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COURT OF APPEALS  
STATE OF NEW YORK

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MATTER OF ESTATE OF HENNEL,  
  
Appellant.

NO. 78

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20 Eagle Street  
Albany, New York  
May 31, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on this  
2 afternoon's calendar is appeal number 78, Matter of Estate  
3 of Hennel.

4 Counsel.

5 MR. COFFEY: Your Honor, Peter Coffey, Englert,  
6 Coffey, and McHugh in Schenectady, New York. I represent  
7 the Estate.

8 First of all, if you're going to have promissory  
9 estoppel, you have to have a promise. It's all over all  
10 the papers. If you want citation, it's Rogers v. Islip.  
11 "To establish a viable cause of action, some sounding a  
12 promissory estoppel," there must be a "clear and  
13 unambiguous promise."

14 JUDGE STEIN: Counselor, the Appellate Division  
15 indicated that you had conceded that there was an oral  
16 agreement; is that not accurate?

17 MR. COFFEY: Well, that's not true. I - - - I -  
18 - - and I don't know where that's gotten, because I've got  
19 my - - - I brought my - - - I brought my briefs from the  
20 other court; we've always challenged that.

21 JUDGE STEIN: Okay. So you don't - - - you don't  
22 even concede that there - - - there was an agreement  
23 between the decedent and the grandchildren that he would  
24 transfer this property to them, mortgage free.

25 MR. COFFEY: There was conversation, apparently.

1 But if you listen to Mr. Parisi, he says, that's what they  
2 told me. And he said, I don't know what was in the  
3 decedent's mind. The petitioners say they had  
4 conversations. So there may have been some - - -

5 JUDGE STEIN: But is that - - - is that - - -

6 MR. COFFEY: - - - conversations, but there's  
7 nothing particular.

8 JUDGE STEIN: But is that corroborated by the  
9 fact that there was a deed?

10 MR. COFFEY: No. The deed simply gives a life  
11 estate. He gave them the property. He gave them the  
12 property.

13 JUDGE RIVERA: So let's clarify this. You said -  
14 - - you said the deed gave them the life estate.

15 MR. COFFEY: Yes.

16 JUDGE RIVERA: Is it - - - what kind of fee is  
17 actually transferred? What fee estate did they get through  
18 - - -

19 MR. COFFEY: Well, in that - - - in that  
20 situation - - -

21 JUDGE RIVERA: - - - this deed?

22 MR. COFFEY: - - - you have a - - -

23 JUDGE RIVERA: Based on the language of the deed,  
24 I'm - - -

25 MR. COFFEY: You have a conveyance from remainder

1 interest and the reservation of life estate, and also the  
2 reservation of power of appointment.

3 JUDGE RIVERA: So - - - so what does it mean in  
4 the deed where it says, "Reserving, however, to the grantor  
5 here in a life estate an exclusive ownership," what does  
6 that mean? So during the life estate, what - - - what did  
7 they - - -

8 MR. COFFEY: During - - -

9 JUDGE RIVERA: - - - get?

10 MR. COFFEY: - - - a life tenant - - - a life - -  
11 -

12 JUDGE RIVERA: Yes.

13 MR. COFFEY: - - - tenant - - -

14 JUDGE RIVERA: Yes.

15 MR. COFFEY: - - - has exclusive possession of  
16 the estate.

17 JUDGE RIVERA: No, no. I understand that. It  
18 says possession, but it also says ownership. So I'm  
19 actually not even sure what is actually transferred to  
20 these people - - -

21 MR. COFFEY: Well, it's - - - it's - - -

22 JUDGE RIVERA: - - - by this deed.

23 MR. COFFEY: - - - it's a life estate. It's  
24 clear.

25 JUDGE RIVERA: He's retained the life estate; I

1 get that.

2 MR. COFFEY: Yeah.

3 JUDGE RIVERA: But what has he actually conveyed?

4 Is it a fee simple absolute subject to this life estate?

5 What does he - - -

6 MR. COFFEY: Yes. Yes.

7 JUDGE RIVERA: - - - actually - - - okay.

8 MR. COFFEY: Yeah. Exactly.

9 JUDGE RIVERA: Okay. Okay.

10 MR. COFFEY: Exactly. It's - - -

11 JUDGE RIVERA: With the power of - - -

12 MR. COFFEY: - - - subject to remainderance, as  
13 you - - - EPTL.

14 JUDGE RIVERA: All right.

15 MR. COFFEY: Exactly. You're absolutely right.  
16 It's - - - it's a fee simple subject to fruition, if you  
17 wish.

18 JUDGE RIVERA: Yes.

19 MR. COFFEY: Yes.

20 JUDGE RIVERA: Okay.

21 MR. COFFEY: Exactly.

22 JUDGE RIVERA: Thank you.

23 MR. COFFEY: Now, so - - - and it's a life estate  
24 with a power of appointment, as it's all ambulatory. He  
25 can change these people, and of course they did some work,

1 and they took care of the property. Why, because if they  
2 didn't, he could appoint it to somebody else.

3 Now, the point - - -

4 JUDGE STEIN: So I - - - I know you want to talk  
5 about whether there's an agreement. But, the - - - the  
6 Appellate Division - - -

7 MR. COFFEY: Yes.

8 JUDGE STEIN: - - - seemed to disagree only on  
9 whether it would be unconscionable not to uphold this  
10 agreement and to apply the statute of frauds.

11 MR. COFFEY: No. No.

12 JUDGE STEIN: Isn't that what the Appellate  
13 Division said?

14 MR. COFFEY: No. No. No. The Appellate  
15 Division, in the dissent, okay, says, it bears specifically  
16 noting there was no evidence of a decedent expressed any  
17 such promise - - -

18 JUDGE FAHEY: Yeah, but that's - - - but that's -  
19 - -

20 MR. COFFEY: - - - in any form.

21 JUDGE FAHEY: Slow down. Slow down.

22 MR. COFFEY: Yes.

23 JUDGE FAHEY: That's - - - that's not - - -  
24 that's not the point. The point - - - the point is is that  
25 the majority holding is little different though, right?

1 MR. COFFEY: The majority - - - yes. The  
2 majority says this on that issue.

3 JUDGE FAHEY: No, you don't need to read it to  
4 me; I've read the Appellate Division's - - -

5 MR. COFFEY: Well, it was - - -

6 JUDGE FAHEY: Slow down. I've read the Appellate  
7 Division - - -

8 MR. COFFEY: Okay. You got it.

9 JUDGE FAHEY: Yeah. Thank you. I - - - rather  
10 than concentrating on whether or not the wrong con - - -  
11 the wrong procedure was looked at in whether or not there  
12 was a change in the 2006 from 2008, I think the question of  
13 unconscionability is really what we should be talking  
14 about.

15 Two things. First, whether or not this court  
16 should adopt the promissory estoppel plus unconscionability  
17 exception to the statute of frauds. I'd like you to  
18 concentrate on that, if you would address that argument.  
19 And if we should, was this an unconscionable change from  
20 the 2006 transaction to the 2008 transaction. Go ahead.

21 MR. COFFEY: "It has been suggested," says Mandel  
22 v. Liebman - - -

23 JUDGE FAHEY: Um-hum.

24 MR. COFFEY: - - - "that an unconscionable  
25 contract is one such as no person in his senses and not

1 under delusion would make on the one hand, or an on honest  
2 and fair person would accept, on the other." Chancellor  
3 Kent, must be so - - - the inequality "must be so strong  
4 and manifest as to shock the conscience".

5 Now, what happened here? What happened here?  
6 These petitioners got a piece of property worth 250,000  
7 dollars. There's a 90,000 dollar mortgage.

8 Now, constantly, everybody is saying they took on  
9 that; they didn't. General obligations 5-705 was not in  
10 the deed, they didn't assume the debt, they could have  
11 walked away, and not had a penny, and no liability, and no  
12 responsibility. They assumed no responsibility whatsoever,  
13 none. They could have sold the property to cede instead  
14 and pocket - - -

15 JUDGE RIVERA: So - - - so you're saying they got  
16 something, they don't have any debt - - -

17 MR. COFFEY: They got 150 - - -

18 JUDGE RIVERA: And - - - and - - - and - - -

19 MR. COFFEY: I'm sorry.

20 JUDGE RIVERA: - - - it's not unconscionable to  
21 deny them the additional property interest that they want.

22 MR. COFFEY: Exactly.

23 JUDGE RIVERA: That is the payment of the  
24 mortgage.

25 MR. COFFEY: Exactly. The got 150,000 dollars.

1 JUDGE WILSON: Why - - - why isn't the mortgage a  
2 debt of the estate?

3 MR. COFFEY: Pardon?

4 JUDGE WILSON: Why isn't the mortgage - - - the  
5 mortgage debt a debt of the estate?

6 MR. COFFEY: Because the cases hold it's not.  
7 It's - - - it's outside the estate, the estate - - - it's  
8 not.

9 JUDGE WILSON: It's a personal loan taken by Mr.  
10 Hennel.

11 MR. COFFEY: Um-hum.

12 JUDGE WILSON: Right?

13 MR. COFFEY: Um-hum.

14 JUDGE WILSON: Which he's obligated to pay.

15 MR. COFFEY: Um-hum.

16 JUDGE WILSON: And the surrogate's court found  
17 that it was a just debt of the estate.

18 MR. COFFEY: I'm sorry, the surrogate's court  
19 found what?

20 JUDGE WILSON: That it was a just debt of the  
21 estate.

22 MR. COFFEY: Yes, but the Appellate Division said  
23 that that only applies if it's a just debt. And it is not  
24 a debt of the estate.

25 So they assumed no responsibility for the debt,

1 no responsibility - - - and I'll be honest with you, your  
2 Honor, we cited a case in the lower court, we've cited it  
3 here, and it's not coming to me right at the moment, but  
4 there's - - - there are - - - there's an appellate case  
5 saying that a debt, such as a mortgage, applies to the  
6 property and not to the estate.

7 JUDGE RIVERA: It - - -

8 MR. COFFEY: I don't have it in my mind right now  
9 - - -

10 JUDGE RIVERA: Is that - - - is that because - -  
11 -

12 MR. COFFEY: - - - but that is the law.

13 JUDGE RIVERA: Is that because he transferred  
14 that conditional fee absolute? Well, not absolute.

15 MR. COFFEY: No. No. No.

16 JUDGE RIVERA: Is that because he transferred the  
17 fee, not because of the fee transfer?

18 MR. COFFEY: Pardon?

19 JUDGE RIVERA: So the mortgage is not part of the  
20 fee transfer is what you're arguing?

21 MR. COFFEY: No, it's not. A mortgage, if you go  
22 through the Real Property Law, a mortgage does not affect  
23 marketability of title. A mortgage is a lien.

24 JUDGE RIVERA: Um-hum.

25 MR. COFFEY: And I can't come up with the case

1 right now, Your Honor, but in fact, it is not. It's a  
2 mortgage, there's a lien on the property, which is  
3 satisfied out on the property, not out of the estate;  
4 that's the law.

5 Now, I see I've got (indiscernible) time left.

6 If you look at the - - - at the - - - the case  
7 cited by both the lower - - - both the majority and - - -  
8 majority and the dissent - - -

9 JUDGE FAHEY: Um-hum.

10 MR. COFFEY: And they had a woman there who lost  
11 100,000 dollars, lost her life savings, lost her child's  
12 college thing, had a college fund for her son, had to sell  
13 her car to pay her debts; that's unconscionable. These  
14 people, there's nothing unconscionable about this debt.  
15 This thing. They - - - they - - - they spent a little  
16 extra time, and one was Swerdloff. Swerdloff is a case  
17 cited by everybody, and that says, right there, the  
18 spending of a little additional time is not - - - does not  
19 render a deal unconscionable. And that's all they did;  
20 they spent a little extra time.

21 CHIEF JUDGE DIFIORE: Mr. Coffee, I took the  
22 liberty of reserving two minutes of rebuttal time for you,  
23 if you would like it, after your opponent.

24 MR. COFFEY: Thank you, Your Honor.

25 CHIEF JUDGE DIFIORE: Um-hum.

1 MR. COFFEY: Thank you.

2 MR. ADAMS: Good afternoon. Robert Adams,  
3 Martin, Shudt, Wallace, Dilorenzo, & Johnson, attorneys for  
4 the respondent on this appeal.

5 I will of course, as you've suggested, focused on  
6 the unconscionability issue first.

7 I think that there are two things which make this  
8 case uniquely unconscionable when you look at the sequence  
9 of events. When you start off with a promise, which was  
10 made by Edmund Hennel to his grandchildren - - -

11 JUDGE STEIN: But don't we have to look at what  
12 the outcome was?

13 MR. ADAMS: I think that - - -

14 JUDGE STEIN: I have a hard time saying - - -  
15 thinking that this is unconscionable when they didn't  
16 expend any of their own money; they did for four years  
17 correct rent and do some of the things, and for that, they  
18 end up with a piece of property worth approximately 150,000  
19 dollars after the mortgage is paid.

20 JUDGE STEIN: What's the nac - - - what's - - -  
21 what unconscionable about it? Maybe it's not fair; maybe  
22 it wasn't the bargain they thought that they had made. But  
23 isn't that different from saying that it's unconscionable?

24 MR. ADAMS: I think it was only a mathematical  
25 issue that made something unconscionable, I'd have to agree

1 with you. But in this case, that's not the situation.  
2 What's unconscionable here, Your Honor, is that there was a  
3 promise, my clients performed their promise to a tee, they  
4 did everything they were supposed to do, and the  
5 understanding clearly was, and, you know, I think we don't  
6 have to spend a lot of time on the fact that there was a  
7 promise, but if you look at the record - - -

8 JUDGE FAHEY: Well, isn't - - - don't both  
9 parties concede that - - - that promissory estoppel applies  
10 here?

11 MR. ADAMS: Well, apparently not as of today. So  
12 - - -

13 JUDGE FAHEY: Um-hum.

14 MR. ADAMS: - - - I think I - - - I just need to  
15 mention that certainly the record is very clear that there  
16 was a promise. I note that in the context of a summary  
17 judgment motion made by my clients at the trial level, the  
18 opposing papers did not present any evidentiary proof to  
19 rebut that.

20 JUDGE FAHEY: I don't want to get you off too far  
21 down.

22 MR. ADAMS: Well, I will - - - I will stop with  
23 that and move on.

24 JUDGE FAHEY: I don't want to get you off too far  
25 on another track, but - - -

1 MR. ADAMS: Sure. So I'll get back to my - - -  
2 my points of what's unconscionable about this situation.

3 So my clients lived up to the - - -

4 JUDGE STEIN: Before you do that, I'm really  
5 sorry, but - - -

6 MR. ADAMS: It's okay.

7 JUDGE STEIN: - - - I should have - - - I should  
8 have made sure that - - - that we were on the same page.  
9 Do you agree that it has to be unconscionable in order to -  
10 - - to offset the statute of frauds?

11 MR. ADAMS: I think the statute is - - - I think  
12 the case law is pretty clear that the word unconscionable,  
13 which, of course, is very subjective - - -

14 JUDGE STEIN: Okay.

15 MR. ADAMS: - - - is the standard that we have to  
16 meet.

17 JUDGE STEIN: Okay.

18 MR. ADAMS: And I think that you can look at it  
19 and say, well, they've got two thirds of a loaf, or they  
20 got a half a loaf, it's got to be more than that before it  
21 matters. I think if you take a rule like that, I think,  
22 you know, you take all the meaning out.

23 JUDGE FAHEY: I - - - I guess though, the  
24 question is is, while this may have been unfair, it - - -  
25 it would seem that in every instance where promissory

1 estoppel applies would now be an exception to the statute  
2 of frauds if we adopt your particular argument. So why  
3 don't you address that?

4 MR. ADAMS: Sure. And Your Honor - - - I'm going  
5 to get back to what I was saying before, because I think  
6 there are two factors here that are very unique and make it  
7 unconscionable.

8 The first one is this, that if they were to get  
9 the benefit of the bargain, my clients would have to end up  
10 owning this property. That's what the bargain was. They  
11 were supposed to own it free and clear. If they've got to  
12 pay the mortgage, they're not getting the benefit. And if  
13 they were to pay the mortgage, and adopt, and keep the  
14 property in that fashion, they would, essentially, be  
15 funding gifts made by Edmund Hennel to four other family  
16 members - - -

17 JUDGE FAHEY: Yeah, you know what, I looked at  
18 that argument, and that's the argument that says, he gave  
19 them 100,000 dollars, and then the money was then used to  
20 fund a golf course business, right?

21 MR. ADAMS: Correct. Well, it was used - - -  
22 actually, no, it was used as a gift to a variety of family  
23 members. They, in turn, invested in the golf course, and  
24 then four people had a falling out and got paid. But  
25 that's not the biggest issue here, Judge, in terms of

1 unconscionability.

2 JUDGE FAHEY: Go ahead.

3 MR. ADAMS: That's just - - - that's kind of the  
4 appetizer.

5 JUDGE FAHEY: Go ahead.

6 MR. ADAMS: Okay. The real issue here of  
7 unconscionability is what happened over time. Because Mr.  
8 Hennel, Edmund Hennel makes the promise, he then proceeds  
9 to have them perform, and then by - - - in 2006 is the  
10 promise, 2007, October 22nd, 2007, he - - - he makes a new  
11 will, the new wife. And that will is deemed to have  
12 revoked his promise, in some fashion.

13 JUDGE STEIN: Okay. But when we talked about  
14 unconscionability, aren't we talking about injury? Isn't -  
15 - - so - - -

16 MR. ADAMS: I think it's - - -

17 JUDGE STEIN: So what happened, you know, you're  
18 saying that the process was unfair. I think that's what  
19 you're saying. But - - - but don't we have to get to the  
20 final analysis, which is what did these people lose?

21 MR. ADAMS: Sure. Well, two - - - two parts to  
22 that answer, if I might, Your Honor. The first part is  
23 that what was unconscionable wasn't just that he did create  
24 the new will. The record clearly establishes that he spoke  
25 to both of my clients and told them, oh, I did a new will,

1 but nothing changed about the property. Everything is  
2 good. He reassured them falsely.

3 JUDGE STEIN: What if the value of the property  
4 since then had gone up threefold, and now they - - - they  
5 didn't expect that to happen, but something happened in  
6 Schenectady, and the property values went through the roof,  
7 and now, this property is worth way more than they ever  
8 thought it was?

9 MR. ADAMS: I think that goes to the point I made  
10 before, that I don't believe that the way in which to  
11 evaluate unconscionability is whether it was a good deal, a  
12 bad deal, a winner, or a loser. I think you look at what  
13 were the external circumstances that would be sufficient to  
14 shock your conscience.

15 JUDGE STEIN: But now, it sounds like what you're  
16 saying is that the shocking of the conscience is the fact  
17 that their grandfather didn't do what he promised them he  
18 was going to do.

19 MR. ADAMS: Right. He lied to them.

20 JUDGE STEIN: So doesn't that - - - doesn't that  
21 get back to, he - - - he broke a promise, and - - - and we  
22 sort of lost unconscionability, because what you're saying  
23 is unconscionable is - - - is the breach of the promise.

24 MR. ADAMS: But it's more than a breach of the  
25 promise; it's basically fraud. Because he got them to

1 continue to perform all their duties, he continued to live  
2 there - - -

3 JUDGE FAHEY: Well, fraud would be if they  
4 weren't compensated at all and if he did it with malicious  
5 intent. I think we're - - - we're a long way from fraud  
6 here. If somebody - - - my grandfather gives me a piece of  
7 property, instead of getting 230, I got 150,000 dollars, I  
8 don't know if that's fraud.

9 MR. ADAMS: Well - - -

10 JUDGE FAHEY: You know, it's - - -

11 MR. ADAMS: - - - he certainly induced them to  
12 continue doing something which he knew, from having signed  
13 a new will, he was no longer going to perform his side of  
14 the deal.

15 JUDGE FAHEY: Let me ask you this. What - - -  
16 what would be the standard that you would ask this court to  
17 adopt? Because it seems like you're asking us to change  
18 the unconscionability standard. Are you asking us to do  
19 something new, something other than shocking to the  
20 conscience, or that line of cases?

21 MR. ADAMS: No, I don't think so, Your Honor. I  
22 think it - - - it does shock the conscience to think that  
23 someone would induce somebody to make a deal, induce them  
24 to take over all the obligations, and then walk away.

25 JUDGE FAHEY: You haven't - - - you haven't been

1 in courts that long then, if you think that, because we - -  
2 - we both experienced, I think, in courts, and in courts,  
3 that happens quite often, and business transactions people  
4 disagree on the meaning of what they've done.

5 MR. ADAMS: That may be, but they don't typically  
6 tell the other side in a bargain - - -

7 JUDGE FAHEY: Um-hum.

8 MR. ADAMS: - - - by the way, everything is fine,  
9 I haven't made any changes, and in fact, they've pulled the  
10 rug out. I think that's a very distinguishing factor in  
11 this case - - -

12 JUDGE FAHEY: Um-hum.

13 MR. ADAMS: - - - which falls within, in my  
14 estimation, shocking the conscience or unconscionability.  
15 Because you shouldn't be allowed to induce someone to  
16 continue to perform at a point where they could not  
17 mitigate their damages, they couldn't stop, they continued  
18 working up on this up until the time of his death, and only  
19 upon his death did they, for the first time, learn of this.

20 JUDGE RIVERA: If - - - if before his death he  
21 had actually paid off all but one percent of what remained  
22 on the mortgage, is it still unconscionable?

23 MR. ADAMS: Well, we're back to making the math  
24 problem here again, Your Honor, which I think is difficult.

25 JUDGE RIVERA: No, but, you know, I'm asking.

1 MR. ADAMS: Sure.

2 JUDGE RIVERA: Because you - - -

3 MR. ADAMS: I - - - I think that's - - -

4 JUDGE RIVERA: - - - you take the straight line -  
5 - -

6 MR. ADAMS: Sure.

7 JUDGE RIVERA: - - - that it's the breaking of  
8 the promise.

9 MR. ADAMS: Well, I think that it's a breaking of  
10 the promise plus damages. And one of the things I'd point  
11 out is that in this case, again, in the context of a  
12 summary judgment motion, the other side did not do anything  
13 to say that, oh, by the way, in our - - - in their  
14 opposition to summary judgment, they didn't come forward  
15 with any proof saying, oh, well, you know, the work that  
16 you did was only worth this, and you got this much of  
17 return on your dollar for all your work and effort.

18 Now, none of the facts were opposed in the - - -  
19 in the summary judgment motion on the part of the estate.  
20 So I think we have to accept it as true the things that  
21 were said, which was that, indeed, they did put a lot of  
22 effort into it. There's an attempt to minimize it, but the  
23 record - - -

24 JUDGE STEIN: Well, that's an interesting  
25 question too. Who - - - where is the burden? I mean,

1           you're essentially trying to overcome a statute of frauds  
2           defense. So don't you have the burden of showing that it  
3           was unconscionable? Don't you have the burden of showing  
4           what the value of that work and those - - - those efforts  
5           were?

6                       MR. ADAMS: Well, I don't know that the burden  
7           comes down, again, to saying, here's how many dollars it  
8           was worth, but there was very extensive proof put in in  
9           sworn form as to all the different things that they did,  
10          all the benefits that their grandfather obtained from their  
11          labors, and - - -

12                      JUDGE STEIN: Right. And that - - - that was - -  
13          -

14                      MR. ADAMS: - - - and that was not contested.

15                      JUDGE STEIN: - - - that proof wasn't opposed.  
16          But - - - but we don't know what that translates to, right?

17                      MR. ADAMS: Well, I think we - - - we know the  
18          various - - - the various pieces of their performance,  
19          which they had to do in order to keep their side of the  
20          bargain. And I think, again, the unconscionability, and I  
21          realize I'm down to my last minute here, so I'll just say  
22          that I think the unconscionability comes in into inducing  
23          the clients to continue at a time when you knew full well  
24          that you had now made a change, and I don't think that any  
25          of us feel that it's fair, reasonable, and therefore not

1 unconscionable, to induce someone to continue a reform when  
2 you know full well you're not going to keep up your side of  
3 the deal. I think that does shock the conscience.

4 JUDGE WILSON: Can you - - - can you help me on  
5 my just debt of the estate's question? The loan and the  
6 mortgage for two different things, in my understanding,  
7 right? Mr. Hennel took out a loan, and it was secured by a  
8 mortgage.

9 MR. ADAMS: Correct.

10 JUDGE WILSON: Why isn't the loan an obligation  
11 of his that is then an obligation of his estate?

12 MR. ADAMS: Right. And I think the reason why  
13 that would be accurate, Your Honor, and I would agree with  
14 it, because the use for that money was not to be put into  
15 the Franklin property; it was - - - it was to be - - -

16 JUDGE WILSON: Regardless of the use.

17 MR. ADAMS: - - - as a gift. Right.

18 JUDGE WILSON: Regardless of the use.

19 MR. ADAMS: So it wasn't associated with - - -  
20 with the property, so I think it is a debt of the estate.

21 JUDGE WILSON: And if that's right, then why - -  
22 - why would you draw the conclusion that when he changed  
23 his will, he actually changed anything about his obligation  
24 to pay the mortgage?

25 MR. ADAMS: Well, I think because I wasn't - - -

1 I wasn't counting on the concept that a court would agree  
2 with that. Obviously, there's been disagreements.

3 JUDGE WILSON: Well, circuit courts appeared to,  
4 unless I'm misunderstanding it.

5 MR. ADAMS: I think they did, but certainly the  
6 focal point was on the statute of frauds issue. So it's  
7 the focus now on it as well. But I don't disagree that if  
8 it's an - - - if it's deemed by this court to be an estate  
9 debt, then the issues of unconscionability, frankly, don't  
10 have to be resolved.

11 CHIEF JUDGE DIFIORE: Thank you, sir.

12 MR. ADAMS: Thank you.

13 CHIEF JUDGE DIFIORE: Counsel.

14 MR. COFFEY: Thank you, Your Honor. I can't find  
15 it in my papers. It's clear though, a mortgage on property  
16 is not an estate debt. It's a - - - it's a lien against  
17 the premises, and it's not paid out of the estate; it's  
18 paid out of the mortgage - - -

19 JUDGE WILSON: That's - - - that's - - -

20 MR. COFFEY: - - - out of the - - - out of the  
21 property.

22 JUDGE WILSON: That's the mortgage - - -

23 MR. COFFEY: And that the estate - - -

24 JUDGE WILSON: - - - that's not the loan  
25 instrument.

1 MR. COFFEY: Pardon?

2 JUDGE WILSON: There's - - - there are two  
3 separate documents, right? There's a loan agreement and a  
4 mortgage.

5 MR. COFFEY: Right.

6 JUDGE WILSON: The mortgage is recorded, the loan  
7 agreement is between Mr. Hennel, presumably, and the bank.

8 MR. COFFEY: Well, no, the mortgage is - - - is  
9 security for the loan.

10 JUDGE WILSON: Right. Security for the loan.

11 MR. COFFEY: Yeah.

12 JUDGE WILSON: It isn't the loan itself.

13 MR. COFFEY: But it is - - - it is a lien against  
14 the premise. Anyway, I - - - I don't want to go too far,  
15 but the law is clear that mortgage is - - - is paid out of  
16 the property, and not out of the debt.

17 We have Rock v. Rock, Second Department, a man  
18 moves in with his parents, he spends 178,000 dollars over  
19 twenty years improving the property, the Second Department  
20 held promissory estoppel didn't apply.

21 In the - - - in the case of Bank - - - Fleet Bank  
22 v. Pine Knoll, spent 100,000 dollars, lost her son's  
23 savings, that was promissory estoppel.

24 As far as unconscionability goes, the case is - -  
25 - well, darn it, I had my number. Anyway, Swerdloff says -

1           - - and very clearly, that spending a lot of extra time  
2           doesn't count; it's not unconscionable. And that's the  
3           only - - - Swerdloff, that's the case. Time doesn't count.  
4           And guess what, that's the only thing the petitioners did  
5           here, the only thing. They only spent a little extra time  
6           managing the property.

7                    JUDGE RIVERA: So if they actually had to pay for  
8           anything as part of that management - - -

9                    MR. COFFEY: They didn't have to pay for  
10          anything.

11                   JUDGE RIVERA: - - - would it be unconscionable?

12                   I understand. It's a hypothetical.

13                   MR. COFFEY: Right.

14                   JUDGE RIVERA: I'm asking you.

15                   MR. COFFEY: Okay. Yes.

16                   JUDGE RIVERA: Yes.

17                   MR. COFFEY: I'm sorry.

18                   JUDGE RIVERA: If they, actually, had to pay for  
19          any maintenance of - - - of the property, would that then  
20          had made it unconscionable?

21                   JUDGE RIVERA: Well, I don't know. Rock v. Rock  
22          says 100,000 doesn't count. If they paid a little  
23          maintenance, I don't think so, Your Honor. But in fact,  
24          the point is, this property was self-sustaining. And I  
25          know there's a question about future and whatever, but to

1 answer Your Honor's opinion, if they held onto this  
2 property, now, I know property is not appreciating very  
3 well, but it's appreciating somewhat. If they held onto  
4 this property for ten years, they would have it totally  
5 free and clear, 300,000 dollars, they walk away with  
6 300,000 dollars.

7 JUDGE RIVERA: Well, couldn't they sell it - - -

8 MR. COFFEY: Pardon?

9 JUDGE RIVERA: - - - now? Couldn't they sell it  
10 now and walk away - - -

11 MR. COFFEY: Right now.

12 JUDGE RIVERA: - - - with money?

13 MR. COFFEY: Right now pocket - - -

14 JUDGE RIVERA: They wouldn't be in debt.

15 MR. COFFEY: Pocket the money.

16 JUDGE FAHEY: Can I ask you - - -

17 Judge, if it's all right, just - - - I see your  
18 time is almost up. For - - -

19 MR. COFFEY: I think it is.

20 JUDGE FAHEY: - - - for you to be successful, we  
21 have to recognize, for the first time, the doctrine of  
22 promissory estoppel applying here, and then - - - then make  
23 a determination as to whether or not that - - - that  
24 violation of that doctrine was unconscionable.

25 So there is a case, Cohen v. Brown, Harris, and

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Stevens, are you familiar with it?

MR. COFFEY: No, I'm not.

JUDGE FAHEY: All right. The Appellate Division makes reference to it, though they don't quote any language from it. But all right, if you're not familiar with it, I'm not going to ask you about it.

Thank you. No, it's - - -

MR. COFFEY: No, I'm not, Your Honor.

JUDGE FAHEY: No, it's all right.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. COFFEY: Thank you.

JUDGE FAHEY: It's okay.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Estate of Hennel, No. 78 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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