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Sufficiency of Proof to Establish Implied Contract

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rant and thereby circumventing the requirements of the fourth amendment.[24]

SUFFICIENCY OF PROOF TO ESTABLISH IMPLIED CONTRACT

Plaintiffs, husband and wife, brought suit against decedent's estate for specific performance of an oral contract to convey or devise real property in return for personal services. An alternative claim asked for the reasonable value of services rendered and expenses paid by plaintiffs in decedent's behalf, and at his request, during the three years preceding his death. Plaintiff wife served as decedent's nurse, housekeeper and occasional provider during this period.[1] Plaintiff husband performed various odd jobs at decedent's request.[2] Throughout this period, plaintiffs received no compensation beyond infrequent use of decedent's lake cabin. Two witnesses testified that decedent told them that he intended to give his lake property to plaintiffs. Decedent's will, however, devised the property to a great-great-niece. At the close of plaintiffs' uncontroverted evidence, the trial court granted defendant's motion to dismiss, apparently for failure to establish a prima facie case.[3] Plaintiffs conceded a failure of proof on their claim for specific performance and appealed only the order dismissing their claim for reasonable value of services. A divided court reversed and remanded for a new trial. *Held:* Clear, cogent and convincing evidence that personal services which were requested and rendered with expectation of compensation is sufficient to imply, in fact, a

[24] See Comment, 11 VILL. L. REV. 357, 363-66 (1966). The adumbration of such a rule can be found in People v. Laverne, 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (Ct. App. 1964), in which the court held that evidence of criminal violations observed by an official conducting a valid inspection was inadmissible. *But see* State v. Rees, 139 N.W.2d 406 (Iowa 1966).

[1] Among other duties, plaintiff wife prepared decedent's meals, did his washing, occasionally purchased his supplies with her own funds, provided automobile transportation without remuneration for gasoline, kept house, canned food for him, and cared for his six cats. Decedent was quite ill and suffered serious elimination problems, making plaintiff's work most unpleasant and difficult.

[2] These odd jobs included furnace, electrical, and plumbing repairs, and cutting and hauling firewood.

[3] "[I]t appears the motion for dismissal was granted on the ground that treating the plaintiffs' evidence as true it was insufficient to establish a prima facie case. We thus may review the record to determine whether there is sufficient evidence or reasonable inferences therefrom to establish a prima facie case for plaintiffs." Jacobs v. Brock, 66 Wash. Dec. 2d 865, 869, 406 P.2d 17, 19 (1965). The dissent disagreed, contending that the lower court had weighed the evidence, and chastised the majority for making its own finding of fact.

promise to pay the reasonable value of services, even when the expected payment was a devise. *Jacobs v. Brock*, 66 Wash. Dec. 2d 865, 406 P.2d 17 (1965).

It is settled in Washington that the Statute of Frauds does not bar specific performance of an oral contract to devise real property if there has been sufficient performance by the complainant.[4] Also recognized is the general rule that, unless circumstances indicate otherwise, a request for personal services implies a promise to pay the reasonable value of such services.[5] Recovery in both cases depends upon proof of a valid contract, either express or implied-in-fact. Significant, however, is the lesser quantum of proof required to recover the reasonable value of services rendered.

The court in the principal case disagreed with the lower court's finding of a "reciprocal course of conduct of kindness and favors,"[6] concluding, rather, that "the benefits flowed in one direction—from plaintiffs to decedent."[7] The court, proceeding to determine whether plaintiffs could recover the reasonable value of their services and expenses, applied the following test:

> Where one seeks to establish a claim against an estate for services rendered to the deceased during his or her lifetime, the party asserting the claim has the burden of proving a contract, express or implied, to pay for the services; and the evidence to support such claim must be clear, cogent, and convincing.[8]

Evidence of the following factors led the court to hold that plaintiffs

[4] Andrews v. Andrews, 116 Wash. 513, 199 Pac. 981 (1921). See Comment, *Contracts to Devise Real Property*, 14 WASH. L. REV. 30, 31 (1939).

[5] Hardung v. Green, 40 Wn. 2d 595, 244 P.2d 1163 (1952). See Shattuck, *Contracts in Washington*, 1937-1957, 34 WASH. L. REV. 24, 27-28 (1959). See generally 1 WILLISTON, CONTRACTS § 36 (rev. ed. 1936). On the general subject of implied-in-fact contracts, see Costigan, *Implied-in-Fact Contracts and Mutual Assent*, 33 HARV. L. REV. 376 (1920).

[6] The lower court's finding of reciprocal gratuities was based largely on a past relationship between decedent and plaintiff wife. When plaintiff was a schoolgirl, decedent rented a house to her family who paid rent in services. Plaintiff's share of this undertaking was to keep house for decedent and his wife. Then plaintiff's family moved away and she saw little of decedent for twenty years. The lower court decided that "plaintiffs and decedent had been very close friends for many years prior to his death and that each had provided the other with many substantial services and kindnesses, for which no payments were made or expected." 66 Wash. Dec. 2d at 874, 406 P.2d at 22.

The appellate majority concluded that, even if decedent's allowing plaintiff wife's family to pay rent in services could be considered a gratuity, it was extended to a different family, not to plaintiffs.

[7] 66 Wash. Dec. 2d at 870, 406 P.2d at 20.

[8] Ross v. Raymer, 32 Wn. 2d 129, 139, 201 P.2d 129, 135 (1948), cited in the principal case at 66 Wash. Dec. 2d at 870, 406 P.2d at 20. *Accord*, Johnson v. Suddreth's Estate, 59 Wn. 2d 517, 368 P.2d 907 (1962); Johnson v. Nasi, 50 Wn. 2d 87, 309 P.2d 380 (1957).

had established a prima facie case for an implied-in-fact contract: (1) a request for services; (2) expectation of payment; (3) lack of mutuality in benefits received. Performance of services "beyond the scope of neighborly concern and helpfulness"[9] certainly aided plaintiffs' case. The court, however, may have placed too much emphasis upon lack of mutuality in benefits received. Because services may be rendered as a gift, a lack of mutuality should probably be given little weight in implying a promise to pay. The court concluded by stating that, when a promise to pay for services may be implied, "recovery for compensation may be had in an action at law where no provision is made [in decedent's will] for the expected legacy."[10]

There is nothing unusual about the result in the principal case. A similar decision was handed down nearly sixty years ago in *Pelton v. Smith*:

> The rule is that where personal services are performed by one person for another under a contract or mutual understanding that compensation therefor is to be made in the will of the party receiving the benefit,... and the party dies without making such provision, an action will lie against his estate to recover the reasonable value of the services.[11]

In *Pelton*, plaintiff was held "entitled to recover on a *quantum meruit*; she need not predicate her action on a breach of the agreement."[12] The recovery is required to prevent unjust enrichment. If a plaintiff is unable to prove an express contract to devise, he can not recover damages for breach of the contract because no contract exists. The same problem arises with oral contracts to devise rendered unenforceable by the Statute of Frauds.[13] If a plaintiff can prove, however, that the services were requested, and were not to be rendered gratuitously, then the recipient of the services should not be permitted to retain the benefit without payment. Thus, if circumstances permit, a promise is implied to pay the reasonable value of the services.

The principal case becomes significant, however, when compared with cases involving claims for specific performance of oral contracts

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[9] 66 Wash. Dec. 2d at 872, 406 P.2d at 21.
[10] *Id.* at 873, 406 P.2d at 21.
[11] 50 Wash. 459, 464, 97 Pac. 460, 461 (1908).
[12] *Id.* at 464, 97 Pac. at 462.
[13] *Quantum meruit* is a standard means of recovery in actions on oral contracts to devise rendered unenforceable by the Statute of Frauds. See 2 CORBIN, CONTRACTS §§ 321, 322 (1950); SPARKS, CONTRACTS TO MAKE WILLS 139-42 (1956); 2 WILLISTON, CONTRACTS § 536 (rev. ed. 1936); RESTATEMENT, CONTRACTS §§ 347, 355 (1932); RESTATEMENT, RESTITUTION § 107(2) (1937); Comment, *Restitution in Washington Contracts*, 35 WASH. L. REV. 308, 333 (1960).

to devise real property. For instance, in another recent en banc decision, *Bicknell v. Guenther*,[14] a very deserving plaintiff lost his claim for specific performance because of failure to meet the extreme burden of proof. Because of the Washington court's "skeptical view of such agreements,"[15] an oral contract to devise property must be proven by evidence that is "conclusive, definite, certain, and beyond all legitimate controversy."[16] As stated by Judge Hamilton, dissenting: "The end result is to render it impossible to establish a contract to devise or bequeath property short of producing a formal written document."[17] Because a lesser burden of proof is required, the plaintiff in *Bicknell* might have been able to obtain some recovery had he alternatively claimed the reasonable value of uncompensated services and expenses.[18] As held in the principal case, only "clear, cogent and convincing" evidence is necessary to prove an implied-in-fact contractual promise to pay for personal services.[19] The lesser burden of proof is not the only factor to consider. Since the recovery is in *quantum meruit*, the reasonable value of services is determinative, not the value of the expected devise. The property may prove to be worth much less than the services. Apparently very few Washington plaintiffs suing on oral contracts to devise property have alternatively claimed the reasonable value of services rendered on the basis of implied-in-fact contract.[20] Pleading inconsistent alternative claims is clearly permissible under Washington rules.[21] Because less proof is required, and

[14] 65 Wn. 2d 749, 399 P.2d 598 (1965), 40 WASH. L. REV. 367.
[15] 65 Wn. 2d at 755, 399 P.2d at 602.
[16] *Id.* at 754, 399 P.2d at 601.
[17] *Id.* at 771, 399 P.2d at 611.
[18] The *Bicknell* court stated: "This case does not involve *quantum meruit* or a quasi-contract." 65 Wn. 2d at 757, 399 P.2d at 603.
[19] *Accord*, Hardung v. Green, 40 Wn. 2d 595, 244 P.2d 1163 (1952); Ross v. Raymer, 32 Wn. 2d 128, 201 P.2d 129 (1948). *But cf.* Humphries v. Riveland, 67 Wash. Dec. 2d 371, 407 P.2d 967 (1965).
On the general subject of burden of proof requirements in Washington, see Wiehl, *Our Burden of Burdens*, 41 WASH. L. REV. 109 (1966). Judge Wiehl states that the Washington court has developed at least five different standards to measure and describe the burden of persuasion in civil cases: (1) proof by "a preponderance of the evidence"; (2) proof by "clear, cogent and convincing evidence"; (3) proof to a "reasonable certainty"; (4) proof by "clear, unequivocal and decisive evidence"; and (5) proof by evidence that is "conclusive, definite, certain and beyond all legitimate controversy."
Note that the four dissenting judges in the principal case were part of a six-judge majority in *Bicknell*. Hale and Weaver, JJ., switched to approve the lower burden of proof in the principal case.
[20] For an unsuccessful suit on such alternatives, see Sweetser v. Palmer, 147 Wash. 686, 267 Pac. 432 (1928).
[21] "A party may ... state as many separate claims ... as he has regardless of consistency and whether based on legal or on equitable grounds or on both." WASH. R. PLEAD., PRAC., PROC. 8(e) (2). *Cf.* Adjustment Dep't v. Brostrom, 15 Wn. 2d 193, 130 P.2d 67 (1942).

because a more favorable judicial attitude is encountered, alternative pleading of a count in *quantum meruit*—on the basis of an implied-in-fact promise to pay—to a count for specific performance, is desirable.

CONSTITUTIONALITY OF CONVICTION UNDER NARCOTICS POSSESSION STATUTE

Defendant was convicted of the felony of possession of a narcotic without a prescription,[1] and was sentenced to serve a maximum term of twenty years. Defendant claimed that, on the same facts, the prosecutor could have charged the defendant with the gross misdemeanor of illegal use of narcotic drugs.[2] Defendant argued that this vests discretion in the prosecutor to charge either a felony or a gross misdemeanor, and that this discretion is violative of the equal protection clauses of the Washington[3] and United States[4] constitutions. On appeal, the Washington Supreme Court affirmed the conviction. *Held:* The gross misdemeanor of illegal use of a narcotic, and the felony of illegal possession of a narcotic, require different elements of proof and the prosecutor may, at his discretion, charge either or both crimes on the same set of facts without violating defendant's constitutional right to equal protection. *State v. Reid,* 66 Wash. Dec. 2d 231, 401 P.2d 988 (1965).

The guarantee of equal protection is aimed at preventing government from making unreasonable discriminations between individuals

[1] WASH. REV. CODE § 69.33.230 (1959) (based on the UNIFORM NARCOTIC DRUG ACT § 2). The illegal possession statute specifies that it shall be unlawful to possess any narcotic drug without authorization. Intent to possess is not a required element of proof. State v. Henker, 50 Wn. 2d 809, 312 P.2d 645 (1957). Thus, the prosecution need show only possession, and the presumption arises that this possession was unlawful. The burden is then shifted to the defendant to prove his inclusion within one of the statutory exceptions. State v. Boggs, 57 Wn. 2d 484, 486, 358 P.2d 124, 126 (1961).

The predecessor of the present possession statute required proof of intent to unlawfully sell, furnish, or dispose of narcotic drugs. See Wash. Sess. Laws 1923, ch. 47, § 3, at 134.

[2] WASH. REV. CODE § 69.32.080 (1959). The illegal use statute specifies that it shall be unlawful to use any narcotic drug except as prescribed, and that "unlawful possession ... shall be prima facie evidence of an intent to illegally use such drugs." It is not clear whether intent to unlawfully use is required. The provision that unlawful possession should be evidence of intent suggests that it is required, but the *definition* of the crime does not require such proof. The "prima facie" language was not part of the former statute. See Wash. Sess. Laws 1923, ch. 47, § 4, at 138.

The present statute says that a "habitual user" shall be guilty of a gross misdemeanor, and defines habitual user as "any person addicted to the use of narcotics ... obtaining such narcotics unlawfully...." Prior to the decision in the principal case, this statute had never been construed by the Washington Supreme Court.

[3] WASH. CONST. art. 1, § 12.

[4] U.S. CONST. amend. XIV.