

1976

# Walter W. Kershaw v. Tracy Collins Bank & Trust Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER W. KERSHAW

:

Plaintiff-Appellant :

vs.

:

TRACY COLLINS BANK & TRUST COMPANY,

:

Case No. 228643

Administrator of the Estate of

HALLIE LOVE DENNIS, also known as

:

MRS. CHARLES F. DENNIS

:

Defendant-Respondent

:

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action brought by plaintiff-appellant, Walter W. Kershaw against defendant-respondent, Tracy Collins Bank & Trust Company, as Administrators of the estate of Hallie Love Dennis, to recover judgment as satisfaction of a claim brought against the estate of Hallie Love Dennis for services rendered to the said Hallie Love Dennis by plaintiff during the last three years of her life.

DISPOSITION IN THE LOWER COURT

Hearing was held on January 30, 1976 before the Honorable James W. Sawaya, sitting without jury on defendant's Motion for Summary Judgment, defendant seeking to dismiss plaintiff's Complaint with prejudice.

The Court determined that there was no genuine issue as to any material fact and granted defendant's Motion for Summary Judgment, dismissing plaintiff's Complaint with prejudice.

#### RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment rendered in the hearing below on respondent's Motion for Summary Judgment, a determination that appellant's claim against the estate of Hallie Love Dennis is legitimate and must be satisfied from the assets thereof, and that the case be remanded with instructions to determine the value of services rendered deceased.

#### STATEMENT OF FACTS

Respondent's late husband, Earl Dennis, shortly before his death, requested appellant to look after and take care of Hallie Love Dennis until her death. Responding to that request, appellant rendered services to Hallie Love Dennis on a nearly daily basis during the last three years of her life. During that period of time, Hallie Love Dennis requested and demanded that appellant perform numerous services to her, including the maintenance and supervision of her estate and affairs and the performance of numerous errands.

Hallie Love Dennis during this period of time, not only permitted, but requested and demanded all of the services which were rendered to her by appellant but never entered a contract with appellant, written or oral, for compensation.

Upon the death of Hallie Love Dennis, appellant filed a claim against her estate for 2,345 hours time spent over a three-year period at \$2 per hour and 20,925 miles traveled at 12¢ per mile. Appellant's claim was for services rendered covering the preservation of the estate as well as the personal care.

maintenance and supervision of Hallie Love Dennis' affairs. Such claim was rejected by the executor of the estate on May 9, 1975.

Appellant then filed action against respondent in June, 1975.

Respondent filed a Motion for Summary Judgment on January 16, 1976 which was granted January 30th.

From the foregoing Statement of Facts the appellant respectfully submits his argument as follows:

### ARGUMENT

#### POINT I

#### A CLAIM MAY BE ENFORCED AGAINST A DECEASED'S ESTATE FOR SERVICES RENDERED TO DECEASED PRIOR TO DEATH IN THE ABSENCE OF AN ACTUAL CONTRACT

To prevent unjust enrichment in the situation where services are rendered to one person in the absence of a formal contract, either written or oral, the courts have imposed a duty to pay for services accepted on the basis of quantum meruit. Recovering on quantum meruit is based upon a benefit accepted or derived for which the law implies a contract to pay. Roane vs. Crow, 209 P.2d 149 (Cal. 1949). By such there is created an implied contract to pay for services rendered an amount which the one reasonably performing deserves for his labor.

Basing a claim upon quantum meruit brings the action under a class of obligations imposed by law without regard to the intention or the assent of the parties to be bound. This is done for reasons dictated by reason and justice. Carpenter vs. Josey Oil Company, (C.C.A. Okl.), 26 F.2d 442 (1928).

The deceased in the instant case during a period of nearly three years requested, on a daily basis, that the appellant render services to her of a personal nature. At page 13 of appellant's deposition the following conversation took place:

Q You said that Earl Dennis had charged you with the responsibility of taking care of Hallie, is that correct?

A That's correct.

Q How had he done that?

A Because he called me over on New Year's Day, January 1st, 1972, to tell me what bad shape he was in physically, and he had only a few days to live. And Hallie didn't realize it. And he had to have somebody to look after her until she died.

After being so charged and receiving this request of the deceased's husband, appellant was continuously requested to render services by deceased herself. Appellant's deposition at page 12 states:

Q And in your claim you say, "together with all of the care and maintenance of Hallie Dennis."

A With the exception--

Q And now, you have said that this regards, maybe some of the supervision of these other people, is that right?

A Well, I was with her every day, and she was a gal that-- well, let's just put the cards on the table. She was the most demanding, cantankerous bitch that God ever created, and she knew that her husband, Earl Dennis, had charged me with the responsibility of taking care of her before her death. And she went out of her way to make it miserable with her demands. She'd call four or five times a day and demand that I go do this, and that, and I'd tell her, "hire a taxicab." "Well, they charge too much money."

And now, she never bought one nickel's worth of groceries. She didn't go to a doctor, or clinic, or talk to anybody. She didn't do one single thing that she didn't demand I perform that



service for her.

Q Did you take her to the doctors or clinics?

A I took her every place she went.

Q Did you take her to the grocery store?

A No, she sent me to the grocery, and I bought every single grocery she consumed from the time her husband died until the time she died. She never went to the grocery store once.

Further evidence of service rendered is found on page 11 of appellant's deposition:

Q Did you hire the nurses?

A I did.

Q What are their names?

A Well, I'll give you those. Dorothy Frickey, an experienced Practical Nurse who resides at 1249 Glendale Drive. Her telephone number is 486-8243. She was employed by me on August the 27th for \$100 a week on a seven day, 24 hour basis to take care of Mrs. Dennis, and she was acceptable to the doctors.

Q Were there other nurses?

A Yes. She couldn't stand the pressure, and Mrs. Dennis was too demanding for her to continue, and so she resigned some time in December. And I was successful to secure the services of an Adelia Ballaine, 1480 Green Street, telephone number 487-9419, who worked for \$85 a week, 24 hours a day, seven days a week until three weeks before Hallie Dennis died.

Regarding the amount of time in appellant's claim against the estate his deposition at page 15 reveals:

Q All right. And now, if you spent 14 hours a week, this would be averaging then two hours a day. What would you do during those two hours a day at her house?

A Well, I had to go to the grocery store once or twice, or

three times a day to satisfy this woman. And every errand that she wanted I had to do. I took care of paying all of her bills, her correspondence. Everything she did. And now, it did average more than two hours a day during that year.

Q How about the other eight weeks that you don't claim for here?

A I wasn't in town. I can't claim it. I wasn't in town.

Q Who helped her during that time, do you know?

A Yes, I know. She got her neighbors, and she got this Claudia Wright that's named in the deal.

From the foregoing it is clear that appellant:

1. Was requested by deceased's husband to look after her;
2. Was not, therefore, a volunteer or relative, acting by love, affection or self seeking;
3. Was continuously requested by decedent to render services to her; and
4. Rendered services ordinarily subject to remuneration.

That these services were to be compensated and appellant was not just a volunteer is found at pages 14 and 49:

Q And now, on the schedule that you have attached to the claim you have this broken down as to the three and a portion of the fourth year that were involved. That is, 1972, 73, 74, and five weeks of 75. And you say in each instance that you worked so many hours.

A She consumed that much time of mine. At least that much time.

Q That you really believe that you were working, and not performing any kind of a friendly service?

A No love or friendship involved in this transaction.

Q You didn't believe that you were doing any kind of a friendly act or charitable deed?

A Well, I'm not going to be that--I felt that I was doing what I was required to do, what I was requested to do. It wasn't a

Then at page 49 the following:

Q And you definitely did not think of your services, whatever you did for Hallie Dennis, as what, maybe, any other fellow Mason would do for another Mason's widow, right?

A No.

Q You definitely felt this was not a charitable deed that any other churchman would do?

A No. Nobody else would do it, not for her.

Q So you were looking at this entirely as something that you were entitled to pay for?

A I'm entitled to compensation for the services rendered to that woman, and the preservation of this estate.

In Kramer vs. Clark, 121 Wash. 507, 209 P. 688, (1922), an action was brought against the Administrator of an estate seeking to recover money for services rendered. The claim was based upon a service rendered by a deceased's stepson who had made a trip at the special request of decedent to her residence, resided with her approximately one week and returned home. No express promise to reimburse the stepson for his trip was found by the court; but nevertheless the court found that since the decedent had telegraphed her stepson to come to Seattle, his following her request rendered her estate liable to pay for such trip.

In the instant case there is no relationship of stepmother-stepson and the continuous request of the decedent over a period of years to have appellant render services to her. Under such circumstances a promise to pay for these valuable services, which were rendered with the deceased's knowledge and approval and at her request, should be enforced. Enforcement of a promise to pay the reasonable value of services is implied where one performs for another with the other's knowledge when the latter expresses no dissent or avails himself of the service, irrespective of a precedent request. Naegle vs. Miller, 73 Idaho 441, 253 P.2d 233, (1953).

If one may be held to a duty of payment without request by availing himself of the benefit of services, one who requests such services certainly ought to be so bound, and the law in most jurisdictions is in accord.

The basis for such a view is found in that series of cases which hold that, generally, when services are rendered by one person for another and voluntarily and knowingly accepted without more, the law will imply a promise to pay what the services are actually worth. Gleason vs. Salt Lake City, et al., 9 Utah 1, 74 P.2d 1225, (1937); Williams vs. Jones, 105 Kan. 257, 182 P. 392 (1919); Hardung vs. Green, 40 Wash. 2d 595, 255 P.2d 1163, (1952). This has been extended to claims against a decedent's estate.

This rule of law was further explained in McCollumb vs. Clothier, 121 Utah 311, 241 P.2d 468, (1952), a case relied upon by respondent below, where the court was confronted with an action brought against a defendant to recover compensation under implied contract for services rendered and expenses incurred by the plaintiff in securing bidders for the purchase of machinery and equipment sold by the defendant. The defendant did institute a foreclosure proceedings in another state and had procured judgment. He then asked the trustee in bankruptcy about the plaintiff, Mr. McCollumb, as to his trustworthiness. After such conversation, the defendant contacted the plaintiff and asked the plaintiff to go to the premises where the machinery was and meet two attorneys involved in the purchase of the machinery. Plaintiff aided them in checking and inventorying the property and discussing the property with some interested persons.

It was undisputed that the plaintiff had talked to both the attorney, Iverson, and to the defendant, Dr. Clothier, concerning his activities. The fact is that plaintiff's work did react to the benefit of the defendant at request of a third party, the defendant's attorney. Upon finding of these facts the court

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"The rule applicable to the situation is contained in the Restatement of Agency, Vol. 2 Section 441, 'except where the relationship of the parties, the triviality of the services, or other circumstances indicate that the parties have agreed otherwise, it is inferred that one who requests or permits another to perform services for him as his agent promises to pay for them'." Id. at 470.

In the instant case, work and labor was performed for the deceased at her request, there is no relationship of the parties, triviality of services, or any other circumstance which would indicate that services rendered were to be rendered gratuitously. In fact the nature and extent of the services obviously takes them beyond the realm of the trivial, and the decedent in the instant case continuously required the plaintiff to render further services, not just permitted them to be rendered.

Further, the established rule, under these facts was set forth in House Estate, Dillenberger vs. Starkweather, 164 Kan. 610, 192 P.2d 179, (1948), where the court stated at 180:

"The burden was, of course, on appellee to prove her claim. The decedent received the benefits of services, and they were performed with his approval. In 34 C.J.S., Executors and Administrators, Section 452, the established rule is well stated: 'Ordinarily the fact that services were rendered decedent at his request or with his approval, raises a presumption that they were to be paid for unless the conduct, relationship, or situation of the parties is of such a nature as to rebut the presumption'." See also Ennis vs. Nusbaum, Adm'r, 90 Kansas 296, 113 P.2d 537.

In the instant case the decedent's husband charged the appellant just prior to his death that he take care of the decedent during the last years of her life, manager her affairs, and see that she was taken care of. Had decedent's husband outlived her, his estate would have been liable for these services rendered at his request. Startin vs. Madsen, 120 Ut. 631, 237 P.2d 834, (1951).

However, Hallie Love Dennis did not predecease her husband, who had charged appellant with duty to see after her needs, and therefore, his estate

went to her. His estate, now held by the deceased, is obliged to pay for these services. In Startin, supra, the court stated at 836:

"There was no error in allowing the jury to include the value of services rendered to Priscilla Madsen, wife of the deceased, since nothing furnished in this case could be construed to be anything but necessities, the expense of which her husband's estate was obliged to pay."

The instant case has as its issue the validity of a claim for services rendered to a decedent prior to her death. As such, it is not based upon contract. Statutory authority that contracts must be proven in writing, therefore, have no application. The law is consistent in every jurisdiction that an implied contract to pay the reasonable value of services rendered is created when services are given with approval and knowledge. When those services are requested, a conclusive obligation to repay for them ought to be created.

## POINT II

WHEN SERVICES ARE RENDERED TO A DECEASED PRIOR TO DEATH AND A CLAIM MADE AGAINST THE DECEASED'S ESTATE, THE CLAIMANT'S BURDEN IS TO SHOW THAT SERVICES WERE RENDERED AND THE EXTENT OF THOSE SERVICES

In an action for unjust enrichment the measure of damages, where there is a proper, equitable basis therefore, is the reasonable value of the services rendered. Baugh vs. Darley, 112 Utah 1, 184 P.2d 335, (1947). Baugh, supra, in an action to recover the amount of a down payment on the purchase price of real property which had been owned by the defendant and for damages for breach of an oral contract by the defendant to sell the real property to the plaintiff. Speaking merely to the issue of unjust enrichment, the court stated at 337, "Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another".

In so holding, the court required that the benefits be sufficient to the plaintiff and not incidental to the defendant. Hallie Love Dennis, for three years made daily requests for appellant to perform services for her. Such

services were not incidental. When the extent and nature of these services are revealed, justice requires their compensation.

What appellant must show is the extent of the services. The following is a series of statements by appellant regarding services rendered: at page 22 of appellant's deposition, we find:

- Q Okay. So back to the claim. So your claim for services at \$2.00 an hour is your own evaluation of your worth?
- A No, it's not my own evaluation of worth. I thought that was a token payment. Hell, common labor gets \$6.00 an hour and I rendered a lot better service than a common laborer.
- Q But if you didn't have any agreement with her then this is for services rendered to her which she accepted, is that correct?
- A I didn't have any written agreement with her, and she didn't accept or make any contract agreement with me, anymore than I make when I employ you as an attorney.

Further, at page 25, the following conversation takes place:

- Q Did you write all checks for her?
- A I think that the bank statement will show that she wrote a very few. I wouldn't say there was over five checks she ever got released and paid, that she wrote herself. I wrote all the checks, but she signed every single check, except three the day before she died. Because I insisted all the bills be paid before she died. I think I paid three checks with power of attorney. Remember, I had power of attorney all of this time.

Again, at page 45, appellant makes the following statements:

- Q Do you have any record in a diary, or a day book, calendar, or any way of the actual days or times that you spent with Hallie Dennis?
- A No, I don't make an entry every day, every time I spent with everything. But I spent time with her every day.
- Q Did you spend time there on Sundays?
- A God, my life wasn't my own the last year, trying to satisfy the demands and desires. And it's a wonder my wife ever stayed with me that last year. God, I wasn't no good to anybody.



Q So that your claim as you set it out is your estimate of the time that you spent on---

A ---That's a minimum time that I spent, each one of those we

Q And likewise the mileage was a minimum mileage, maybe?

A Absolutely, minimum mileage.

That these services were valuable in preserving the estate was pointed out by appellant.

A Well, let's turn it around and say if it hadn't been for Walter Kershaw there wouldn't be one single dime in that estate to haggle about or administer to. I'm the one wholly responsible for having the entire \$66,000 of inventory that's filed with the court. Now--

Q Tell me one thing which you did to preserve any one asset of the estate?

A I prevented her from deeding that home to the Christian Scientist Church, for which Tracy-Collins received \$34,000 in cash. She was hellbent on delivering the deed to that property to the Christian Science Church.

Q Then she could have been subject to being taken advantage of, namely the Christian Scientist Church? Right?

A That's right. And if I hadn't stepped in and catered to her and these nurses, and hauled them back and forth, and she'd been obliged to pay the nurses' services that she actually obtained between August 27th and April 7th that would have cost more money. The cash that was on hand when she died, that would have cost at least \$25,000. And I'm the one that preserved that estate, nobody else involved in the situation.

Now, furthermore, I have been successful in prevailing upon Doctors Clark and Lindem, in St. Mark's Hospital not to file claim for the amount of monies due them for the difference between what she received from Blue Cross and Medicare, and what their charges were. And those charges are in excess of \$6,000.

Q You're saying that you asked these doctors not to file a claim?

A I did. I prevailed upon them. I felt they had enough that well, they just sort of agreed with me that they'd overlook filing the claims. Now, that's the situation. And those claims are in excess of \$6,000.



In Nylund vs. Madsen, 94 Cal. App. 441, 271 Pac. 374, (1928), the court held that performance for another person of useful services of the type and character usually charged for, with the other's consent, raised an implied promise to pay the reasonable value of the services by the person served. There existed a claim against the estate for services rendered to the deceased prior to death. In allowing recovery under implied contract, the court also pointed out that because it was a cause of action and under an implied promise to pay reasonable value for services, the action was based upon quantum meruit. In such instance the court said:

"When, upon the trial of the general issue in an action upon a quantum meruit for services of a domestic character, the plaintiff offers evidence showing the facts in which the promise to pay may properly be inferred, and also showing the nature and extent of the services rendered, the case should be submitted to the jury, although no witness expresses an opinion as to the value of the services."

Such holding allows one making a claim against an estate to establish by testimony the nature of the services rendered, and then allows the judge or jury to determine the value of those services under the theory of quantum meruit. The court finally held that because the services performed for deceased were extraordinary:

"Just as stated in the case of Young vs. Bruere, 78 Cal. App. 127, 248 P. 301, where one performs for another with the other's knowledge a useful service of the character usually charged for, the latter expresses no dissent or avails himself of the services, a promise to pay a reasonable value of the service is implied."

POINT III

AN ENFORCEABLE CLAIM MAY EXIST AGAINST AN ESTATE FOR SERVICES RENDERED DECEASED PRIOR TO DEATH, EVEN THOUGH DEMAND FOR PAYMENT WAS NOT MADE WHEN DECEASED WAS ALIVE.

Appellant, during the period of time he rendered services for the deceased, Hallie Dennis, did not demand payment from her. Appellant's deposition, page 50 illustrates:

Q Did you ever ask her grandson or her granddaughter for any compensation for anything that you were doing?

A No. And they couldn't have paid a penny. They're both destitute.

Q Did you ever make any demand to Tracy-Collins Bank as Trustee for Earl Dennis--

A No, never.

Q --before Hallie died?

A No. No. Frank Dutson and I are very, very good friends, and Frank knows exactly what I was doing.

However, formal demand upon a deceased prior to death is not necessary for appellant to recover for services rendered to her. McCaffrey v. Cronin, 140 Cal. App.2d 973, 295 P.2d 587, (1956). In McCaffrey, supra, the court pointed out that conduct may determine that compensation is due even without communication to that effect between the parties. The court stated:

"And the case law has established that intention to pay and expectation of compensation for services rendered may be inferred from conduct where equity requires it as well as from direct communications between the parties...The principle was thus stated in DeRosier v. Vierra, 109 Cal. App.2d 291, 240 P.2d 660, 662: 'When services are rendered by one person from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a "presumption of law" which arises from proof of services rendered that the person enjoying the benefit of the same was bound to pay what they are reasonably worth. The doctrine of implied contracts has its foundation in the doctrine of unjust enrichment.' Id. at 591.

In the instant case, the rendering of services for three years, the traveling of 20,925 miles at the deceased's request, and the spending of 2,345 hours giving the deceased personal care and preserving her estate, indicate that expectation of compensation was present.

This view has been reiterated in our own jurisdiction. In Woodridge v. Wareing, 120 Utah 514, 236 P.2d 341, (1951), the plaintiff and defendant had entered into a joint endeavor to sell ice-making equipment and had consummated several sales. Plaintiff, in the absence of an express contract, brought an action to recover for services rendered on the doctrine of quantum meruit for the reasonable value of the services. The court held that "he who accepts services from him who unofficially performs under circumstances justifying the latter in reasonably assuming he would be compensated, must pay the reasonable value thereof." At 342.

The reason a demand need not be made upon a deceased during life for the value of services rendered is also set forth in Western Asphalt Company v. Valle, et al., 25 Wash.2d 428, 171 P.2d 159, (1946), where the court described in detail how the presumption for payment arises:

"To recover for work and labor on the theory of implied contracts to pay therefore, plaintiff must ordinarily show that the services were rendered under reasonable expectation of payment therefore by persons sought to be charged, and with such persons' knowledge that services were being performed with such expectation and a promise to pay for services contrary to the parties intention will not be implied, the recipient's actual belief as to whether the one performing the service is expecting compensation is immaterial, if recipient as a reasonable man should have understood that compensation was expected."

Id. at 165, Emphasis mine.

The court, in introducing the reasonable man test, further went on to indicate that presumption that payment for labor was contemplated arises where the kind of labor ordinarily subject to remuneration is rendered and accepted with knowledge and consent, in absence of anything in the parties

relation to rebut such presumption.

Appellant is not related to the deceased, the services which he rendered were of the type ordinarily subject to payment and are of such extreme nature in the amount of time consumed that the recipient's estate should be charged with payment therefore, especially when the deceased continuously requested the services.

The same holding is found in O'Shaughnessy vs. Brownlee, 77 S.W.2d 867 (Mo. 1934). In Brownlee, supra, the court held that recovery may be had for services rendered a deceased at his request regardless of whether deceased intended to pay. The court stated:

"If a decedent requested some and received the benefit of and permitted all, the services which were rendered by a neighbor during an eleven (11) year period, and the decedent, who was crippled, stated that he didn't see how he could get along without such a neighbor, the estate was liable, even though the decedent did not intend to pay."

The gift of a ring to appellant by the deceased does not fully cover the reasonable value of the services rendered and exhibits an intention on the part of Hallie Love Dennis to pay for those services. Her estate should be liable for the appellant's claim for the remainder of the reasonable value of those services. No demand need have been made upon Hallie Love Dennis since she should have understood as a reasonable person, that compensation was expected.


#### CONCLUSION

Reliance below by the defendant upon the fact that plaintiff's claim must be grounded in contract was ill founded. Authorities in every jurisdiction have pointed out, and have clearly held, that the reasonable value of services rendered to a deceased prior to death may be recovered from his

estate regardless of actual contract. The law of work and labor is in agreement.

Appellant rendered extremely valuable services to the deceased during a three year period at her request. Judgement in the lower court granting defendant's Motion for Summary Judgement should be reversed and the case remanded for hearing on the extent of the services rendered.

RESPECTFULLY SUBMITTED this 20th of May, 1976.

  
Walter R. Ellett  
Attorney for Appellant

#### CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellant was served on counsel for respondents, James W. Beless, 1011 Walker Bank Building, Salt Lake City, Utah 84111, by mailing three copies thereof in a postage prepaid envelope on the 20th day of May, 1976.

