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Equity

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departure from traditional concepts is a juvenile court decision concerning the custody of an illegitimate child.[43] The normal rule is that the mother of the child is entitled to custody and the fact that the child is illegitimate does not mean that the mother is therefore so immoral that she should be denied custody. Apparently the theory is that the mother may mend her ways. *In re Dake*[44] indicates that there is a "point of no return" in these cases. A young lady who had never married but had given birth to four illegitimate children was permanently deprived of custody, although there was very little evidence of the mother's unfitness aside from the fact that pregnancy had become a habit.

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EQUITY

INJUNCTIVE RELIEF

Personal Service Contracts

In *Central N. Y. Basketball, Inc. v. Barnett & Cleveland Basketball Club, Inc.*[1] the defendant, a professional basketball player, was under a yearly contract to render personal services to the plaintiff, a team in the National Basketball Association. The contract contained a so-called "reserve clause" by which the player agreed to play only for the plaintiff unless released, sold, or traded. The contract also provided that in the event the parties should fail to agree upon the terms of a next succeeding yearly contract, the plaintiff had the right to renew the contract and fix the compensation to be paid.[2]

The parties entered into negotiations for a contract for the 1961-1962 season which negotiations, the court found, resulted in an oral understanding between them as to terms. The plaintiff then mailed a written contract containing the terms to the player who refused to sign it. As a result, the plaintiff notified the defendant-player by mail that it was renewing the previous yearly contract in accordance with its renewal option. Meanwhile, an agent of the corporate defendant, a team in a competing professional basketball league, had negotiated a contract under which the defendant-player agreed to play. The plaintiff then sued, successfully, to enjoin the player from playing for the corporate defendant and to enjoin the latter's interference with plaintiff's contract with the defendant-player.

Courts of equity will not normally specifically enforce contracts for

43. *In re* Dake, 180 N.E.2d 646 (Ohio Juv. Ct. 1961).
44. *Ibid.*

personal service because to do so would amount, at least in theory, to compelling involuntary servitude. But in exceptional cases where the services to be performed require special knowledge or unique skill and ability of the employee, equity has granted relief by way of enjoining the employee from rendering his services to others, normally competitors of the plaintiff. This is despite the fact that such an injunction may, as a practical matter, strongly tempt the employee to perform for the plaintiff.[3] However, if the employee's services are not unique he will not normally be enjoined from working for a competitor.[4] In the instant case the evidence was to a degree conflicting as to the uniqueness of the player's talent, but the court ruled that the fact that the player was a professional itself indicated that his skill was sufficiently unique to support injunctive relief.[5]

The defendants challenged the validity of the contract on the ground that, because of the reserve clause, it lacked mutuality of obligation, presumably on the ground that although the plaintiff had an option to renew, the defendant-player did not. The argument continues that equity might enjoin the player from working for the plaintiff's competitor without having any assurance that the plaintiff would renew the contract. In accordance with the modern trend of decisions,[6] the court, citing *Fuchs v. Motor Stage Co.*,[7] gave the mutuality argument short shrift by observing that as long as the plaintiff complies with the conditions of the contract, there is sufficient consideration to support equitable relief. The result seems clearly sound, since the plaintiff had in fact renewed and would have been bound had the player carried out his part of the bargain.

Protections of Trade Names and Customers Lists

National City Bank v. National City Window Cleaning Co.[8] involved a suit by an old and established Cleveland banking institution against a recently incorporated window cleaning company. The plaintiff obtained an injunction against the defendant's use of the term "National City" in

1. 181 N.E.2d 506 (Ohio C.P. 1961).

2. The compensation to be paid was at a rate not less than a specified percentage of that stipulated in the contract of the preceding year.

3. See, *e.g.*, Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973 (1902); Warner Bros. Pictures, Inc. v. Nelson, [1937] 1 K.B. 209; Lumley v. Gye, 2 E. & B. 216, 118 Eng. Rep. 749 (1853); Lumley v. Wagner, 1 De G. & M. 604, 42 Eng. Rep. 604 (1852).

4. See Frederick Bros. Artists Corp. v. Yates, 271 App. Div. 69, 62 N.Y.S.2d 714 (1946), *reversing* 186 Misc. 871, 61 N.Y.S.2d 478 (Sup. Ct. 1946), *aff'd mem.*, 296 N.Y. 820, 72 N.E.2d 13 (1947).

5. 181 N.E.2d 506, 517 (Ohio C.P. 1961).

6. Gould v. Stelter, 14 Ill. 2d 376, 152 N.E.2d 869 (1958); Morad v. Silva, 331 Mass. 94, 177 N.E.2d 290 (1954); Walter v. Hoffman, 267 N.Y. 365, 196 N.E. 291 (1935).

7. 135 Ohio St. 509, 515, 21 N.E.2d 669, 672 (1939).

8. 180 N.E.2d 20 (Ohio Ct. App. 1962).

connection with its business. The court found that the term had acquired a distinctive associational significance and noted that to permit its use by the defendant would likely create in the minds of the public the impression that the plaintiff was in some way sponsoring or backing the defendant's enterprise, or would permit the defendant to trade upon the good will built up by the plaintiff. Citing *Henry Furnace Co. v. Kappleman,*[9] the court stated that the injunction would lie even though the defendant was in a noncompeting business.

It may be noted in passing, however, that to the extent a defendant's business is unrelated to the plaintiff's, confusion as to source with its consequent trading upon good will is less likely to exist. Witness the usual classroom example of "V-8," a mark which is the designation of a particular automotive engine, a brushless shaving cream, an after-shave lotion, a hair dressing formula, and a vegetable juice drink at one and the same time.[10]

The case of *Commonwealth Sanitation Co. v. Commonwealth Pest Control Co.*[11] involved competing businesses. In this case the plaintiff, an exterminating company, successfully sought an injunction against the use of the name "Commonwealth" by two of its former employees in competing companies incorporated by them. But the plaintiff was unsuccessful in its attempt to enjoin the defendants from soliciting plaintiff's customers for themselves. The plaintiff had not taken the precaution of exacting a written contractual promise from the individual defendants that, in the event they left the plaintiff's employ, they would not compete with the plaintiff. When they established competing businesses of their own, they solicited the customers of their former employer whose names they remembered.

Citing the Restatement of the Law of Agency, the court noted that, in the absence of a contrary agreement, although an agent after termination of the agency owes to his principal a duty not to use written lists of names or other similar confidential matters given him for the use of his principal only, he may use "general information concerning the method of business of the principal and the names of the customers retained in his memory, if not acquired in violation of his duty as agent . . . ."[12] The court concluded that because it is generally known in the exterminating business who the most frequent customers are — hotels, restaurants, bars, bakeries, grocers, and apartment house owners, businesses whose names are available in a city or telephone directory — the

9. 91 Ohio App. 451, 108 N.E.2d 839 (1952).

10. See Standard Brands, Inc. v. Smidler, 151 F.2d 34, 35 (2d Cir. 1945). *Cf.* Standard Brands, Inc. v. Eastern Shore Canning Co., 172 F.2d 144 (4th Cir. 1949).

11. 178 N.E.2d 518 (Ohio Ct. App. 1961).

12. RESTATEMENT (SECOND), AGENCY § 396 (1958).

plaintiff's lists of customers was not confidential and an injunction against the defendants' use of it would not lie.[13]

The court noted the existence of conflicting lines of authority: one allowing the solicitation of customers of a former employer in the absence of a restrictive covenant or fraud; the other prohibiting it. It might have been preferable for the court simply to have relied upon the former line of authority, rather than basing its decision on the nonconfidential character of the plaintiff's list, for although lists of potential customers for an exterminator's services may well be universally available, the plaintiff's particular list was not publicly available and was known to the defendants only because of their former employment by the plaintiff.

Deed Restrictions

Swineford v. Nichols[14] was a suit by lot owners in an allotment to restrain the defendant from operating a beauty parlor allegedly in violation of uniform covenants restricting the use of the lots to residential purposes. The defendant operated the beauty shop on the ground floor of her split level residence. She caused a listing to be inserted in the yellow pages of the telephone directory and advertised in a local newspaper. Noting that the business required no alterations in the construction or character of the building as a residence, and that operation of the beauty shop did not materially affect the value of adjoining properties or annoy neighbors, the court concluded that the operation did not, under the circumstances, violate the restrictive covenant and it refused to enjoin the operation. It did, however, enjoin the defendant from advertising. Perhaps it would have been preferable for the court simply to have refused to render its aid in the enforcement of the covenant, rather than holding there was no violation, since the evidence apparently indicated that the operation of the beauty parlor did not result in any substantial detriment to the plaintiffs. It is difficult to see how the absence of advertising for a commercial establishment renders it any less non-residential; it is easier, perhaps, to see its relevance to the substantiality of the injury.

Standing to Sue

Daily Monument Co. v. Crown Hill Cemetery Ass'n [15] was a suit by a monument dealer for an injunction to prevent the defendant, a nonprofit cemetery corporation, from selling grave markers in competition with the plaintiff and from charging allegedly excessive fees for their installation and maintenance. According to the defendant's rules and

13. It should be noted that the defendants apparently did not use such public sources but instead relied upon their memories of the plaintiff's list.

14. 177 N.E.2d 304 (Ohio C.P. 1961).

15. 114 Ohio App. 143, 176 N.E.2d 268 (1961).