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Domestic Relations -- Work and Labor -- Contracts Between Persons Living in a Family Relationship

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During the Summer Session of 1943 at the Law School of the University of North Carolina Judge J. Warren Madden, of the United States Court of Claims, gave the course in Labor Law. Dean Robert H. Wettach has been serving as Public Panel Member for the Regional War Labor Board.

The executives of the Editorial Staff of the NORTH CAROLINA LAW REVIEW for 1943-44 are: William A. Johnson, Editor-in-Chief, John F. Shuford and Cecil J. Hill, Associate Editors. They are likewise the recipients of the faculty research assistantships for the current year.

John T. Kilpatrick, Jr. and Fred R. Edney, Jr. were elected last spring to the honorary Law School society of the Order of the Coif.

Of last year's editorial staff the following are in military service: C. D. Hogue, Jr., Arthur C. Jones, Jr., Wallace C. Murchison and H. Milton Short, Jr.

NOTES AND COMMENTS

Domestic Relations—Work and Labor—Contracts Between Persons Living in a Family Relationship

Plaintiff, daughter-in-law of the defendant's intestate, and her husband moved into the home of her father-in-law in June, 1929. In March, 1936, the father-in-law suffered a stroke of paralysis, causing a gradual deterioriation in his health until his death in 1941. During the period of illness the plaintiff acted as housekeeper-nurse for her father-in-law, doing such menial tasks as washing his bed clothes two or three times weekly, bathing him, giving him medicine, and preparing a special diet. There was no express contract to pay for these services between the parties, but the father-in-law said in plaintiff's presence that he expected her to be paid out of his estate after his death.[1] Plaintiff brought an action against the administrators of her father-in-law's estate to recover for the value of her services rendered during the illness on the basis of an implied contract to pay. The defendants argued that such services were rendered by a person living in a family relationship and, therefore, were gratuitous. The court held there was sufficient evidence of an implied contract to allow plaintiff to recover.[2]

[1] Francis v. Francis, 223 N. C. 401, 26 S. E. (2d) 907 (1943), Record on Appeal, 20-29.

[2] Francis v. Francis, 223 N. C. 401, 26 S. E. (2d) 907 (1943).

Generally, where one voluntarily accepts the benefits of services performed in his behalf, he ratifies the act of the party performing them and becomes liable to him for the reasonable value thereof.[3] The rule does not usually apply to services rendered between persons living in a family relationship, regardless of the kinship between the parties. The law presumes that services are performed freely because of the desire to promote family interest and goodwill when performed between husband and wife,[4] parent-in-law and child-in-law,[5] uncle and nephew,[6] brother and brother,[7] parent and child,[8] stepfather and stepchild,[9*] or even strangers living in the family relationship.[10] It is essential in the above relationships that the parties live together as a family.[11*]

It must be noted, however, that kinship alone does not create a presumption of gratuitous service.[12] Where the parties do not live together in the family relationship, the presumption of the gratuitous nature ceases to exist, or is greatly weakened, according to the proximity of relationship and the nature of the services performed.[13]

The presumption of gratuity may be overcome by proof either of an express agreement to pay, or of such facts and circumstances as satisfactorily show that both parties at the time expected payment to be made, thus giving rise to an implied contract.[14*] Where the family relationship exists, the claimant has the burden of refuting the presumption and proving the existence of an express or implied under-

[3] Shippen v. Walker, 26 Ga. App. 280, 105 S. E. 853 (1921); Winkler v. Killian, 141 N. C. 575, 54 S. E. 540 (1906); 28 R. C. L. 668, §3.

[4] Coleman v. Burr, 93 N. Y. 17, 45 Am. Rep. 160 (1883).

[5] *See* Brown v. McCurdy, 278 Pa. 19, 22, 122 Atl. 169, 170 (1923).

[6] Bolling v. Bolling's Adm'r, 146 Ky. 313, 142 S. W. 387 (1912).

[7] Hodge v. Hodge, 47 Wash. 196, 91 Pac. 764 (1907).

[8] *See* Thysell v. McDonald, 134 Minn. 400, 402, 159 N. W. 958, 959 (1916); Williams v. Halford, 73 S. C. 119, 53 S. E. 88 (1905) (illegitimate children).

[9*] *See* Sargent v. Foland, 104 Ore. 296, 308, 207 Pac. 349, 352 (1922) (The mere relationship of stepfather and stepchild does not raise the presumption of gratuity, for the parent does not have to receive the child.).

[10] Gjurich v. Feig, 164 Cal. 429, 129 Pac. 464, Ann. Cas. 1916B, 111 (1913).

[11*] The federal rule accords with that of the states: The Morning Star, 1 F. (2d) 410 (W. D. Wash., 1924).

An interesting point arises in the case of bigamous marriages. In Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721 (1888) the court held that one could not recover against an administrator for services rendered during a bigamous marriage. North Carolina has taken a contrary view on another ground. In Sanders v. Ragan, 172 N. C. 612, 90 S. E. 777 (1916) the court held that a woman, innocently believing that she was becoming a lawful wife, was entitled to recover, by reason of a fraud practiced upon her, the value of her services above the benefits she may have received in clothes and maintenance.

[12] Kerr v. Wilson, 284 Pa. 541, 131 Atl. 468 (1925); Gibb's Estate, 266 Pa. 485, 110 Atl. 236 (1920).

[13] Hartley v. Bohrer, 52 Idaho 72, 11 P. (2d) 616 (1932).

[14*] Einolf v. Thompson, 95 Minn. 230, 103 N. W. 1026 (1905). For a complete discussion of family contracts see Havighurst, *Services in the Home—A Study of Contract Concepts in Domestic Relations* (1932) 41 Yale L. J. 386.

standing between the parties that a charge for the services was to be made and to be met by payment.[15]

Many elements are considered by the courts in determining the validity of a contract between persons living in a family relationship.[16*] While there are varying theories as to presumptions and counterpresumptions, and what evidence rebuts presumptions, and as to the implications to be drawn from the evidence, the difference is so minute as to be of no practical value. The difference of opinion is based upon the court's views as to whether there should be a higher degree of certainty and definiteness in the evidence in contracts arising in the family relationship than those arising in the ordinary civil case.[17]

In proving the validity of a contract the evidence must show something more than a mere expression of gratitude. In *Dowell* v. *Dowell's Adm'r*[18] two sons, living on their father's farm and reaping the profits therefrom, endeavored to recover for services rendered the father at his request prior to his death. The father expressed his appreciation for the services and promised to pay for them by leaving them his farm at his death. But his statement at no time amounted to an express promise on his part to pay for the services, and were not sufficient to constitute an *unqualified* acknowledgment of an indebtedness on his part for such services. The court by implication held that such expressions were merely gratitude, and the free use of the farm afforded ample compensation.

A mere expectation to pay by the person receiving the benefits does not create a contract. In *Avitt* v. *Smith*[19] a mother remarked in the plaintiff's presence that "she wanted the plaintiff to have sixty acres of her land in consideration of his taking care of her." The court held that the old lady's remark showed a "kind disposition," but failed to show any evidence of a contract or promise to pay. This case is distinguishable from the *Francis* case in that there was a reciprocity of services here. The plaintiff testified that the entire family worked together: "I (plaintiff) supported them and they supported me."

Justice McIver in *Ex parte Aycock*[20] seems to have summed up the requirements in saying: "It must have been the purpose . . . to assume a legal obligation, capable of being enforced."

In the case of infants there can be no contract between a parent and a minor child on a master-servant basis unless the child is shown

[15] Hartley v. Bohrer, 52 Idaho 72, 11 P. (2d) 616 (1932); Miller v. Richardson, 56 S. W. (2d) 614 (St. Louis Ct. of App., Mo., 1933); 28 R. C. L. 677, §13.
[16*] See (1908) 11 L. R. A. (N. S.) 873 for extended annotation on this point.
[17] *Ibid.* *See* Bryant v. Fogg, 125 Me. 420, 424, 134 Atl. 510, 512 (1926).
[18] 137 Ky. 167, 125 S. W. 283 (1910).
[19] 120 N. C. 392, 27 S. E. 91 (1897).
[20] 34 S. C. 255, 13 S. E. 450 (1890).

to have been emancipated, and the burden of proof of emancipation rests upon the one alleging such.[21]

Although it has been held that in the absence of an express contract the services are presumed to be gratuitous,[22] the majority of the decisions hold that a contract may be inferred from sufficient facts and circumstances in the evidence reasonably justifying the inference of an agreement to pay[23*] In *Miller* v. *Richardson*[24] the plaintiff cared for her father after the death of her mother, doing such menial tasks as cooking for him, caring for the livestock, and acting as his nurse during his illness. He gave certain proceeds of his farm to her sporadically. On various occasions he said in the plaintiff's presence that she was to be paid well, and the plaintiff had replied: "I expect to be repaid." The court held that there were sufficient facts and circumstances to justify the inference of a mutual understanding between the parties for an implied contract.

Most courts follow the rule that there must be a reciprocity of benefits or a contract will be implied.[25*] In cases where the recipient of services rendered is mentally incapable of making a contract, one is implied for compensation for services of an unusual and extraordinary nature.[26*] It is not essential under an implied contract that the amount of the compensation be agreed upon.[27]

Many cases arise out of services rendered with the expectation of

[21] American Products Co. v. Villwock, 7 Wash. (2d) 246, 109 P. (2d) 570 (1941).

[22] Baldwin v. Kansas City Rys. Co., 218 S. W. 955 (Kan. City Ct. of App., Mo., 1920).

[23*] McGarvey v. Roods, 73 Iowa 363, 35 N. W. 488 (1887) (Intestate frequently said that plaintiff should be compensated, that all her property was devoted to this purpose, and that she had given her other children all that she had intended to give them. The court held this to be sufficient facts as evidence of an implied contract.); *In re* Grogan's Estate, 82 Misc. 555, 145 N. Y. Supp. 285 (1913) (Daughter, at the request of her father cared for him while he gradually became helpless at the great sacrifice of her own interests and pleasures without compensation therefor.); Winkler v. Killian, 141 N. C. 575, 54 S. E. 540 (1906) (Where a married daughter, living nearby, cared for her mother during old age.); Kerr v. Wilson, 284 Pa. 541, 131 Atl. 468 (1925) (An aged uncle sought a home with his nephew to care for him in his old age. No services were rendered by him, nor were any contemplated.).

[24] 56 S. W. (2d) 614 (St. Louis Ct. of App., Mo., 1933).

[25*] Marks Adm'r v. Boardman, 89 S. W. 481 (Ky. Ct. of App. 1905) (A sister cared for her brother at her home, nursing him and performing for him certain menial services, being only a detriment to her.); *accord,* Morton v. Ranier, 82 Ill. 215, 25 Am. Rep. 311 (1876) (Nephew lived with uncle, and after majority furnished his own clothes and paid his own bills.); *see In re* Grogan's Estate, 82 Misc. 555, 145 N. Y. Supp. 285 (1913).

[26*] Gover's Adm'r v. Waddle, 245 Ky. 652, 54 S. W. (2d) 19 (1932); Key v. Harris, 116 Tenn. 161, 92 S. W. 235 (1905). (The *Key* Case by way of dicta suggests that an allowance for services might be sustained on the ground that the same were necessaries, citing Waldron v. Davis, 70 N. J. L. 788, 58 Atl. 293 (1904). This theory is weakened in the *Key* Case, since the parties in *Waldron* v. *Davis* were not living in a family relationship.)

[27] *See* McGarvey v. Roods, 73 Iowa 363, 35 N. W. 488 (1887).

being paid by provision in a will. If such a provision is made and the will is later destroyed, there is sufficient evidence of an agreement to pay and to be paid; and the claimant does not have to wait until death to bring an action for recovery.[28] Where the testator has made it impossible to fulfill the contract by conveying substantial portions of the property to other parties, the one rendering the services can still recover for the reasonable value thereof under the common counts.[29]

In the *Francis*[30] case it would have been manifestly unjust to prevent recovery by the presumption of gratuity. The absence of a reciprocity of benefits is evidence that the plaintiff did not intend gratuity, and the statement by deceased that he expected plaintiff to be paid out of his estate adquately shows an implied contract.

CECIL J. HILL.

Garnishment—Bank Directors—Bank Stock

Action by M, judgment creditor, to garnish $1,000 worth of bank stock deposited with defendant bank by its owner, a director of the bank, as required by a state statute.[1] From a holding that the bank stock was exempt from garnishment, and an order discharging the bank as garnishee, M appeals. *Held,* one judge dissenting, *reversed.* The bank stock is subject to garnishment.[2]

This case squarely presents the question of whether or not bank stock owned by a judgment debtor, and held by the bank, to qualify him as a director in the bank can be garnished. It appears that the rule was well settled at common law that stock in a corporation was not subject to attachment or garnishment. This rule was based on the theory that choses in action could not be attached and in those states allowing attachment or garnishment of choses in action corporate stock could not be garnisheed unless the statute provided for it,[3] and the courts made no distinction between bank stock and any other corporate stock in applying this rule. However, it, like so many other common law rules, has been displaced by statute, in most states, which expressly or impliedly provide, or have been construed by the courts to provide that shares of stock in a corporation may be attached or gar-

[28] Einolf v. Thompson, 95 Minn. 230, 103 N. W. 1026 (1905).
[29] Patterson v. Franklin, 168 N. C. 75, 84 S. E. 18 (1915); *accord,* Messier v. Messier, 34 R. I. 233, 82 Atl. 996 (1912).
[30] Francis v. Francis, 223 N. C. 401, 26 S. E. (2d) 907 (1943).

[1] ILL. STAT. ANN. (Smith-Hurd, 1934) c. 16½, §4.
[2] Molner v. South Chicago Savings Bank, 138 F. (2d) 201 (C. C. A. 7th, 1943).
[3] 4 AM. JUR. (1936), Attachment & Garnishment, §351; 10 FLETCHER, PRIVATE CORPORATIONS (perm. ed. 1931) §4759; *cf.* Elgart v. Mintz, 123 N. J. E. 404, 197 Atl. 747 (Ch. 1938); Lambert v. Huff, A. & T. Co., 82 W. Va. 362, 95 S. E. 1031 (1918).