Spring 1966

Recovery against a Decedent's Estate for Services Rendered Him during His Lifetime: The Missouri View

James E. Bowles

Follow this and additional works at: http://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation

James E. Bowles, Recovery against a Decedent's Estate for Services Rendered Him during His Lifetime: The Missouri View, 31 Mo. L. Rev. (1966)

Available at: http://scholarship.law.missouri.edu/mlr/vol31/iss2/6

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.
Comments

RECOVERY AGAINST A DECEDED'S ESTATE FOR SERVICES RENDERED HIM DURING HIS LIFETIME:
THE MISSOURI VIEW

I. INTRODUCTION

A problem that has arisen frequently in Missouri is one in which one person renders some form of services, usually of a personal nature, to another and the recipient dies without having made payment for those services. The person rendering the services is then left with a claim against the recipient's estate. Often this claim is challenged by the administrator or executor. The purpose of this comment is to explore some of the problems that arise in the course of the resulting litigation.

II. GENERAL RULE

A. Distinction Between Stranger and Family Relationship

The Missouri courts distinguish between recovery by one who is in a family relationship with the decedent and one who is a stranger to him. Whether recovery will be allowed depends in part on the relationship. Therefore, an understanding of the nature and effect of the distinction is essential.¹

The general rule in Missouri is:

[W]here one performs services for another, at the latter's request, but without any agreement or understanding as to remuneration, the law implies a promise on the part of the party requesting the services to pay the just and reasonable value thereof; but where the services are rendered to each other by members of a family, living as one household, no such implication will arise from mere rendition and acceptance of the services. In such cases the law presum's that the services are rendered gratuitously, casting upon the party claiming compensation therefor the burden of rebutting such presumption.²

¹. 2 LIMBAUGH, MISSOURI PRACTICE § 781.
². Wood v. Estate of Lewis, 183 Mo. App. 553, 562, 167 S.W. 666, 668 (St. L. Ct. App. 1914). Manning v. Driscoll's Estate, 174 S.W.2d 921, 923 (St. L. Mo. App. 1943). Cf. Embry v. Martz' Estate, 377 S.W.2d 367 (Mo. 1964); Steva v. Steva, 332 S.W.2d 924 (Mo. 1960); Muench v. South Side Nat'l Bank, 251 S.W.2d 1 (Mo. 1952); Wells v. Goff, 361 Mo. 1188, 239 S.W.2d 301 (1951); Chandler v. Hulen, 335 Mo. 167, 71 S.W.2d 752 (1934); Lillard v. Wilson, 178 Mo. 145, 77 S.W. 74 (1903); In re Winschell's Estate, 393 S.W.2d 71 (Spr. Mo. App. 1965); Boyher v. Gearhart's Estate, 367 S.W.2d 1 (St. L. Mo. App. 1963); Sevier v.
In applying this rule, the Missouri courts have also distinguished between (1) express contracts, (2) contracts implied in fact and (3) contracts implied in law. An express contract exists if the parties declare its terms orally or by a writing at the time it is entered. A contract implied in fact arises when a person performs services or furnishes goods at another's request and there is no express agreement to pay therefor, but the circumstances are such that a promise to pay the reasonable value thereof may be inferred from the circumstances, situation, conduct and relationship of the parties. A contract implied in law is imposed without promise or intent by the party to be bound. The assent is legal fiction and the liability created thereunder rests in reason and justice. Therefore, if there has been no request and valuable services or goods are knowingly accepted by the party benefiting therefrom under circumstances which would reasonably justify the belief that the party furnishing them expected payment to the extent of their reasonable value, the obligation to pay will be implied by law.

The importance of this distinction becomes clear when one considers the procedural effect of the family relationship rule. When services are rendered to a stranger, even without agreement, the burden of proof is on the party accepting the services to prove that they were rendered gratuitously or the contract will be implied by law. In other words, proof by the plaintiff of rendition of valuable services and acceptance by the deceased makes out a prima facie case and the defendant has the burden of proving the services were gratuitous. On


5. Supra note 3.

the other hand, when a family relationship exists between the plaintiff and deceased, then, prima facie, the services are presumed to be gratuitous and the burden is on the plaintiff to rebut the presumption. In order to rebut the presumption of gratuity, the plaintiff must show by clear and convincing evidence either an express contract or such facts and circumstances from which a mutual agreement that the services were to be remunerated may be inferred. Therefore one in a family relationship who is seeking recovery for services rendered to the decedent may do so only upon an express contract or a contract implied in fact. Smith v. Estate of Davis summarizes Missouri's view on recovery by one in a family relationship on a contract implied in law as follows:

If we read these cases correctly, there is never a recovery by a member of a family (i.e. one in a family relationship) owing a duty on what is technically termed an implied contract in law, but as stated before, the recovery must be upon an express contract, or from evidence from which it can be reasonably concluded that there was a distinct understanding and agreement, understood an [sic] acted upon between the parties, a contract established on inference rather than implication.

B. Dead Man's Statute

A major problem in proof for a plaintiff in a family relationship is the Dead Man's Statute. The only way that the plaintiff who is in a family relationship to the decedent may recover for his services is to prove an express or implied agreement to rebut the presumption of gratuity that attaches to the services by virtue of the family relationship. But the Dead Man's Statute prohibits the plaintiff's testifying as to any agreement with the deceased. As a result, plaintiff will have a difficult time showing his intent to charge for the services and deceased's intent to pay.


8. Cases cited note 7 supra.


11. § 491.010, RSMo 1959.

12. In re Winschel's Estate, 393 S.W.2d 71, 75 (Spr. Mo. App. 1965).
Yosburg v. Smith13 is a prime example of the difficulties caused by a combination of the presumed gratuity and the Dead Man's Statute. In that case, plaintiff took her mother into her home although there were four other children in the family. Due to the mother's condition, the personal services rendered her by the plaintiff were of a most distasteful and onerous nature. Plaintiff clearly was deserving since she was the only child in the family who rendered this onerous care to the mother, and she was able to prove her agreement. But she was only able to do so by third parties' testimony as to what they saw of the services rendered to the deceased by the plaintiff and what deceased said to them about compensating the plaintiff for those services, from which the court was able to infer an agreement between plaintiff and the deceased for compensation. Without the good fortune of having third party witnesses, plaintiff could not have recovered.

The plaintiff in Farris v. Farris' Estate14 was less fortunate. Plaintiff pleaded an express contract. The evidence produced through third party witnesses was insufficient for the court to infer a contract and was not sufficient to support an express contract to provide for the plaintiff in her will. In commenting upon this situation, the court said:

However deserving claimant in this case may be; however valuable his services were; however regrettable that clear and convincing evidence is not available to establish whether any contract or understanding existed between claimant and the deceased for compensation, and if any, what it was, the court cannot disregard the presumption which the law imposes for the protection of the estate of a deceased person; nor can the court itself create an express contract between the parties, nor infer that one existed without sufficient facts in evidence; nor can the court herein assume and enforce a testamentary provision which the deceased herself failed to make.15

Of course, a court cannot infer a contract where none exists, but it is very harsh to make a deserving claimant's right to recover depend on the fortuitous circumstances of third parties being present at opportune times in order that they may testify as to facts from which an agreement may be inferred.

To recover, the plaintiff must rebut the presumption that the services are gratuitous and the Dead Man's Statute effectively prevents him from offering the best evidence he has to do it. It is unrealistic to think that the jury will not be aware of his interest in proving the agreement and consider this when weighing his testimony. It would be more just to allow this factor to go to the weight of plaintiff's testimony rather than to exclude it altogether.16

13. Supra note 7.
14. Supra note 3.
15. 212 S.W.2d 71, at 77.
16. McCORMICK, EVIDENCE § 65 (1954); 2 WIGMORE, EVIDENCE §§ 578, 578(a) (1940); 7 WIGMORE, EVIDENCE § 2065 (1940); Ray, The Dead Man's Statute—A Relic of the Past, 9 Sw. L.J. 390 (1956); Comment, The "Administration Disqualification" of Missouri's Dead Man Statute, 6 St. Louis U.L.J. 413 (1961).
MISSOURI LAW REVIEW

D. Factors Considered

1. Statements by Deceased to Third Parties

What are some of the sufficient facts and circumstances from which the court will infer an agreement between the plaintiff and the decedent? The evidence that seems most persuasive to the courts is statements by the deceased to third parties showing an intent to pay the person rendering the services. The courts also place much emphasis on the plaintiff's having been present when these statements were made to the third party, for while plaintiff must show that the deceased intended to pay, he must also show that he intended to charge for the services at the time they were rendered. Services intended as a gratuity may not afterwards be turned into a charge. Since plaintiff cannot testify as to the transactions with the deceased due to the Dead Man’s Statute, the best proof of his intent to charge is his presence and acquiescence when the deceased expressed an intent to compensate the plaintiff. This is also the only way that plaintiff may show that deceased was aware of his intent to charge for the services and that he was aware of deceased’s intent to pay for them, thereby satisfying the requirement that there must be a mutual intent on the part of the deceased to compensate and plaintiff to be compensated for the services.

A mere intent on the part of the deceased to bestow a bounty or a gratuity on the plaintiff is not sufficient to establish an agreement. The statements to the third party by the deceased must show an intent on the part of the deceased to compensate for valuable services rendered him.

2. Relinquishing Home or Job to Perform Services

In Smith v. Estate of Davis, the court said that where the claimant gave up a home or other employment and went to live with a parent or other party from whom remuneration is sought, or where such party went to live in the

17. Kopp v. Traders Gate City Nat’l Bank, 210 S.W.2d 490 (Mo. 1948); Chandler v. Hulen, supra note 7; Liebaart v. Hoehle’s Estate, supra note 7; Hyde v. Honiter, supra note 7; Crowley v. Dagley, supra note 7.
18. See, e.g., Kopp v. Traders Gate City Nat’l Bank, supra note 17; Vosburg v. Smith, supra note 7; Offord v. Jenner’s Estate, 189 S.W.2d 173 (St. L. Mo. App. 1945); Liebaart v. Hoehle’s Estate, supra note 7 (In Liebaart, the court emphasizes that the plaintiff was not present when the statements of the deceased were made to the witnesses.)
19. Supra note 17.
21. Supra note 11.
22. Supra note 17.
23. Id.
24. 206 Mo. App. 446, 462, 230 S.W. 670, 673 (Spr. Ct. App. 1921). Cf. In re Winschel’s Estate, supra note 12; Liebaart v. Hoehle’s Estate, supra note 7; Koch v. Hebel, 32 Mo. App. 103 (K.C. Ct. App. 1888). But see Weir v. Carter’s Estate, 224 S.W. 147 (St. L. Ct. App. 1920), wherein the court did not regard the fact that the plaintiff worked out of home and returned periodically to be such an interruption of the family relationship as to rebut the presumption that the services rendered by her to the decedent were gratuitous.
home of the claimant and it is shown that such party was receiving valuable services as a result of the changed relationship, much less evidence will be required for the court to infer a remunerative relation than in those cases where the claimant was himself the recipient of a home and other benefits of the family relationship.

3. Nature of Services

Another factor considered by the courts is the nature of the services rendered to the deceased by the plaintiff. Often the services for which compensation is sought were very distasteful and onerous. Many times the person receiving the services was old and quite ill and had lost control of bodily functions making nursing, cleaning and laundry services particularly burdensome and unpleasant. In cases where the services were of this nature, the court is more inclined to find an agreement between the parties that the services were to be compensated than in the case of more nominal services.

4. Attitude of Parties toward One Another

Even though the parties were living in an ostensible family relationship, the attitude of the parties toward each other may indicate that any services provided by one to the other were rendered pursuant to an agreement for compensation. In *Taylor v. Hudson* the plaintiff was a niece of the decedent, Mrs. Kerby. In 1898, Mr. and Mrs. Kerby requested plaintiff to come to their home and care for them, as both were in declining health. During Mr. Kerby’s life, he clothed plaintiff, sent her to school for two years, and bought her a piano. In general, he treated her as one of his own family. After he died, the plaintiff expressed an intent to leave, but was persuaded by Mrs. Kerby to remain. During the next ten years, Mrs. Kerby furnished no clothing for the plaintiff, nor did she pay her anything. The court found that although Mr. Kerby clearly regarded plaintiff as a member of the family, Mrs. Kerby did not so regard or treat the plaintiff. The court said:

If plaintiff was regarded by Mrs. Kerby as a member of her family we are at a loss to know why during all the years of faithful attendance to her wants, and services rendered for her, Mrs. Kerby did not treat her as such, by providing her clothing and other things customary in the family relation. And it is incredible that plaintiff under such circumstances would have rendered the service without the expectation of some compensation.

The court held that statements by Mrs. Kerby to third parties that plaintiff would be amply provided for and the conduct of the parties was sufficient to show an implied (in fact) contract that plaintiff was to receive pay for her services.

27. *Id.* at 381, 129 S.W. at 261.
28. Parentheses added.
E. Family Relationship

1. Definitions

Taylor v. Hudson also illustrates the troublesome and difficult problem of defining what constitutes a family relationship, and determining whether it exists from a given set of facts. As illustrated by Taylor, the mere existence of relationship by consanguinity or affinity does not conclusively establish a family relationship between the parties as that term is used in law. Mrs. Kerby was a blood relative of plaintiff while Mr. Kerby was not, yet the court held that Mrs. Kerby did not regard or treat plaintiff as being in a family relationship.

Lillard v. Wilson states that the reason for the family relationship rule is:

... that the household family relationship is presumed to abound in reciprocal acts of kindness and good will which tends to mutual comfort and convenience of the family; and the rule stated applies not only to members of a family who are related by blood, but to those distantly related, and to those who are in fact not related at all, provided they live together as members of one family.

In Steva v. Steva, the court states the generally accepted definition of family relationship as: "a collective body of persons under one head and one domestic government, who have reciprocal, natural, or moral duties to support and care for each other."
The cases cited in footnotes 30 and 33 supra indicate that the important factor in establishing a family relationship is not blood relationship, but whether the parties did in fact live as one family as defined in Steva and other cases cited in note 32. Each case, therefore, calls for a determination on its own particular facts. The Missouri courts have held that family relationship is a mixed question of law and fact and if the relationship clearly exists, the trial court should rule on it as a matter of law, but if there is any doubt as to its existence, the issue should be submitted to the jury under proper instructions.  

2. Jury Instruction

Just what is a proper instruction has not been fully clarified. Many of the instructions that have been approved by the courts summarize the evidence to such an extent and are so verbose as to be more hinderance than help to a jury. An example of such an instruction is found in 2 Raymon’’s Missouri Instructions Section 4722. A better instruction is one found in Embry v. Martz’’ Estate. That instruction sets out the rules in Missouri for recovery in cases of a family relationship and does not summarize the evidence. But that instruction also has vices which could be eliminated. The instruction tells the jury that if a family relationship exists, certain presumptions apply; and if it does not, other presumptions are applicable to the facts.

Instructions in these cases could be much improved and simplified by wholly eliminating any reference to presumptions. The jury should be given the definition of family relationship as set out in Steva and then told that if they find that such relationship exists, they must find an agreement between plaintiff and deceased that the services were to be compensated in order to allow plaintiff a recovery. However, if they find that no such relationship exists, then plaintiff may recover upon proof of rendition of valuable services and deceased’s acceptance of the same, unless the defendant persuades them that the services were rendered gratuitously. This will enable the jury to find exactly what it would have to find under the old instructions, and it avoids confusing the jury with verbiage summarizing the evidence and with presumptions which are often troublesome to lawyers and judges themselves.

3. Burden of Proof

In submitting family relationship cases to the jury, the problem of burden of proof on the various issues arises. As stated above, in the absence of a family relationship, once the plaintiff shows that he rendered valuable services to the

be living in a family relationship); Hyde v. Honiter, supra note 7 (grandmother-granddaughter); Brock v. Cox, 38 Mo. App. 40 (K.C. Ct. App. 1889) (mother and daughter held to be living in a family relationship).

34. Manning v. Driscoll’s Estate, supra note 33; Wood v. Estate of Lewis, supra note 2; Hyde v. Honiter, supra note 7; Birch v. Birch, supra note 7.

35. 2 Raymond, Missouri Instructions § 4722 (1942). The instruction was taken from Love v. Richardson, 61 S.W.2d 220 (St. L. Mo. App. 1933).

36. 377 S.W.2d 367, 368 (Mo. 1964). The reference is to Instructions 1 and 3.
deceased which the latter accepted, the burden is upon the defendant to show that the services were gratuitous. But if a family relationship is established, the presumption of gratuity attaches to the services and the burden of proof shifts to the plaintiff to show that the services were to be compensated. In order for the defendant to shift the burden of proof on the issue of compensation to the plaintiff, he must prove the existence of a family relationship. In Missouri, family relationship is in the nature of an affirmative defense, and must be pleaded and proved by the defendant.

F. Problem of Wagner v. Edison Elec. Illuminating Co.—
A Third Classification

One troublesome problem in Missouri is the language in Wagner v. Edison Elec. Illuminating Co. indicating an extension of the presumption of gratuity to cases other than those involving a family relationship. Hyde v. Honiter sets out the formulation of the rule that the courts have drawn from Wagner:

It has been held that where the family relation does not exist, relationship either by consanguinity or affinity alone is not sufficient to raise a presumption that beneficial services rendered and accepted are gratuitous, except where the relation is that of parent and child.

However this may be, our courts have held that, even where no ties of kinship exist between the parties, the fact that they stand in any peculiar relation to each other may have a very important bearing upon the presumptions arising in the case and the burden of proof; for whenever the relationship of the parties is such as to lead a reasonable person to believe that the services are performed gratuitously, then the presumption is indulged that they are not to be paid for and the burden is cast upon the party asserting the claim to overcome this presumption. It is said that "this principle is not confined to the family relation, but finds appropriate application as well in all cases where the relations of the parties are sufficient, according to the experience and customs of men, to invoke its influence as a result of reason and natural justice."

This statement by the court, which has been repeated in several other cases, leaves the impression that there is a third class, neither family relationship nor stranger, which will be covered by the presumption of gratuity.

37. Supra note 6.
38. Supra note 7.
41. Supra note 7.
42. 175 Mo. App. at 598, 158 S.W. at 87. But see note 30 supra indicating that the relationship of parent-child is not enough of itself to raise the presumption of gratuity, unless they live in a family relationship as defined in law. This seems to be the better view.
43. 175 Mo. App. at 598, 158 S.W. at 88 (St. L. Ct. App. 1913).
44. E.g., Boyher v. Gearhart's Estate, supra note 7; Trantham v. Gullic, supra note 7; Patrick v. Crank, supra note 25; Taylor v. Currie's Estate, 83 S.W.2d 194 (St. L. Mo. App. 1935); Wharton v. Denny, supra note 6; Shern v. Sims, 258 S.W. 1029 (K.C. Mo. App. 1924); Wood v. Estate of Lewis, supra note 2.
There are several things wrong with this view. The statement was dictum in the *Hyde* case which has been the case cited for the application of the *Wagner* statement to this type of case. In that case, the court found the existence of the family relationship and the statement quoted above was a makeweight argument. The only case of which the author is aware in which this statement from *Hyde* has been made the basis of the court's decision is *Taylor v. Currie's Estate*.

In the other cases cited in note 44 *supra*, the statement was not made the basis of the decision, nor was it necessary for the decision. In *Taylor*, the services in question were rendered by one old friend, Mr. Taylor, to another, Mr. Currie. Subsequent to the rendition of the services, there was a falling out between the two. After the death of Mr. Currie, Mr. Taylor sought recovery from the estate for the services, which consisted mostly of handling the deceased's stocks and bonds, as Taylor was a salesman for a brokerage house. Upon occasion, the deceased had allowed Taylor to pledge certain of the bonds as collateral for loans. Neither party ever made any charge upon the other. While the court used the *Hyde* rule as the basis for its decision, the case could have been decided on the simple ground that the evidence showed that plaintiff had no intent to charge when the services were rendered. There is a well-established rule that services intended as a gratuity may not afterwards be turned into a charge. There were sufficient facts for such a finding without resort to the use of a presumption. Another equally good basis upon which the case could have been decided would have been that conceding for the moment that plaintiff did intend to charge for the services when they were rendered, the use of deceased's bonds as collateral without charge was a sufficient consideration for the services rendered to the deceased by the plaintiff; therefore, plaintiff was not entitled to additional compensation from the estate.

The vice of using the above rule is that it places the presumption of gratuity on the plaintiff when it should not be so placed. In attempting to explain the rule as set out in the *Hyde* case, the Kansas City Court of Appeals said in *Patrick v. Crank*:

> Our understanding of the rule . . . is that if one performs valuable services for another, which the other receives, the law presumes an intention on the part of the performer to charge therefor and the receiver to pay the reasonable value thereof. However, that presumption of the law takes flight when it is shown that a peculiar relationship exists between the parties, such as that of a family relationship, or, where there are other circumstances tending to show that the services rendered (even though by a stranger) were voluntarily performed or were made without the expectation of pay.

This statement goes more properly to the rule that services rendered without expectation of compensation may not later be made a charge. It must be re-

45. *Supra* note 44.
47. *Supra* note 25, at 385.
48. *Supra* note 46.
membered that the basic rule in this area is a presumption that valuable services were rendered under an agreement for compensation and the defendant has the burden of proving that they were gratuitous. If a family relationship is established by the defendant, then the burden is upon the plaintiff to show an agreement between the parties that the services were to be compensated. If there are facts and circumstances other than a family relationship that indicate that the services were rendered by the plaintiff without an intent to be paid therefor, it is more properly an element of the defendant's burden of proof that the services were gratuitous than a basis for shifting the burden of proof on that issue to the plaintiff. Due to the Dead Man's Statute, the plaintiff has a difficult enough problem in getting his proof before the court without adding to his burden of proof unnecessarily. Only by a showing of a family relationship between the parties should the defendant be able to rid himself of the burden of proof that valuable services were rendered gratuitously.

Another reason for not applying the rule as stated in Hyde is that the statement from Wagner upon which the Hyde court based its rule was not intended to apply to cases of this nature. In Wagner, plaintiff represented Missouri Electric Light and Power Co. on a committee set up by the various St. Louis power companies to supervise the laying of conduit in an area of the city as required by ordinance. Plaintiff was elected supervising engineer of the work by the committee with defendant's representative dissenting. Plaintiff then sued the defendant for compensation as supervising engineer of the project. Plaintiff represented two companies besides Missouri Electric Light and Power Co. on the committee and the defendant argued that plaintiff was being paid by them for his work and therefore had no claim against the defendant. Plaintiff claimed that the services were for all parties and were over and above his duties as representative on the committee for which his employers paid him. The relationship between the parties in this case was master-servant, a much different one than exists in the cases to which the rule was transposed by the court in Hyde.

In the quote from Hyde set out above, the court included this statement from Wagner:

The principle is not confined to the family relation. It finds appropriate application as well in all cases where the relations of the parties are sufficient, according to the experience and customs of men, to invoke its influence as a result of reason and natural justice.

Had the court included the next sentence in Wagner in its quote, the type of case to which the rule was intended to apply would have been indicated. That sentence reads:

49. Supra note 6.
50. Supra note 7.
51. Supra note 11.
For instance, the officers of incorporated companies, such as bank presidents and cashiers, are expected, of course, to perform all necessary services to the bank, incident to the office they hold, in consideration of the salary they receive for executing such offices. In view of this relation, the law presumes generally that all services performed by such officers are performed by them in the capacity and as within the duties of the particular office they occupy.

This statement indicates that the Wagner court was not considering the application of this rule to cases involving decedents' estates. Therefore, because the rule is not appropriate to this area and was not intended to be by the court that stated it, it is hoped that in the future the courts will limit its application to those cases to which it was intended to apply by the Wagner court.

III. CONTRACT TO COMPENSATE BY BEQUEST OF ENTIRE ESTATE

If either a stranger or one who is in a family relationship to the deceased seeks recovery for breach of a contract for compensation by a bequest of deceased’s net estate, another set of interesting problems arises. Proof of a contract for compensation will rebut the presumption of gratuity attaching to services rendered by one in a family relationship, so both strangers to deceased and those in a family relationship to deceased are treated alike in allowing recovery under such a contract.

The plaintiff seeking recovery under such a contract will first have the problem of what form of action he should use, and second, the problem of the Statute of Wills and the Statute of Frauds.

Plaintiff’s contract with deceased may have been breached either by failure of deceased to make a will, or by failure of deceased to provide for plaintiff in the will as agreed. In either case, plaintiff has three forms of action from which to choose.

A. Suit on Express Contract

Plaintiff’s first alternative is to sue the administrator at law for damages due to deceased’s breach, the measure of damages being the contract price. This alternative has not been successful in Missouri. The Statute of Frauds is not a

54. Supra note 7.
55. § 474.320, RSMo 1959.
56. § 432.010, RSMo 1959.
57. If the deceased had made a will, the person that the plaintiff would sue would be the executor. For purposes of simplicity, the term administrator will be used to include both.
bar since plaintiff's performance takes the contract out of the Statute, but the Statute of Wills is another matter. Missouri has held that in an action at law a parol agreement to make a will may no more act as one than a parol will. The contract may not be enforced in an action at law, and may only be used to limit the amount the plaintiff may recover in quantum meruit for the reasonable value of his services. In *Hall v. Getman*, the court said that to permit the plaintiff to recover the estimated value of the property promised plaintiff in the contract would be a flagrant violation of the Statute of Wills.

The main reason given by the courts in Missouri for not allowing recovery in an action at law for breach of contract is a lack of an adequate measure of damages. In *Muench v. South Side Nat'l Bank*, the court said:

> It seems to be conceded by everyone that there could be no recovery on a suit for damages for breach of the contract because of ... the impossibility of proving the net value of the estate to which amount plaintiff's recovery would be limited in that kind of a suit.

The reason that the measure of damages is inadequate at law is best set out in *Whitworth v. Monahan's Estate*:

> This, of course, for the obvious reason that such a contract not only calls for the subsequent performance of services by the one party which at the time are necessarily but speculative and contingent as to their extent and value, but what is more important, it also provides a consideration which is equally indefinite and speculative, in that neither contracting party can possibly know at the time of entering into the agreement what the ultimate net value of the estate will be. Furthermore, were the one party, even after he has performed under the contract, to be allowed to maintain an action at law upon it for damages growing out of the other party's breach of the contract, it would neither be feasible nor proper to attempt to estimate the net value of the estate until the time for proving demands against the estate had expired, since in all possibility the witnesses might err in their statements or estimates of the amount and character of the indebtedness of the estate, with the inevitable consequence that the burden of such mistakes would be thereby imposed upon the creditors of the estate in direct violation of the evident meaning of the contract.

*Reigley v. Fabricus' Estate* is a case in which recovery was allowed at law for the breach of contract to provide for plaintiff by bequest. While at first appearance this seems to be contra to the above rule, in *Reigley* there was a standard by which damages could be measured. The contract that was alleged in

---

60. *Id.*
61. *Muench v. South Side Nat'l Bank*, *supra* note 58; *Sharkey v. McDermott*, *91 Mo. 647*, 4 S.W. 107 (1887); *Whitworth v. Monahan's Estate*, *111 S.W.2d 931* (St. L. Mo. App. 1938).
62. *Id.*
63. *251 S.W.2d* at 4.
64. *111 S.W.2d* at 932.
65. *332 S.W.2d 76* (St. L. Mo. App. 1960).
Reighley was that deceased was to compensate the plaintiff by “making provision in her Will, giving, devising, and bequeathing to plaintiff sufficient money and property so as to compensate fairly, reasonably and adequately for the services which she, plaintiff, performed.” Therefore, although plaintiff was allowed to recover at law on the contract, her measure of damages in reality was nothing more than the reasonable value of her services which she could have recovered in quantum meruit, which the Missouri courts allow in these cases.

B. Quantum Meruit

While plaintiff cannot ordinarily recover on the contract promising compensation by will, he may abandon the contract and sue the administrator at law in quantum meruit for the reasonable value of the services rendered deceased. As pointed out above, a plaintiff in a family relationship cannot recover in quantum meruit for the services due to the necessity of proving an agreement to overcome the presumption of gratuity. But if the plaintiff does show that agreement, thereby overcoming the presumption, he may then elect to abandon the contract and sue in quantum meruit for the reasonable value of those services.

In a case such as this, the Statute of Wills would be no bar to recovery, since it is not based on the contract. The Statute of Frauds will be no bar to a stranger seeking recovery for the same reason. Some question, however, may arise in the case of a plaintiff who is in a family relationship to the deceased since he must prove the agreement in order to rebut the presumption of gratuity. Since the plaintiff is proving the agreement not to recover on it, but to rebut the presumption of gratuity in order that he may then abandon the contract and seek recovery in quantum meruit, logic would have it that the Statute of Frauds would be no bar, since the recovery itself is not based upon the contract. But, even if such use of the contract were held to fall within the Statute of Frauds, plaintiff’s performance of his part of the agreement would, as pointed out above, remove it from the bar of the statute.

Until 1952, the Missouri rule as given in Hall v. Getman was that in a case where the plaintiff was promised the net estate by will as compensation for the services rendered the deceased, although the plaintiff could not recover on the contract for its breach, the net value of the estate would be the limit of his recovery in quantum meruit. However, in 1952, the Missouri Supreme Court in

66. Id. at 78.
67. Supra note 58.
70. 121 Mo. App. at 638, 97 S.W. at 610.
Muench v. South Side Nat'l Bank\textsuperscript{72} said that the limitation in Hall on recovery in quantum meruit was dictum and was disapproved. The court said that plaintiff had been compelled to sue due to the deceased’s default and now had abandoned the contract to recover instead the reasonable value of his services. To put this limit on the recovery would allow the estate to profit by deceased’s wrongdoing.\textsuperscript{73} Also the net value of deceased’s estate, which Hall imposed as the limit of plaintiff’s recovery in quantum meruit, could not be determined until after plaintiff’s claim was disposed of, as she was also a creditor of the estate. The court added that the net value of the estate was no easier to prove in a quantum meruit action than in an action on the contract seeking damages for its breach.\textsuperscript{74} Therefore, the plaintiff may recover the reasonable value of his services in quantum meruit without limitation to the net value of the estate.

C. Specific Performance

Due to the fact that there is an inadequate measure of damages at law, the plaintiff may seek an equitable remedy in the form of specific performance against the heirs of the deceased.\textsuperscript{75} The Missouri courts have held that the Statute of Wills is no bar to this form of action.\textsuperscript{76} Equity treats the contract, not as an attempted will, in which case it would fail for non-compliance with the Statute of Wills, but rather treats it as a contract to make a will which will be enforced since it is based on sufficient consideration, i.e. the plaintiff’s services to the deceased.\textsuperscript{77} The authority of equity thus to practically enforce a will that fails to comply with the Statute of Wills is based on the principle that equity will treat as done that which the parties intended should have been done.\textsuperscript{78}

Furthermore, the Statute of Frauds is not a bar to specific performance. The Missouri courts hold that such a contract, although not in writing, will be enforced in equity where it has been partially performed and the failure to complete it would work a fraud on the claimant.\textsuperscript{79} Therefore, since the plaintiff has performed his part of the contract, failure of the recipient of the services to perform his part will work a fraud on the plaintiff and equity will specifically enforce the agreement against the deceased’s heirs.

IV. Conclusion

This is an area that has many pitfalls for the unwary. Those who undertake to perform services for another for which they expect compensation should be care-

\textsuperscript{72.} 251 S.W.2d at 6.
\textsuperscript{73.} Id. at 5.
\textsuperscript{74.} Ibid.
\textsuperscript{75.} Supra note 58.
\textsuperscript{76.} Sharkey v. McDermott, supra note 62; Sutton v. Hayden, 62 Mo. 101 (1876); Hall v. Getman, supra note 58.
\textsuperscript{77.} Ibid.
\textsuperscript{78.} Sharkey v. McDermott, supra note 62; Hall v. Getman, supra note 58.
\textsuperscript{79.} Sharkey v. McDermott, supra note 62; Ver Standig v. St. Louis Union Trust Co., supra note 58; Hall v. Getman, supra note 58.
ful to have an agreement to that effect with the recipient of the services that can be proved without resort to the testimony of the person rendering the services. This is particularly true if a family relationship exists between the parties to the agreement, because it will shift the burden of proof on the issue of compensation to the plaintiff. The rules in these cases are far easier to state than to apply, and the courts must exercise caution to insure that a deserving plaintiff is not defeated through an over emphasis on presumptions or by improper additions to his already heavy burden of proof.

JAMES E. BOWLES