup> The second contention was considered inapplicable in light of a finding that the marriage had been dissolved at the time of the wife's commencement of her divorce action and that there was no showing of an attempted reconciliation or settlement of the action. The court went on to hold that when the attorney fully performed his part of the contract by prosecuting the divorce action to final judgment, he became the equitable owner of one-third of the property recovered for the wife. The court did not advance any rationale for refusing to invalidate the contract, nor did it refer to the majority rule or the policy considerations supporting it.<sup>7</sup>

The later case of *Coen v. Stout*,<sup>8</sup> decided in the same appellate district as *Kull*, appears to have extended *Kull* by permitting the attorney to recover on his contract which provided for a fee of fifty per cent of the amount recovered in an action for past-due *alimony* and *child support* payments. Again, no policy justifications were advanced. Similarly, the Texas State Bar's ethics committee, in an opinion<sup>9</sup> upholding the ethics of such a contract, could point to no

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6. *Id.* at 513.

7. The court may have noticed its earlier decision in *Huffmaster v. Toland*, 250 S.W. 468 (Tex. Civ. App. 1923), in which it affirmed a judgment cancelling an instrument executed by a wife pursuant to an agreement by which she was to convey to her attorney one-fourth of all property which he could recover for her in her divorce action. The validity of the contingent fee contract *per se* was not at issue in *Huffmaster*; the ground of the decision was that the attorney had misrepresented the degree of difficulty of the case.

8. 245 S.W.2d 971 (Tex. Civ. App. 1952).

9. STATE BAR OF TEXAS COMMITTEE ON INTERPRETATION OF THE CANONS OF ETH-

other rationale than the fact that the Texas courts do not disapprove. This liberal approach appears to have been somewhat modified by the Texas Supreme Court's 1964 decision in *Archer v. Griffin*.<sup>10</sup> In this action to set aside a deed executed by a wife to her attorney pursuant to a contingent fee contract between the parties, the trial court cancelled the deed. The Court of Civil Appeals affirmed,<sup>11</sup> reasoning that a married woman may only contract for necessities; that while employment of an attorney to represent her in a divorce action is such a necessity, expenses therefor must be reasonable and proper; and that the instant contract, under which the attorney's compensation would have been in excess of \$6,400 (one-fourth of the wife's recovery), was invalid as beyond the authority of a wife to execute. A sharply divided Supreme Court affirmed. The majority assumed without deciding that the "contingent fee arrangement is not necessarily improper in a divorce action . . ."<sup>12</sup> It nevertheless concluded that the record supported the trial court's finding that the contract was "so exorbitant and unreasonable<sup>[13]</sup> as to require that the conveyance be set aside."<sup>14</sup> The four dissenters, citing *Kull v. Brown*, argued that the reasonableness of the contingent fee contract should not have been in question<sup>15</sup> and that, absent evidence of actual or constructive fraud, the

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ICS, OPINIONS, No. 292 (1964).

10. 390 S.W.2d 735 (Tex. 1964).

11. *Archer v. Blakemore*, 367 S.W.2d 402 (Tex. Civ. App. 1963).

12. 390 S.W.2d at 740.

13. What is reasonable in Texas? An excerpt from the majority opinion may provide a clue:

[I]n the section [of the schedule of minimum fees recommended by the State Bar of Texas] applicable to divorce actions, a minimum fee of \$250 is recommended in an uncontested case with \$100 to be added if the custody of children is involved and an agreement is reached. It further states that: "For the legal services rendered in the property settlement, the additional charge, based on the fair net value of the property allocated or set aside to the attorney's client, should be 10 per cent on the first \$5,000 and five per cent on the excess; where unusual or complex problems are involved or where the parties cannot agree and the matter must be decided by litigation, a higher charge should be made." The trial judge . . . was entitled to conclude that the contract . . . provided for a fee three and one-half times greater than the minimum fee recommended in such schedule.

*Id.* at 741.

14. *Id.* at 740.

15. Some Texas attorneys apparently assume that the Texas approach to contingent fees in divorce actions is the rule rather than an exception. The court, in

deed could not be set aside. Neither opinion addressed the policy issues involved.<sup>16</sup>

### *The California Approach: Practicality*

California courts take a middle ground between the absolute prohibitions of the majority rule as exemplified by *Jordan v. Westerman* and the permissive Texas approach. The leading case of *Kreiger v. Bulpitt*<sup>17</sup> is illustrative. Bulpitt had been sued for divorce. He retained Kreiger to represent him in the pending action and to obtain a favorable property settlement. The contract of employment provided that Kreiger's fee was to be a percentage of the value of all property secured for Bulpitt, subject to a minimum and a maximum amount. Kreiger negotiated a property settlement agreement with Bulpitt's wife, which Bulpitt orally approved but later refused to execute. Bulpitt permitted his wife to obtain an uncontested interlocutory decree and refused to pay Kreiger any attorney fees or costs. Kreiger sued on the contract and recovered a judgment for the stipulated minimum fee of \$5,000. Fifteen months

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Singleton v. Foreman, 435 F.2d 962 (5th Cir. 1970), for example, describes a rather outlandish course of conduct allegedly engaged in by a prominent Texas attorney retained, on a contingent fee basis, as counsel in a Florida divorce action.

16. The liberal Texas rule is probably not now followed in other American jurisdictions. In *Manning v. Edwards*, 205 Ky. 158, 265 S.W. 492 (1924), an attorney-client contract, entered into after the husband and wife had agreed to separate and under which the attorney agreed to effect a settlement of the wife's property rights in return for a fee of a percentage of the amount recovered, was held valid. After that unreasoned holding was implicitly overruled by the decision in *Overstreet v. Barr*, 255 Ky. 82, 75 S.W.2d 1014 (1934), it was cited by the Supreme Court of Washington for the proposition that "where the contingent fee contract calls for legal proceedings between husband and wife to settle property rights, but no divorce is contemplated the contract is valid." *In re Smith*, 42 Wash. 2d 188, 254 P.2d 464, 468-69 (1953). That statement was only dictum, however, and receives no support from WASHINGTON STATE BAR ASSOCIATION LEGAL ETHICS COMMITTEE, OPINIONS, Nos. 2 (1951) and 116 (1963); although it appears to have been embraced in IDAHO STATE BAR, OPINIONS, No. 20 (1959).

In *Hoskins v. Adkins*, 184 Ark. 124, 41 S.W.2d 753 (1931), the court refused to invalidate a contract in which the attorney's fee for representing the wife in her divorce action was a percentage of the recovery of her separate estate, *dower*, and *alimony*. The decision cited no supporting cases and may well have been an aberration; it did not acknowledge square local authority to the contrary, *McConnell v. McConnell*, 98 Ark. 193, 136 S.W. 931 (1911), and was in turn ignored by the court in *McDearmon v. Gordon & Gremillion*, 247 Ark. 318, 445 S.W.2d 488 (1969) (contingent fee contract held invalid as against public policy).

17. 40 Cal. 2d 97, 251 P.2d 673 (1953).

later, Kreiger levied execution on Bulpitt's airplane, discovering in the process that Bulpitt had executed a bill of sale on the plane to one Ruiz two weeks earlier. Kreiger then commenced an *in rem* proceeding to determine title to the airplane. The airplane was then sold under court order and the proceeds placed in a special fund. The lower court found that Bulpitt was the owner of the airplane and that the proceeds of its sale were held in trust for Bulpitt subject to a lien in favor of Ruiz. The court then entered judgment for Kreiger for the excess of the trust funds over the amount of Ruiz's lien. Ruiz appealed, contending that the court should not lend its assistance to the enforcement of a judgment based on a contract void as against public policy. A unanimous California Supreme Court affirmed, distinguishing several prior cases<sup>18</sup> which held similar contracts void. The court noted that Bulpitt's wife had commenced the divorce action, a factor which, in its view, established the unsettled and unsatisfactory domestic relations of the parties. It further noted that, at the time of the agreement, Bulpitt had no funds to pay for services of counsel in the pending action. The opinion concluded:

A contingent fee contract made under such circumstances . . . does not involve vitiating considerations contrary to public policy [nor] constitute an agreement "promotive of divorce." Such agreement is wholly distinguishable from the contingent fee contract which is condemned as tending "directly to bring about alienation of husband and wife by offering a stranger a premium to advise dissolution of the marriage ties [citation omitted]." Since the reason for condemning a contingent fee contract in a divorce action does not here exist, there is no ground for invalidating such contract.<sup>19</sup>

The court cautioned that "[t]here should not be a dogmatic condemnation of every contingent fee contract in a divorce action regardless of distinguishable circumstances. Rather, the validity of such contract should be determined in the light of the factual background of the particular case and considerations of public policy appropriate thereto."<sup>20</sup>

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18. See, e.g., *Parsons v. Segno*, 187 Cal. 260, 201 P. 580 (1921); *Newman v. Freitas*, 129 Cal. 283, 61 P. 907 (1900).

19. 40 Cal. 2d 97, 251 P.2d 673, 675 (quoting *Hill v. Hill*, 23 Cal. 2d 82, 92, 142 P.2d 417, 421 (1943)).

20. 40 Cal. 2d 97, 251 P.2d 673, 675.

Pursuant to the functional mandate of *Kreiger*, the California Supreme Court approved a contingent fee contract where the attorney's client sought dissolution of her bigamous marriage.<sup>21</sup> The policy considerations opposing such an arrangement were found to be present, however, in another case<sup>22</sup> in which the court refused to assume that the wife's marriage was unsalvageable at the time she retained the attorney.

The approach of the California courts seems to be to intervene and set aside the contingent fee arrangement only when the policy considerations underlying the majority rule are present. Absent such considerations, the freedom of the parties to contract is, presumably, limited only by the usual rules of reasonableness and absence of fraud or overreaching. The California approach, not inconsistent with the ABA Code of Professional Responsibility,<sup>23</sup> has been followed by courts in other jurisdictions. In *Kraus v. Naumburg*,<sup>24</sup> a Pennsylvania court refused to invalidate an agreement under which the attorney's fee was a proportion of the amount of property recovered for the wife where the agreement was not conditioned upon divorce and where alimony and child support were not mentioned. The ground of decision in *Naumburg*, was adhered to in *Polis v. Briggs*.<sup>25</sup> In the latter case, however, the attorney was not permitted to recover in contract since the parties were reconciled after the negotiation of the property settlement. Similarly, a Florida appellate court recently refused to invalidate an agreement in which the percentage fee related to the amount of the wife's separate property recovered for her.<sup>26</sup> The court distinguished its earlier broad injunction that "attorneys' contingent fee contracts in matrimonial actions are against public policy"<sup>27</sup> and are void.<sup>28</sup>

21. *Coviello v. State Bar*, 45 Cal. 2d 57, 286 P.2d 357 (1955).

22. *Coons v. Kary*, 69 Cal. Rptr. 712 (Ct. App. 1968).

23. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 2-20.

24. 13 Bucks 547, 36 Pa. D. & C.2d 746 (C.P. Bucks County 1964).

25. 70 Pa. D. & C.2d 792 (C.P. Phila. County 1975).

26. *Salter v. St. Jean*, 170 So. 2d 94 (Fla. App. 1964).

27. *Sobieski v. Maresco*, 143 So. 2d 62 (Fla. App. 1962).

28. A view similar to that of the California courts may also obtain in Oklahoma. Although a contract in which the attorney's fee depended upon the amount recovered in a divorce action was held void as against public policy in *Opperud v. Bussey*, 172 Okla. 625, 46 P.2d 319 (1935), a limited exception may have been created by the decision in *Smith v. Armstrong & Murphy*, 181 Okla. 1293, 73 P.2d 140 (1937). In the latter case, the attorney was permitted to recover on his contract which provided for a fixed fee for handling the divorce and a percentage of the value

In *Burns v. Stewart*,<sup>29</sup> the Supreme Court of Minnesota recently refused to hold void as against public policy a contingent fee arrangement between an attorney and a financially destitute and deserted wife. The wife sought to recover her share of the joint marital assets held by the husband who had left the state. The court found that the agreement was not promotive of divorce and hence did not offend public policy. In fact, said the court, the agreement was "possibly the only manner by which the deserted wife might hope to regain some of her lost property."<sup>30</sup>

### Conclusion

Where permitted in domestic relations actions, the contingent attorney's fee is normally limited to a share of property recovered from the marriage for the client. A fee conditioned upon procuring a divorce or based upon a percentage of alimony or child support recovered is rarely approved. Where the contingent fee has been allowed in matrimonial actions, no policy grounds have been expressed in support of the privilege. Moreover, no cases have been found which challenge the legitimacy of the policy considerations usually advanced as militating against allowance of the contingent or percentage fee in actions affecting marriage. Cases sanctioning the device can be classified as follows:

- (1) The "Texas" Type. Most such cases have in common:
  - (a) a refusal to examine or even to recognize the opposing policy considerations;
  - (b) a failure to distinguish the device from the normal, accepted, socially useful contingent fee arrangement;
  - (c) a disregard of strong local and national precedent to the contrary; and
  - (d) the complete absence of a judicial rationale.
- (2) The "California" Type. These cases share two characteristics:
  - (a) an explicit recognition of the policy considerations underlying the majority rule; and

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of property recovered for the wife. The court noted that the wife's right to recover existed by virtue of a joint business venture entered into by the spouses and "was not dependent upon the dissolution or maintenance of the marriage relation. . . ." 181 Okla. 1293, 73 P.2d 140, 142.

29. 290 Minn. 289, 188 N.W.2d 760 (1971).

30. *Id.*, 188 N.W.2d at 767.

(b) a determination that such considerations are inapplicable to the facts of the particular case.

The functional California approach is most in accord with the rule of law. Properly confined, as in *Kreiger*, where the client was otherwise unable to obtain his choice of counsel, it may be socially desirable. The Texas approach, in contrast, amounts to an arbitrary rule without reason, made possible only by an abdication of judicial responsibility. Although it may derive marginal support from the principle of freedom of contract, in jurisdictions where divorce costs are taxed to the "breadwinning" spouse, such a rule appears to have little social utility.

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