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Domestic Relations--Decedent's Estate--Separation Agreement--Gift Inter Vivos (In re Kelly's Estate, 285 N.Y. 139 (1941))

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the defendants all the protection the statute was intended to provide while in *People* v. *Maione* the instruction tended to cancel its effect.

P. D. A.

DOMESTIC RELATIONS — DECEDENT'S ESTATE — SEPARATION AGREEMENT—GIFT INTER VIVOS.—The claimant, the former wife of the deceased, is seeking to recover from the executors money alleged to be due her on a separation agreement between her and the deceased, which at the request of the parties had been incorporated into the divorce decree obtained by the claimant in the New Jersey Court of Chancery.[1] The agreement provided that in lieu of alimony the husband would pay the claimant one hundred dollars per month for the support and maintenance of their son "as long as the said son should continue to be a student at college." At the time of the agreement the son was about to enter a college of liberal arts. After graduating at the end of the four-year course, he continued, with his father's knowledge, to take post-graduate work in universities in Europe and in the United States, up to the time of his father's death. The deceased paid to the claimant one hundred dollars for each school month during the first four years. The claim is for the difference between the amount received and the amount that would be due to her at one hundred dollars per month with interest from the time of the commencement of the payments in June, 1930 to December, 1937, the time the deceased passed away. The surrogate denied the claim on the ground that there had been full payment by the deceased under the agreement incorporated in the divorce decree on the basis that a college year does not exceed ten months, and that four such undergraduate years were all that were contemplated. The Appellate Division modified the decree so as to allow the claimant one hundred dollars per month for each of twelve months for each of four years. *Held,* decree as modified by the Appellate Division affirmed. *In re Kelly's Estate,* 285 N. Y. 139, 32 N. E. (2d) 62 (1941).

A separation agreement which has been made part of a final divorce decree in a foreign jurisdiction is enforceable in New York despite the fact that it is subject to revision by the court where it was rendered.[2] The constitutional requirement[3] that full faith and credit shall be given to judgments and decrees of other states requires, where applicable, that such states shall give to the decree such force and

[1] Divorce obtained on the grounds of desertion under New Jersey statute (2 REV. STAT. c. 50).

[2] Yarborough v. Yarborough, 290 U. S. 202, 54 Sup. Ct. 181 (1933); Guggenheim v. Wahl, 203 N. Y. 390, 396, 397, 96 N. E. 726 (1911); Jones v. Jones, 108 N. Y. 415, 15 N. E. 707 (1888).

[3] U. S. CONST. Art. IV, § 1.

effect as it was entitled to receive in the state in which it was rendered.[4] In the instant case, the decree was neither modified nor was it attacked at any time by the husband during his life. The obligation of the husband to support his wife continues during his life time and under statute [5] in New York the husband cannot contract with his wife to relieve him of his duty to support her.[6] But agreements under which the wife is paid a stipulated amount in lieu of all claims against her husband's estate or of any claim for maintenance are not against public policy if there is no fraud involved and the wife is not overreached.[7] A settlement made in discharge of the husband's duty of maintenance is binding on his wife, if incorporated in the divorce decree unless the wife can disaffirm for fraud or overreaching and the like.[8] Following these cases the agreement in the instant case was held to be binding and the only question was as to the amount due under the agreement. This depended on the interpretation of the word "college" which the court found was properly decided by the lower court to mean the regular four-year undergraduate course and not to include by implication, post-graduate courses thereafter in one or more professional schools, although more than four years may be required in preparation for many professions and vocations and for specialization in many fields leading to academic and higher degrees.[9] In an earlier case [10] a similar question was presented to the court. This was in the construction of a trust created in a will which stated that a trustee was "* * * to apply the income or as much of the principal as the said trustee in his opinion he shall deem necessary, for the proper education of my brother Daniel B. Wolf." The key words here are "proper education", and the period of time necessary for the acquisition of such "proper education" being the period of time for the duration of the trust. The court considered the character of the deceased and that of the brother and decided that the words were used in their broadest sense so as to include not only formal education but that which is acquired by living and studying the things which we find in life. Following this interpretation the court concluded that such an education would continue throughout an entire lifetime and so the trust would likewise have to continue throughout the man's life. In both these cases the court considered the surrounding circumstances in order to determine the intent of the parties. In the instant case it was shown that the wife was financially able to pay for the education of her son, in fact that she had already

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[4] Haddock v. Haddock, 201 U. S. 562, 567, 26 Sup. Ct. 525 (1906).
[5] N. Y. DOM. REL. LAW § 51.
[6] Garlock v. Garlock, 279 N. Y. 337, 18 N. E. (2d) 521 (1939).
[7] *In re* Browning's Estate, 153 Misc. 564, 276 N. Y. Supp. 270 (1934).
[8] Helvering v. Leonard, 105 F. (2d) 900 (C. C. A. 2d, 1939); Greenfield v. Greenfield, 161 App. Div. 573, 146 N. Y. Supp. 865 (1st Dep't 1914); N. Y. CIV. PRAC. ACT §§ 1155, 1170; N. Y. DOM. REL. LAW § 51.
[9] See dissenting opinion by RIPPEY, J. in instant case, p. 143.
[10] *In re* Wolf's Estate, 164 Misc. 504, 299 N. Y. Supp. 99 (1937).

expended an amount far in excess of the amount she could possibly have received under the most liberal interpretation of the agreement. The determining factor in arriving at the intent, in the case referred to, was the character of the deceased and that of the brother which showed an inclination toward unlimited study and education.

P. D. A.

EQUITY—RESTRICTIVE COVENANTS—SPECIFIC PERFORMANCE—WAIVER—ESTOPPEL—INJUNCTION.—Action for specific performance of a covenant contained in a deed which conveyed certain premises in Kew Gardens, upon which is now erected the Homestead Hotel. The covenant prohibited the public sale of liquor and other alcoholic beverages. The plaintiff reserved the right to cancel, modify or annul, in whole or in part, the restrictive covenant. Plaintiff, pursuant to its reservation, released restrictions on other parcels in the Kew Gardens Development so as to permit the sale of intoxicating liquors in stores and taverns. Plaintiff seeks to enjoin defendant from operating a cocktail lounge and bar. *Held,* judgment for plaintiff reversed. Where the grantor of the deed, allowing the construction of a hotel, which was restricted by the covenant, knew that wine and beer were sold at the hotel since 1933, but failed to take action for specific performance of the restrictive covenant until September, 1940, at a time when it knew that the defendants were in the process of constructing a new cocktail lounge and bar, and it appeared that grantor had released other properties in the same tract from similar restrictions, the grantor "waived" any right which it might have had to enforce the restriction as against the hotel premises, and was "estopped" from enforcing the restriction. *Kew Gardens Corp.* v. *Ciro's Plaza,* 261 App. Div. 576, 26 N. Y. S. (2d) 553 (2d Dep't 1941).

Restrictive covenants are not favored by the law [1] as they are repugnant to trade, commerce, and the free transfer of real property.[2] Because they are abhorred by the common law as a deterrant to the land for all the lawful purposes which go with title and possession,[3] it has been the policy of the courts to construe these covenants strictly

[1] Thompson v. Glenwood Community Club, 191 Ga. 196, 12 S. E. (2d) 623 (1940); Baltimore Butchers Abbatoir and Livestock Co. v. Union Rendering Co., 17 A. (2d) 130 (C. A. Md. 1940); Whitmarsh v. Richmond, 20 A. (2d) 161 (C. A. Md. 1941); State *ex rel.* Bollenbeck v. Village of Shorewood Hills, 237 Wis. 50, 297 N. W. 568 (1941).

[2] Hall v. Koehler, 148 S. W. (2d) 489 (Sup. Ct. Mo. 1941); Bass v. Hunter, 216 N. C. 505, 5 S. E. 558 (1939); Batchelor v. Hinkle, 132 App. Div. 62, 117 N. Y. Supp. 620 (1st Dep't 1909); Getchal v. Lawrence, *et al.,* 121 Misc. 359, 201 N. Y. Supp. 121 (1923).

[3] Sharp v. Quinn, 214 Cal. 194, 4 P. (2d) 942 (1931).