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Article 11

Contracts - Material Benefit - Moral Obligation in Contracts to Compensate by Legacy

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RECENT DECISIONS

Contracts — Material Benefit — Moral Obligation in Contracts To Compensate By Legacy — Claimant, who was not related to the deceased, furnished him room, board, clothing and other incidental services for a period ending in 1936. Subsequently, in 1943, as well as on later occasions, deceased orally promised her that whatever he had when he died was to go to her. She filed two claims in the alternative, one for the entire estate, the other for the reasonable value of the services performed. The State contended that the alleged claims were barred in that the statute of limitations, Sec. 330.19(3), had run before the deceased promised she would be compensated when he died, and that, therefore, the promise was unenforceable for lack of consideration in that it did not rest on a legal obligation of the deceased. Further, since the statute of limitations had run, Sec. 330.42, requiring an acknowledgement or a new promise to be in writing signed by the party to be charged, barred the enforcement of the oral promise. *Held:* The claim for the entire estate cannot be allowed. However, claimant may recover the reasonable value of services rendered. Past services performed by a person not a member of the promisor's family are adequate considerations for a promise to compensate therefor by legacy. Where the promise is to pay after the death of the promisor, the statute of limitations does not begin to run until the time of the death when he cause of action accrues. Since the cause does not rest on the revival of a prior legal or equitable obligation, section 330.42 is not applicable. *In re Estate of Herman Gerke, Deceased: State of Wisconsin, Appellant v. May Decimowich, Claimant, et al., Respondents,* 271 Wis. 297, 73 N.W.2d 506 (1955).

The facts of this case bring it within a narrow area of contract law which appears to be governed in Wisconsin by rules particularly applicable thereto. An agreement to leave property to another as compensation for services previously rendered raises two questions, first, the adequacy of the consideration, and second, the measure of recovery in the action on the contract.

Although the trend of modern authorities is said to allow recognition of a moral obligation as adequate considertaion under the "material benefit rule" where it can be shown that previously rendered services were not intended to be gratuitous,[1] it is not clear whether Wisconsin decisions in general contract law follow this liberal attitude. Past or executed consideration in the absence of a prior legal or equitable

[1] 8 A.L.R.2d 787, supplementing 17 A.L.R. 1367; 79 A.L.R. 1346. Jurisdictions cited as following the trend are U.S.C.A10th, Alabama, Kansas, Oregon, Pennsylvania, and Wisconsin.

obligation, i.e. one resting on an express but not enforceable promise to pay on which the promisee relied in rendering his performance, has been held to raise an assumpsit only in those jurisdictions recognizing the doctrine of moral obligation.[2] Although some language in a few early cases[3] appeared to indicate that past consideration could support a later promise where the facts antecedent to the making of the promise created a moral obligation to keep the promise, the doctrine was rejected in Wisconsin prior to 1932.[4] Following the statement of the doctrine of moral obligation, by way of dicta, in the *Park Falls* decision,[5] a few cases allowed recovery for previously rendered services in actions brought on promissory notes.[6] An analysis of these cases reveals "obiter in praise of moral obligation"[7] rather than a general relaxation of the contract requirement of valid consideration.

Where, however, the promise was to compensate by legacy, or at the death of the promisor, previously rendered services have been recognized as adequate consideration. This rule, first stated in *Jilson v. Gilbert,*[8] has been followed consistently in a number of decisions enforcing executory promises in actions on the contract against the estate of the deceased promisor.[9] Early decisions justify the adequacy of the consideration merely on the ground that the making of a subsequent promise implies that the previously rendered services were performed by the promisee in the expectation of receiving compensation therefor, rather than with a gratuitous intent.[10] It has also been said that the benefit to the promisor of the use and enjoyment of his property during his lifetime was sufficient to support his executory promise to compensate by legacy.[11]

A parallel may be noted between the liberal rule applicable to con-

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[2] Page, *Consideration, Genuine and Synthetic,* 1947 WIS. L. REV. 483; Buer, *The Philosophy of Contractual Obligation,* 21 MARQ. L. REV. 157, 194 (1937) 12 AM. JUR., CONTRACTS §§97, 98.

[3] Messenger v. Miller, 2 Pin. 60 (1847); Brandeis v. Neustadtl, 13 Wis. 158 (1860).

[4] Frey v. City of Fond du Lac, 24 Wis. 204 (1869); Briggs v. Miller, 176 Wis. 321, 186 N.W. 163 (1922).

[5] Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N.W. 516 (1932).

[6] Elbinger v. Capital and Teutonia Company, 208 Wis. 163, 242 N.W. 568 (1932); Estate of Hatten, 233 Wis. 199, 288 N.W. 278 (1939); Estate of Schoenkerman, 236 Wis. 313, 294 N.W. 810 (1940); Fraser Lumber and Manufacturing Company v. Layendicker, 243 Wis. 25, 9 N.W.2d 97 (1943); Holmes v. Krueger, 271 Wis. 129, 72 N.W.2d 734 (1955), modification of teachers' retirement annuity contract.

[7] Page, *supra* note 2, at 498.

[8] 26 Wis. 637 (1870). The rule was held to constitute a good defense in an action on a promissory note by the estate of the payee who had promised to surrender it at the death for past services rendered.

[9] Silverthorn v. Wylie, 96 Wis. 69, 71 N.W. 107 (1897); Murtha v. Donohoo, 149 Wis. 481, 134 N.W. 406 (1912); Frieders v. Estate of Frieders, 180 Wis. 430, 193 N.W. 77 (1923).

[10] Jilson v. Gilbert, *supra;* Silverthorn v. Wylie, *supra* note 9.

[11] Murtha v. Donohoo, *supra* note 9.

tracts to compensate by legacy and the so-called Wisconsin "moral obligation" decisions in that, in the latter in several cases,[12] enforcement of the subsequent promise was sought against the estate of the deceased promisor. The question may be raised whether the rule has been extended to executory promises in general, or whether the nature of the party against whom the claim is asserted affects the enforceability of promises allegedly lacking legal consideration. In the instant case, the Court cites the rule of the *Jilson* case,[13] and for the first time relies on the doctrine of moral obligation as well.

Grounding the cause on the doctrine of moral obligation simplifies the answer to the challenge of Sec. 330.42[14] where the form of the promise is oral rather than written. An earlier case held, in regard to this section that the promise was "an independent and substitutionary contract within the rule of *Jilson v. Gilbert.*"[15] When it is held that the action rests on a promise supported by a moral obligation, and that prior to the making of the promise no obligation recognized in law existed, it becomes clear that there is no acknowledgement or revival, and that, therefore, the statute is not applicable.

It should be noted that this decision and earlier cases[16] establish that a promise to compensate previously rendered personal services by legacy may be in oral form. Since such a promise is performable within one year, it is not in and of itself within the statute of frauds. Where, as here, the nature of the thing promised does not consist of real property to bring it within the statute of frauds, and where the material benefit conferred on the promisor is in the nature of personal services, there is no further statutory bar to the enforcement of the oral promise.

Where an action is permitted for breach of promise to will property, the general rule allows recovery of the value of the thing promised.[17] Wisconsin, however, notwithstanding the recognition of the contract, limits recovery to the reasonable value of the services rendered in case of oral promises, or executed consideration when the amount promised is not fixed or definite.[18] As the Court has stated, "to measure re-

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[12] Estate of Hatten, *supra* note 6; Estate of Schoenkerman, *supra* note 6.
[13] Jilson v. Gilbert, *supra.*
[14] WIS. STATS. (1955) §330.42: "No acknowledgement or promise shall be sufficient evidence of a new or continuing contract, whereby to take the cause out of the operation of this chapter, unless the same be contained in some writing signed by the party to be charged thereby."
[15] Murtha v. Donohoo, *supra* note 9, at 487
[16] Jilson v. Gilbert, *supra;* Murtha v. Donohoo, *supra* note 9.
[17] 69 A.L.R. 79; 106 A.L.R. 742; Hirsh, *Contracts to Devise and Bequeath,* 9 WIS. L. REV. 388, 398 (1934); see also 31 A.L.R. 127 *et seq.*
[18] Murtha v. Donohoo, *supra* note 9; Frieders v. Estate of Frieders, *supra* note 9. Oral promises: In re Bayliss v. Estate of Pricture, 24 Wis. 651, (1869); Slater v. Estate of Cook, 93 Wis. 104, 67 N.W. 15 (1896).

covery by the value of the estate would circumvent the statute of wills"[19] and make possible fraudulent claims against the estate of the deceased promisor. Competent evidence as to the value of the agreed compensation merely has "some evidential bearing on the reasonable value of the services rendered."[20] To allow more would in effect grant specific performance to enforce a promised legacy.[21]

Adherence to the rule of recognition of the contract with the limitation of a quantum meruit recovery results in a somewhat anomalous situation. To establish the contract, the concept of valid consideration is extended to its broadest possible limits. Should this decision become authority for executory promises in general, the "material benefit rule" would clearly be elevated beyond its present status of dictum. The nature of the recovery, however, suggests an abandonment or denial of the contract, as though the promisee in the face of a repudiation by the promisor who makes no testamentary disposition embodying his promise, is restricted to a quasi-contract return of the economic benefit conferred upon the promisor. Granting the soundness of the grounds on which rests the quantum meruit recovery, the question arises why the action should be brought on the contract at all. As a practical matter, to further the interest of justice, there is justification for this rule. In many instances, as here, the services for which compensation is sought were rendered long before the promisor's death. If the promisee attempts to recover in quasi-contract, the statute of limitations, Sec. 330.19(3),[22] or Sec. 330.21(5),[23] bars the action since the period begins to run from the time of the completion of the services.[24] Where, however, the action is brought on the promise to compensate by legacy, it is well settled that the cause of action does not accrue until the death of the promisor.[25] Sec. 330.14,[26] which must be read in conjunction with the subsequent sections of the statute, thus postpones the running of the period until that time and permits a trial of the claim.

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[19] Frieders v. Estate of Frieders, *supra* note 9, at 434.
[20] Murtha v. Donohoo, *supra* note 9, at 486.
[21] Frieders v. Estate of Frieders, *supra* note 9.
[22] WIS. STATS. (1955) §330.19(3): "An action upon any other contract, obligation or liability, express or implied, except those mentioned in Sections 330.16 and 330.18."
[23] WIS. STATS. (1955) §330.21(5): "Any action to recover unpaid salary, wages, or other compensation for personal services, except fees for professional services. . . ."
[24] Estate of Leu, 172 Wis. 530, 179 N.W. 796 (1920).
[25] Jilson v. Gilbert, *supra;* Estate of Schaefer, 261 Wis. 431, 53 N.W.2d 427, (1951).
[26] WIS. STATS. (1955) §330.14: "The following actions must be commenced within the periods respectively hereinafter prescribed after the cause of action has accrued."