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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

1911

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

WALTER W. KERSHAW :

Plaintiff-Appellant :

vs. :

TRACY COLLINS BANK & TRUST :
COMPANY, Administrator of
the Estate of HALLIE LOVE :
DENNIS, also known as :
MRS. CHARLES F. DENNIS :

CASE NO. 14512

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE
THIRD DISTRICT COURT FOR
SALT LAKE COUNTY
HONORABLE JAMES S. SAWAYA

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER W. KERSHAW :

Plaintiff-Appellant :

vs. :

TRACY COLLINS BANK & TRUST :

Case No. 14512

Administrator of the

Estate of HALLIE LOVE :

DENNIS, also known as

MRS. CHARLES F. DENNIS :

Defendant-Respondent :

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondent believes that the court must have before it a full exposition of the facts, which are best stated and documented directly from Appellant's deposition (R.41).

Appellant Walter Kershaw is a retired executive of Wheeler-Kershaw, a Caterpillar distributorship (Kershaw deposition, page 4). He owns and manages income-producing properties in several states (D.3), and he is a world traveler (D.39,40).

Hallie Dennis was the widow of Earl Dennis, who died in January, 1972 (D.5). Kershaw described himself as Earl's ~~closed~~^{closest} friend, his "buddy," long-time brother Mason and Shriner, and active fellow Presbyterian (D.6,48,49).

By Earl's will, Tracy-Collins Bank acted as trustee for Hallie and paid to her or for her benefit whatever necessary for her support and maintenance (D.25,35). Hallie's personal estate consisted of her home, a \$20,000 certificate of deposit and some valuable jewelry (D.26). Hallie maintained her own checking account and paid her personal expenses from that account (D.25).

When he was in town, during the three years following Earl's death, by his own statement Kershaw took over the supervision of Hallie's personal life (D.7). He chauffeured her, bought groceries, ran errands (D.15), did menial repair work at her home (D.24), hired and fired nurses (D.11) and doctors (D.45), hired and directed her attorney (D.6,28), occasionally reviewed her personal check book (D.33), vetoed payments from her personal funds which she wanted to make (D.11), and would not allow Hallie to consider a gift to the church of her choice (D.8,44,45).

Kershaw took over supervision of Hallie's life because he felt that he had been "charged" by his Masonic brother,

Earl, to "look after" Earl's widow (D.13). Kershaw described Hallie as follows:

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. (D.12)

When asked if he considered his services rendered to Hallie as work or a job, he countered:

What do you mean I looked on it, thought it was a job? It was a demand, a request to perform services for her. And she made it so unbearable that you couldn't do anything but perform the services. (D.47)

Kershaw admitted that there was never any agreement, written or oral, for any payment for any of his services or mileage (D.20,21,23). There was no writing which could be considered as an acknowledgment of prior services (D.22).

Kershaw never asked for or demanded of Hallie during her lifetime any compensation for any services or mileage (D.24). In his personal income tax returns for 1972, 1973 and 1974 he did not claim as a business deduction his expenses for mileage regarding the errands and chauffeuring for Hallie (D.47,48). Hallie never offered to pay Kershaw for anything other than reimbursement for groceries and medical supplies purchased by him (D.23). She accepted the fact that Earl had "charged" his brother Mason to "look

after" his widow (D.12). Kershaw did not expect any pay or gratitude from Hallie during her lifetime. When asked if Hallie ever agreed to pay for his auto expenses, he replied:

No, she didn't. She wasn't that type of a woman. She wasn't generous, let's put it that way. She was most demanding. (D.23)

Hallie died on February 7, 1975. Kershaw filed a claim for \$6,600 with Tracy-Collins Bank, Hallie's executor. The claim was rejected; and Kershaw sued, claiming for services rendered for and on behalf of Hallie over the three-year period from Earl's death. His claim was for 2,345 hours time at \$2.00 per hour and 20,925 miles traveled at 12¢ per mile. The claim alleges services rendered "covering the preservation of the estates as well as all personal care maintenance and supervision of all of the deceased's affairs and operations." (R.4) The claim gave credit for \$2,000 for receipt by Kershaw of a diamond ring by Hallie's will and codicil, leaving a net claim of \$4,600 (R.4).

Hallie's will dated January 27, 1972 (R.30) gave to Kershaw an option to buy the diamond ring for \$2,000. Hallie instructed Kershaw and Ralph Miller, the attorney brought in to Hallie by Kershaw (D.6), to make the codicil dated May 2, 1974 (R.38) and thereby bequeath the ring to Kershaw (D.17,18). Kershaw admitted that Hallie had bequeath-

to him the ring as compensation for services (D.19,20).

Kershaw's deposition (R.41) was taken by Respondent. Based on the facts as shown in the deposition, Respondent moved the District Court for Summary Judgment, which Judge James S. Sawaya granted, stating in his memorandum decision (R.44):

I am of the opinion that the better reasoned rule of recovery under the facts established in this matter, is the rule urged by and supported by the authorities stated in defendant's memoranda. I don't believe, giving plaintiff the benefit of the facts stated in his deposition, that he is entitled to recover under any theory of express or implied contract.

ARGUMENT

Appellant's brief limits his claim to quantum meruit, for giving to Hallie Dennis personal care, for preserving her estate and for supervising her affairs. Appellant does not refute his own admission that the diamond ring was bequeathed to him by Hallie's codicil in satisfaction for whatever services he may have rendered.

POINT I.

THE GENERAL RULE OF QUANTUM MERUIT IS ADMITTED. HOWEVER, APPELLANT DOES NOT MEET THE QUALIFICATIONS OF THAT RULE, AS EVERY BENEFIT CONFERRED IS NOT RECOMPENSABLE, AND EVERY ENRICHMENT IS NOT UNJUST.

For recovery in quantum meruit there must be a showing of facts of benefit accepted and unjustly conferred to imply

a contract. There are built-in qualifications to the general rule of quantum meruit which spell out that every benefit conferred is not recompensable and every enrichment is not unjust.

The qualifications to the general rule for recovery in quantum meruit and the parameters for the rules of implied contracts are:

1. Voluntary services are not compensable.
98 C.J.S 723.
2. There must be reasonable expectation by both parties that compensation is to be paid.
98 C.J.S. 724,735.
3. A person who officiously confers a benefit on another is not entitled to restitution therefor.
66 Am.Jur.2d §5,p.948.
4. Gratuitous services are not compensable, particularly if the person rendering services changes his mind.
17 A.L.R. 1371; 98 C.J.S.727; 8 A.L.R.2d 801.
5. Moral obligation does not create an implied contract.
17 AmJur.2d 477.
6. A "family-type" or social relationship, based on friendship and mutual concern, even where there is no relationship by blood or marriage, creates a presumption of rendering of services without pay.
98 C.J.S. 741, 745; 7 A.L.R. 2d 12.

The Utah Supreme Court has both recognized the general theory of quantum meruit and has in recent Utah cases limited restitution in quantum meruit for the reasons as above stated.

Gleason v. Salt Lake City (1937) 74 P.2d 1225, 94 U.I,
is the Utah decision uniformly referred to as the general

statement of the rule for recovery in quantum meruit. The court said:

Ordinarily 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 were reasonably worth. (Emphasis ours)

In qualifying the general rule by adding "ordinarily" and "without more," the Utah court allowed the later Utah decisions to spell out and delineate situations which fail to imply in fact or in law a promise or fail to cause unjust enrichment. Quantum meruit requires a promise to pay implied in fact. Facts negating such promise or causing an enrichment, not unjust, disallow recovery in quantum meruit, as there is then no implied contract in fact or in law.

We accept as basic law the general rule for recovery in quantum meruit by implied contract, as set out in the Gleason case. All of the cases cited in Appellant's brief hold that there can be an implied promise to pay. We agree, but to find that implied promise all of the facts must be examined to determine the intention of both parties, as to whether pay was expected by the renderer and to be paid by the recipient of the services. What was the relationship of the parties? Was there a relationship of friendship on which the recipient should have been able to rely? What was the nature of the services? Were they such as both the

recipient and the renderer should reasonably expect to be for pay, or were they normal gratuities?

The Utah Supreme Court in Burton v. McLaughlin (1950) 217 P.2d 566, 117 U.783, decided a quantum meruit case involving personal services rendered to a decedent in his lifetime by a neighbor by quoting and applying this test from Williston on Contracts Rev. Ed. §36, p.94:

It is a question of fact if services are accepted whether a reasonable man in the position of the parties would understand that they are offered in return for a fair compensation, or would rather suppose either that they are offered gratuitously, or if not, that the recipient might think so.

Intimate friends sometime render services gratuitously and how close must relationship be to make one presumption or another applicable? The question is purely one of fact, varying in every case, but with the burden always on the party, who alleges a contract and seeks to enforce it, to prove its existence.

The Utah Court in the Burton case found that the extensive nursing care rendered was not such as could possibly be expected from a neighbor as gratuity; that the rendered had provided food and medicine for the decedent; that the decedent had admitted that she owed the renderer reimbursement; and that these facts could make for an implied contract.

From the Kershaw deposition Judge Sawaya found abundant facts to hold that Hallie Dennis looked upon Kershaw's acts as those of a volunteer and a friend and as gratuities;

that she did not expect to pay for them, except by way of the bequest of the ring; that Kershaw was a volunteer, and that he did not expect pay for the services rendered, which were the services normally expected of a friend; and that those facts negated any implied contract.

POINT II.

KERSHAW'S SERVICES WERE ACCEPTED BY HALLIE AS GRATUITOUS, AND SHE DID NOT EXPECT TO PAY. KERSHAW DID NOT EXPECT TO BE PAID, BUT CHANGED HIS MIND AFTER HER DEATH. THESE FACTS DO NOT CREATE AN IMPLIED CONTRACT.

The Utan court in McCollum v. Clothier (1952) 241 P.2d 468, 121 U.311, cited at 98 C.J.S. 720, 724, 725 and 727, restated the general quantum meruit rule of the Gleason case and then added at page 470:

It is appreciated that this rule should not be applied to bind one under implied contract who merely permits services to be rendered him, or accept benefits from another, under such circumstances that he may reasonably assume they are given gratuitously. The law should not require everyone to keep on guard against such possibilities by warning persons offering services that no pay is to be expected. It is, therefore, essential that the court should exercise caution in imposing the obligations of implied contract, as contrasted to express contract, where the parties have actually defined and agreed to the terms they are to be bound by. With such caution in mind, the test for the court to apply was: Under all the evidence, were the circumstances such that the plaintiff could reasonably assume he was to be paid and that the defendant should have reasonably expected to pay for such services.

Justice Wolfe wrote a concurring opinion in the McCollum decision, page 473, where he concurred in the language in the main opinion, saying:

My comment on this wise statement is that it appears to me that our courts have merely paid lip service to it or ignored it altogether. It is too easy in this state for one to surprisingly find himself a promisor under an implied contract.

All of us are familiar in life with instances where a seeming volunteer ingratiates himself into the confidence of another only to be later revealed as a self-seeker.

The McCollum case is cited at 98 C.J.S. (Work & Labor) 720 under the statement:

Implication of a contract to pay for services is greatly narrowed by rules of statutory and judicial construction; the courts should exercise caution in imposing the obligations of an implied contract of this nature.

The same admonition is at 17 C.J.S. (Contract) 556, again citing the McCollum case.

In Jensen v. Anderson v. Radakovitch (1970) 468 P.2d 366, 24 U.2d 191, the Utah court held that the fact that a holder of an option to purchase a decedent's property obtained while visiting decedent and assisting him with various chores about decedent's property without any contemporaneous promise by decedent to pay for them was not consideration to support the option. The court found there was no evidence to indicate that the services "were rendered at request as a matter of business" and consequently, no contemporaneous

promise in fact to pay for them. The court then restated the admonishment regarding implied promises by quoting the language from the McCollum decision set out above.

The Jensen case is cited at 17 C.J.S. 839, §117, under the following statement:

The authorities which speak of services rendered on request as supporting a promise must be confined to cases where the request implies an undertaking to pay, and do not mean that, what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked for.

The above language was quoted by C.J.S. from the Jensen opinion, page 368.

Vogl v. Goldrick's Estate (1929) 224 NW.741, 198 Wis. 500, is a case on all fours with Kershaw. Vogl, a bank president and long-time friend of Mr. Goldrick, performed some manual yard work, clerical services and gave business advice to Mrs. Goldrick, the widow living next door. Only after Mrs. Goldrick's death, Vogl made a claim in quantum meruit for eight years services. The Wisconsin court denied the claim, saying that the relation existing between those parties would not raise an implied contract. The court added:

Claimants, silent in the lifetime, become voluble when their pretended debtors can no longer speak. Such claims are not favored in the law.

Let us examine the Kershaw deposition in the light of the McCollum and Jensen decisions for facts going to establish

or to negate an implied contract for payment of services. Kershaw stated that he acted on Hallie's requests and that her demands were "unreasonable" and that she was "unbearable." We repeat Kershaw's statements:

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.' (D.12) (Emphasis ours)

A. What do you mean I looked on it, thought it was a job? It was a demand, a request to perform services for her. And she made it so unbearable that you couldn't do anything else but perform the service. (D.47)

We submit that Kershaw's own statements prove that the requests and demands made by Hallie certainly did not contemplate that she would compensate him. On the contrary, it appears clearly that Hallie was expecting gratuitous services from Kershaw because of their long-standing friendship and because of the known "charge" given to Kershaw by his "buddy" and brother Mason, Earl Dennis.

Kershaw clearly stated in his deposition, pages 20, 21, 22 and 23, that he had no agreement with Hallie, or any promise by her, for payment by her for his services in the past or in the future. Kershaw stated (D.47) that in his

personal income tax returns for 1972, 1973 and 1974 he did not take as deductions any automobile expenses, which he is now claiming. This clearly shows that during that period he was not looking at his acts as any work for which he was entitled to pay. His services were gratuitously rendered, and he did not expect pay at the times when rendered.

Kershaw admitted that over the period of three years when he claimed to have rendered services for Hallie, at no time did he ask for reimbursement or make any demand for such. At page 23 of the Kershaw deposition is the following colloquy:

- Q. Did she ever agree to pay you \$.12 a mile?
- A. No, she never discussed any mileage.
- Q. Did she ever agree to pay you anything for your expenses for operating your automobile?
- A. No, she didn't. She wasn't that type of a woman. She wasn't generous, let's put it that way. She was most demanding.
- Q. Did you ever make any demands on her for any of the work that you had done, including your mileage?
- A. No, I didn't make demands on her.
- Q. Was the first demand that you did make when you filed your claim after she died?
- A. Yes, I'll say indirectly, yes.

POINT III.

KERSHAW WAS A VOLUNTEER. THERE WAS NO CONSIDERATION FOR HIS SERVICES. A MORAL OBLIGATION IS NOT LEGAL CONSIDERATION.

The Utah law is clear that a moral obligation does not make for legal consideration.

In Manwill v. Oyler (1961) 361 P.2d 177, 11 U.2d 433, the plaintiff sued to recover payments voluntarily made by him on defendant's land without any consideration or adequate promise for repayment. Plaintiff claimed that whereas defendant had been materially benefited, defendant had a moral obligation to repay. The Utah court held that a moral obligation by itself is not sufficient to make legal consideration; that circumstances in addition to a purely moral obligation "must be such that it is reasonably to be supposed that the promisee (plaintiff) expected to be compensated in some way therefor"; and the Utah court cited Section 78-12-144 UCA, in requiring a writing signed by the party to be charged, as the statutory requirement to revive or establish a prior debt or claim. The Manwill case is cited at 17 Am. Jur.2d 487 in support of the general rule, "that a mere moral obligation, without anything more, is not a sufficient consideration for an executory promise."

The general rule that a moral obligation based on relations of friendship and good will is not matter for legal redress is set out in Rask vs. Norman 169 N.W. 704, 141 Minn. 198, 17 A.L.R. 1296. The Minnesota court would not allow

recovery on the promise of one business associate to another in his last illness to look after and protect the business interests of the latter's wife, which was made on the basis of friendship and good will and was unsupported by pecuniary or material benefit. The general rule is restated with many cases at the note of 8 A.L.R.2d 787. See also 17 C.J.S. 776, §90.

Kershaw was entirely a volunteer. He performed whatever services he did because of an obligation he felt toward his "buddy" and Masonic brother as shown in the following colloquy at page 13 of the deposition:

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.

We submit that Kershaw had no obligation, legal or moral, toward Hallie; that his services were rendered to her as a volunteer and accepted reasonably by her as gratuitous; and that Kershaw at the time of rendering services, did not expect compensation. Kershaw twice dramatically denied any responsibility

for Hallie by saying:

She was no responsibility of mine and they could drop her in a garbage can and send her to the city dump. (D.29,31)

POINT IV

KERSHAW ACTED OFFICIOUSLY IN IMPOSING HIMSELF ON HALLIE. THE LAW WILL ALLOW NO RECOVERY IN QUANTUM MERUIT FOR SERVICES OFFICIOUSLY RENDERED.

The Utah Supreme Court in Baugh v. Darby (1947) P 2d 335, 112 U.1, cited at 98 C.J.S. 722, in a quantum meruit controversy held: "The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor," citing to A.L.I. Restatement of Restitution, Sec. 2, and further: "Nor are services performed by the plaintiff for his own advantage, and from which the defendant benefits incidentally, recoverable," citing Restatement of Restitution, Sec. 40, comment C and Sec. 41 (a)(i).

A.L.I. Restatement of Restitution, Sec. 2, page 15, provides: "A person who officiously confers a benefit upon another is not entitled to restitution therefor." Comment (a) states:

A. Officiousness means interference in the affairs of others not justified by the circumstances under which the interference takes place. Policy ordinarily requires that a person who has conferred a benefit whether by way of giving another services or by adding to the value of his land or by paying

his debt or even by transferring property to him should not be permitted to require the other to pay therefor, unless the one conferring the benefit had a valid reason for so doing. A person is not required to deal with another unless he so desires and, ordinarily, a person should not be required to become an obligor unless he so desires.

The principle stated in this section is not a limitation of the general principle stated in Sec. 1; where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. The rule denying restitution to officious persons has the effect of penalizing those who thrust benefits upon others and protecting persons who have had benefits thrust upon them.

The following comment is at 66 AmJur.2d 948:

A basic principle underlying the rules in regard to restitution is that a person who officiously confers a benefit upon another is not entitled to restitution therefor. Where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched.

In Wooldridge v. Wareing (1951), 236 P.2d 341, 120 U.514, the Utah court in deciding another quantum meruit case, emphasized that services must be rendered unofficially by one who reasonably assumes he will be compensated to recover. The qualification of unofficial performance appears four separate times in the Wooldridge opinion.

Oxford Dictionary shows "meddlesome" as a synonym for "officious." Webster's Dictionary shows "impertinent" as a synonym, and "impertinent" is then defined as: "one who

meddles or intrudes in things which are not one's concern." We submit that the Kershaw deposition by its whole tenor, and in the particulars hereafter shown, demonstrates that Kershaw imposed himself on Hallie without necessity and forced her to do his will. He was truly a meddler.

In proof of his officiousness, we refer to Kershaw's proudful admissions of how he took Hallie Dennis out of the hospital, saying that this action was contrary to her doctors' orders (D.10,11). Kershaw claimed to have preserved Hallie's estate by not allowing payment by Hallie of those doctors' legitimate claims for their medical services (D.44,45). Kershaw was shown Hallie's last check register (Exhibit 3, D.36) and checks issued (Exhibits 4 and 5, D.38 41,42) and he stated that some were in the handwriting of Hallie Dennis and some were in his printing. He said: "I asked her to sign everything. She did sign everything that I asked her to." (D.42) Kershaw said: "I'd explained to her what the charges were, and when she wanted to issue a check for something, that was ridiculous and she did, I wouldn't let her release the checks." (D.11)

In explaining what he meant by his claim for "preservation of the estate," Kershaw said that he prevented Hallie from deeding her home to the Christian Science Church (D.8). He believed that Hallie was competent and never senile, and

when asked what he did to prevent Hallie from deeding the home to anyone, Kershaw answered:

- A. Just told her she couldn't sign anything, she couldn't give it. I told the Christian Science Church that she couldn't give that home to them. (D.8)

Kershaw repeated that Hallie wanted to make a gift of her home to the Christian Science Church (D.43,44). He disagreed with that church, and he stated that it was his objection that blocked her. At this point he stated he believed that Hallie was "subject to being taken advantage of, namely, by the Christian Science Church." (D.44)

Kershaw's officiousness culminated in the change of Hallie's will. Her will of January 27, 1972 gave to Kershaw an option to buy a certain diamond ring for \$2,000.00 on Hallie's death. He "ordered" Ralph Miller, Hallie's attorney who had been employed at the suggestion of Kershaw in 1972 (D.6), to prepare a codicil to Hallie's will (D.16,17). The codicil dated May 2, 1974 revoked the provision of the will giving Kershaw the option to buy the diamond ring, and it then bequeathed the ring to him outright (R.38).

We are sure that Kershaw did have a miserable three years with Hallie Dennis, but as a volunteer, that was his problem. His services were not really necessary. Tracy-Collins

Bank was administering the trust of Earl Dennis, primarily for the benefit of Hallie (D.5,13,14). She had two grandchildren, neighbors, nurses and doctors who physically cared for her at her own expense (D.11). Kershaw said that he "catered" to Hallie (D.44). The change in the will was proof positive of his officiousness and the ultimate success of his self-ingratiation. Justice Wolfe would have immediately identified Walter Kershaw as the "seeming volunteer who ingratiates himself into the confidence of another only to be later revealed as a self-seeker." McCollum v. Clothier, supra.

POINT V.

A RELATIONSHIP BASED ON FRIENDSHIP AND MUTUAL CONCERN PRESUMES THAT SERVICES RENDERED WERE GRATUITOUS AND ACCEPTED AS SUCH. HALLIE BELIEVED THAT SHE WAS RECEIVING GRATUITOUS HELP FROM HER HUSBAND'S BEST FRIEND.

At 98 C.J.S. (Work & Labor) 741 is stated the general rule that the existence of a "family" relationship between the performer and the recipient of services raises a presumption of gratuity. Such presumption rests on common experience. Blood or marriage relationship is not necessary to create the "family" relationship, which is really based on the mutual friendship and concern of the parties.

The lengthy annotation at 7 A.L.R.2d 12 is summarized under the statement that:

The view is generally taken that the element of family relationship not only rebuts the general implication of a promise to pay for services rendered and accepted, but also raises an affirmative presumption which will preclude recovery for the services unless an agreement as to compensation is established.

The Utah Supreme Court in Mathias v. Tingey (1911) 118 P.781, 39 U.561, held that services rendered by a child are presumed to be gratuitous unless an agreement can be shown to the contrary, thus settling in Utah the blood family situations.

In Shields v. Eckman (1926) 248 P.122, 67 U.474, the Utah court showed that the gratuitous presumption should not apply in a parent-child case, where the child as provider gave up her own home to move in with the parent, and particularly where a promise to pay for the services was proved.

Beyond blood and marriage ties, the social and fraternal relations of the parties can raise a presumption that services are rendered without any intention or reasonable expectation of payment, as:

Where in the case of neighbors, the social relations of the parties and the character of the services rendered raise a presumption of gratuity, the law will not imply a contract for compensation. 98 C.J.S. 740, citing Vogl v. Goldrick's Estate, supra.

Payne v. Bank of America (1954) 275 P.2d 128, 128 C.A. 2d 295, was a quantum meruit suit by a business associate and

"bosom friend" against the executor of his deceased friend for giving business advice, taking his friend for walks and drives, engaging doctors and nurses for him and generally caring for him. The California court denied recovery, saying at 275 P.2d 134:

If at the time the services were originally rendered they were intended to be gratuitous or as an accomodation, motivated by friendship, kindness, or some other significant relationship existing between the parties, and were tendered without any expectation of remuneration, they cannot afterwards be converted into an obligation to pay their reasonable value under the theory of an implied contract.

There was no blood, marriage or communal family relationship in the Payne case. It was the fact of friendship which negated any implied promise to pay for the type of services rendered and accepted by the recipient and believed by him to have been friendly acts.

The Payne case followed Smith v Riedele (1923) 213 P.281, 157 Cal. 667, where recovery in quantum meruit for personal services was denied to a non-blood "family" member, where the recipient and the provider of services were close friends and fishing buddies. The California court would not imply any agreement to pay from acts of friendship, kindness and the close relationship between the parties, which made the provider and the recipient occupy positions similar to

that in a family. Other cases denying recovery for quantum meruit on a presumption of gratuitous nature of services are Morton v. Angst (1918) (Calif.) 173 P. 90, 36 C.A. 644 (intimate friends); Dallman v. Frank (1905) (Calif.) 82 P. 564, 1 C.A. 541 (social friends and neighbors); Kremmel v. Schnaufer (1940) (Wash.) 103 P.2d 38, 4 Wash.2d 242 (banker friend); and Cook v. Bryson (1928) (Calif) 265 P. 289, 89 C.A. 445 (business partners and close social friends).

Let us examine the facts as shown in the Kershaw deposition in the light of and under the test of the Utah Burton v. McLaughlin decision, supra.

Kershaw supervised Hallie Dennis' life because he felt that he had been "charged" by his Masonic brother, Earl, to "look after" Earl's widow (D.13). He had no understanding with Hallie for any compensation, and he made no demand for pay during her lifetime (D.20-24). His services in driving her, running errands, helping in finding nurses and performing menial chores, were those normally expected of a friend. After her death, Kershaw complained of Hallie, saying that she was "unbearable," "a demanding, cantankerous bitch" and that his acts were not a friendly service. He did not expect pay from her. He said: "She wasn't that

type of woman. She wasn't generous." (D.23) However, he did accept Hallie's diamond ring after her death, following the change in her will, as arranged by Kershaw (D.17-20).

Kershaw admitted that Hallie knew that Earl Dennis had "charged" his Masonic brother to take care of Hallie (D.12). Hallie accepted the services of Kershaw as from a friend and a fellow member of the Presbyterian "church-family," believing that Kershaw was sincere in fulfilling his Masonic obligation to protect and care for the widow of a brother Mason. Kershaw's services may have been time-consuming and irritating to him, but they were really not necessary for Hallie. Tracy-Collins Bank, Earl's trustee, was ready always and did provide whatever necessary for her support and welfare. Kershaw's acts were those which should be expected of a long-time friend, and Hallie did accept them for what they were, namely, gratuities.

Judge Sawaya examined the facts as stated in Kershaw's deposition, applied to them the test of the Burton v. McLaughlin case and concluded that, giving Kershaw the full benefit of the facts as stated, there was no way for him to recover under any theory of express or implied contract (R.44).

POINT VI.

KERSHAW HAS ADMITTED RECEIPT BY HIM OF THE DIAMOND RING AS PAY FOR ANY SERVICES RENDERED.

Paragraph Fifth of Hallie Dennis' will gave to Kershaw a first option to buy her diamond ring for \$2,000 (R.31). Hallie instructed Kershaw and Ralph Miller, her attorney, to make the codicil dated May 2, 1974 (R.38) and thereby bequeath the ring to Kershaw (D17,18). The codicil is silent as to any reason for the bequest. In his probate claim, Kershaw has given credit against the claim of \$6,600.00 for \$2,000.00 for the ring as bequeathed to him (R.4).

Appellant's brief does not refute that Kershaw admitted the ring having been bequeathed to him in satisfaction for whatever services he may have rendered. He said:

A. Well, I don't need to believe anything. It was her deal that she was grateful for the services I had performed up to that time and that the littlest she could do was to give me that ring. Now, she was giving it to me for services performed to that time.

Q. And that was as of what date?

A. The will, the codicil--she didn't tell me for what time. She told me for services rendered. There's no cutoff on the date. The codicil, where she gives me the ring, is May 2, 1974. (D.19)

We submit that Kershaw has been paid more than amply through his own manipulations.

The California court in Payne v Bank of America, supra, said at 275 P.2d 136:

A person who expects to be benefited by a legacy cannot later resort to an action for the reasonable value of his services where a mere expectation is shown and neither an express nor an implied contract to pay for the services is established.

We submit that Kershaw should not be allowed to take a bequest from Hallie Dennis, then turn around and collect further from the estate of this decedent, whom he termed an "ungrateful bitch."

CONCLUSION

The deposition of Walter Kershaw conclusively confirms that there was no promise by Hallie Dennis in fact or implied in fact or law to pay for any services by Kershaw. He was a volunteer, and more, he was an officious meddler. Services accepted by Hallie were believed by her to have been gratuitous because of her past friendship and that of her husband with Kershaw. He did not expect to be paid, beyond the bequest of the diamond ring, until he changed his mind after

Hallie's death. There is no basis for any implied contract in quantum meruit. The Utah case law is entirely opposed to any recovery for Kershaw. Judge Sawaya's decision should be affirmed.

Respectfully submitted,

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