

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re Estate of KURT E. BUNDE, a/k/a Kurt A.  
Bunde, Deceased.

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LOIS L. SMITH,

Plaintiff-Appellant,

v

OLD KENT BANK, Successor Trustee to the Kurt  
A. Bunde Trust,

Defendant-Appellee.

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UNPUBLISHED

April 23, 2002

No. 225410

Allegan Circuit Court

LC No. 99-050929-CZ

Before: Griffin, P.J., and Holbrook, Jr., and Hoekstra, JJ.

HOLBROOK, JR., J. (dissenting).

Both the trial court and a majority of this Court conclude that the agreement at issue was a contract to make a will. I respectfully disagree. Further, even if the agreement is properly characterized as a contract to make a will, I do not believe that summary disposition was properly granted. Accordingly, I dissent.

I agree with the majority that plaintiff only seeks to enforce two of the alleged three promises made by decedent. These promises are (1) that plaintiff would never have to worry about having enough money to take care of herself, and (2) that if decedent died first, plaintiff would have the home located at 370 Blue Star Highway to live in.<sup>1</sup> The third promise—that plaintiff and decedent would be partners and work together in the bakery—is still relevant, however, to the issues of the intent of plaintiff and decedent, be it manifest or implied, and the equities of the situation. A close examination of plaintiff’s deposition testimony shows that while plaintiff indicated that she did not believe she was entitled to a percentage of the proceeds from the 1996 sale of the bakery, she nonetheless wanted to have the promise of support

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<sup>1</sup> I do not disagree that plaintiff contends that in making this second promise, decedent indicated that he was “going to live forever,” and that plaintiff would have the home “forever.” *Ante* at 1. I do not include these obviously exaggerated statements in my discussion of the relevant fact and applicable law.

enforced. In other words, she indicated that she did not believe she was due financial support as a result of a business partnership, but because of decedent's obligation to support her.

The majority finds it significant that plaintiff repeatedly averred that she did not expect to be paid a salary or receive a paycheck in return for her promise to move to South Haven and work side-by-side with decedent in his bakery. However, plaintiff did not bargain for a paycheck or a salary for her work in the bakery. Rather, she bargained for decedent's monetary obligation of support as well as a place to live. It is not dispositive that plaintiff did not expect a fixed regular compensation to be satisfied through the issuance of a check.

The first benefit promised by decedent—a monetary obligation for support—was not limited to merely providing support to plaintiff after decedent's death, but also encompassed a promise to support plaintiff during decedent's life. Thus, decedent's promise created a monetary obligation that existed in his lifetime, i.e., a *debitum in praesenti*. The fact that part of this promise would not be discharged until after decedent's death does not make it a contract for a will. See *In re Estate of Morris*, 193 Mich App 579, 583; 484 NW2d 755 (1992) (observing that “there was ample evidence from which one could conclude that claimant performed at least some of the work because of his expectation created by affirmative statements of decedent, that decedent would *compensate him, albeit after her death, for her services*” [emphasis added]). The idea that decedent allegedly decided at a later date to discharge, in part, this obligation by providing for plaintiff in his will is not dispositive. The method by which decedent chose to discharge the obligation does not change the binding nature of the obligation, nor the fact that it was complete when contracted for. Further, there is no indication in the record before us that when the agreement was reached in September 1991, plaintiff bargained for the promise to be included in decedent's will.

The same is true of the second promise made by decedent (the promise of a place to live). There is no indication that when contracted for, decedent was promising to transfer an interest in the home in his will or other testamentary document. Further, regardless of how decedent was to discharge this promise, the obligation to provide a home for plaintiff was a *debitum in praesenti*.

I believe that a genuine issue of material fact does exist on the question of whether the parties entered into an express oral contract, *Tyranski v Piggins*, 44 Mich App 570, 573-574; 205 NW2d 595 (1973), or whether recovery is warranted under a contract implied-in-fact theory. *Featherston v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997). Because the agreement was not a contract to make a will, the rule of *In re Estate of McKim*, 238 Mich App 453; 606 NW2d 300 (1999), does not bar enforcement of decedent's promise of monetary support.<sup>2</sup> Under

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<sup>2</sup> Arguably, *McKim* does not address the issue of whether an express oral contract is barred by MCL 700.2514 (formerly MCL 700.140). Even though the plaintiff in *McKim*, argued that an express oral agreement had been reached, *McKim*, *supra* at 455, the *McKim* Court indicated that the specific issue it was addressing was whether this statute precludes recovery for an alleged contract to make a will under either an implied-in-fact or implied-in-law theory. *Id.* at 459. While both an implied-in-fact contract and express contract are based on a manifested assent, Farnsworth, *Contracts* (2d ed), § 3.10, p 135, n 4, in an express contract, be it oral or written, the terms of the agreement have been explicitly set out by the parties. Conversely, an implied-in-

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Michigan law, a promise is not enforceable if the consideration for the promise was an illicit sexual relationship. *McKim, supra* at 461; *Tyranski, supra* at 573.<sup>3</sup> Nonetheless, “[t]his Court will . . . enforce an agreement made during the relationship upon proof of additional independent consideration.” *Featherstone, supra* at 588. Accord *Corbin, supra* at § 1476, p 622 (“A bargain between two persons is not made illegal by the mere fact of an illicit relationship . . . , so long as that relationship constitutes no part of the consideration bargained for and no promise in the bargain is conditional upon it.”). I believe enough evidence has been adduced to establish the existence of independent consideration. The work performed, and expenditures made, by plaintiff in decedent’s bakery from late 1991 until the business was sold in 1996, as well as expenditures made, and services rendered, in the upkeep and development of the Blue Star residence, all serves as valuable consideration. See *Hierholzer v Sardy*, 128 Mich App 259, 263-264; 340 NW2d 91 (1983). Additionally, the timing of events also supports a finding of independent consideration. It is undisputed that the benefits rendered by plaintiff did not begin at the same time or after the initiation of the intimate relationship between plaintiff and decedent. Instead, the agreement was reached and plaintiff moved to South Haven to begin work in the bakery three months before the onset of the intimate relationship. Indeed, plaintiff averred that she had slept in a chair in a guest room for three months after the move.

Given the special relationship that later developed between plaintiff and decedent, a presumption arises that the benefits conferred by plaintiff, including the personal services rendered in caring for decedent and the Blue Star home, were rendered gratuitously. *In re Lewis Estate*, 168 Mich App 70, 74; 423 NW2d 600 (1988). This presumption, however, is rebuttable. *Id.* at 75. I do not believe it can be conclusively said that no evidence existed showing that plaintiff expected to be compensated for her actions. *Sammon v Wood*, 107 Mich 506, 509; 65 NW 529 (1895). Accepting plaintiff’s credibility, this evidence may be buttressed following further discovery. Certainly, decedent’s expressions of an intent to compensate plaintiff serve as strong evidence rebutting the presumption. Further, the commercial nature of the services rendered in the bakery, the hours spent working in the bakery, the fact that plaintiff had worked for the decedent before in a similar capacity for which she received payment, and plaintiff’s claim that decedent expressly indicated that she would be compensated for her work, “was more than sufficient . . . to present a question of fact as to the parties’ expectations.” *Roznowski v Bozyk*, 73 Mich App 405, 409; 251 NW2d 606 (1977). Additionally, because plaintiff did not begin rendering personal services merely in expectation that she would be included in decedent’s will,

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fact contract is one that “the parties presumably intended, either by tacit understanding or by the assumption that it existed.” *Black’ Law Dictionary* (7<sup>th</sup> ed), p 322. See also *Pyeatte v Pyeatte*, 135 Ariz 346, 353 (1983) (“An implied-in-fact contract is a true contract, differing from an express contract insofar as it is proved by circumstantial evidence rather than by express written or oral terms.”).

<sup>3</sup> This doctrine is based on public policy considerations, i.e., not to uphold agreements that are deemed offensive to the institution of marriage. 6A *Corbin, Contracts*, § 1474-1476, pp 610-623.

recovery is not precluded under *In re Pierson's Estate*, 282 Mich 411, 418; 276 NW 498 (1937), and its progeny.<sup>4</sup>

While it is a close question, I also do not believe that recovery under either an implied-in-law, or quantum meruit, theory of restitution is precluded. In order to reach such equitable relief, plaintiff must first surmount two public policy based barriers. The first barrier is the rule against enforcement of contracts made in consideration of a meretricious relationship. As I have already discussed, the evidence supports a finding of independent consideration. *Featherstone, supra* at 588. The second and more difficult hurdle to clear is the presumption raised that benefits conferred when the parties are involved in a meretricious relationship are deemed gratuitous. *McKim, supra* at 461. See also *Morris, supra* at 582. While the presumption that the services were rendered gratuitously is rebuttable when the claim is based on either an express agreement, *Tyranski, supra* at 573-574, or an implied-in-fact contract, *In re Estate of Van Dyke*, 159 Mich 180, 184; 123 NW 608 (1909), Michigan case law indicates that the presumption “will overcome the usual contract implied by law to pay for what is accepted.” *Roznowski, supra* at 409. Accord *Van Dyke, supra* at 184.

I believe that the idea that such a presumption is irrebuttable when equity is invoked is an antiquated restraint on the freedom to contract. The presumption is based on the reasonable inference that persons involved in a close personal relationship perform services for each other without expectation of payment. See Farnsworth, *supra* at § 3.10, p 137, n 10. However, the modern trend is to allow equitable relief when the circumstances show that it would be unjust not to do so. See, e.g., *Watts v Watts*, 137 Wis 2d 596 (1987); *Harman v Rogers*, 147 Vt 11 (1986); *Pyeatte, supra*; *Marvin v Marvin*, 18 Cal 3d 660 (1976). This Court should not be averse to reexamining judicially created policies based on identified public interests or mores when the interests of the society have changed. On this point, I am guided by the words of the United States Supreme Court:

It is impossible to define with accuracy what is meant by that public policy, for an interference and violation of which a contract may be declared invalid. It may be understood in general that contracts which are detrimental to the interests of the public as understood at the time fall within the ban. The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests at a more advanced stage are treated as legal and binding. [*Pope Mfg Co v Gormully*, 144 US 224, 233-234; 12 S Ct 632; 36 L Ed 414 (1892).]

Further, I do not believe that with respect to the work performed by plaintiff in the bakery, the basis for the presumption applies. Again, it is important to remember that when this deal was struck the nature of the relationship between plaintiff and decedent was one of friendship. I do not believe it is reasonable to conclude that plaintiff's moving to South Haven and working fulltime in the bakery was an incidental and natural extension of this relationship. See Farnsworth, *supra* at § 2.20, p 108; see also *Pyeatte, supra* at 353; cf. *Roznowski, supra* at

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<sup>4</sup> See, e.g., *In re Lewis Estate, supra* at 75.

409.<sup>5</sup> Under such circumstances, I believe the presumption that these services were gratuitous because of the later developed meretricious relationship is, and should be, rebuttable.

I am not judging the merits of plaintiff's claims for an implied-in-law contract and quantum meruit, but merely indicating that I believe that she should be given her day in court to prove her case. Both these equitable theories of recovery are based on the principle against unjust enrichment. In the case at hand, I believe an argument can be made that under the circumstances, that restitution for the benefit conferred on decedent is just. I disagree with the majority that such equitable relief is not available because plaintiff consistently argues that promises were made to her by decedent. Plaintiff should not be asked to undermine one of her claims in order to maintain another. Assuming the evidence fails to show either an express contract or a contract implied-in-fact, or that some legal principle precludes enforcement of a contract despite the mutual assent of the parties, plaintiff has every right to plead these equitable theories as an alternative basis for relief. There is nothing in the nature of either remedy that precludes their imposition when a plaintiff pleads an express contract. Again, both theories of recovery are not based on the lack of exchanged promises, but on the notion that services have been rendered, and in the absence of an enforceable contract, justice requires that the plaintiff be compensated for the value of the services. The absence of an enforceable contract does not presume the absence of an exchange of promises. See generally, Dobbs, *The Law of Remedies* (2d ed), § 4.2(3), pp 384-388.

Regarding the promise to provide plaintiff a home, while MCL 700.2154 is not applicable because this was not a contract for a will, MCL 566.106 still applies. However, I do not believe that relief is precluded under this statute of frauds.

The law in Michigan is clear that partial performance of an oral contract to convey an interest in land may remove that contract from the statute of frauds.<sup>[6]</sup>

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<sup>5</sup> In *Roznowski*, the plaintiff had also helped the defendant operate a business. Specifically, the plaintiff helped the defendant “run his resort, including painting and cleaning the cabins and working in the bar. In addition . . . , the plaintiff performed most of the domestic chores . . . .” *Roznowski*, *supra* at 407. I do not believe that such commercial work is necessarily incidental to an intimate relationship, and thus decline to follow the lead of *Roznowski*. MCR 7.215(D)(1). In any event, *Roznowski* is distinguishable primarily because the bargain for, and the onset of, plaintiff's work in the case at hand preceded the initiation of the meretricious relationship. This same circumstance distinguishes *McKim* and *Lewis*. In *McKim*, the plaintiff and “the decedent lived together for four years before the alleged agreement had been raised.” *McKim*, *supra* at 461. In *Lewis*, the plaintiff had lived with the deceased for one year before the promise that she would be “taken care” of arose. *Lewis*, *supra* at 72.

<sup>6</sup> It is common to see it written that part performance of an oral contract takes or removes a contract from the applicable statute of frauds. I agree with Professor Corbin that this characterization makes sense when the statute of frauds “is expressly limited to cases in which there has been no part payment, nothing given in earnest, and no acceptance and receipts of part of the goods.” Corbin on Contracts, One Volume Edition (1952), § 420, p 434 (hereinafter Corbin II). When the statute is like MCL 566.106, which does not include such a specific provision, then part performance does not serve to take the case out of the statute of frauds, but takes “the statute out of the case.” *Id*

Possession and improvements in regard to the property may remove it from the statute. Payment of money pursuant to the contract is another factor to consider. [*Zaborski v Kutyla*, 29 Mich App 604, 607; 185 NW2d 586 (1971) (citations omitted).]

The part performance doctrine is a creature of equity, designed specifically “to prevent the terms of a formal statute from doing grave injustice.” Corbin II, *supra* at § 425, p 437. See also *Boelter v Blake*, 307 Mich 447, 451; 12 NW2d 327 (1943). Looking at the record before us in the appropriate light, I believe that triable issues of fact exist on whether plaintiff’s possession of the Blue Star residence, the improvements she made to the property, and the services rendered constitute part performance, thereby removing the applicability of the statute of frauds. Indeed, because decedent contracted for plaintiff’s services, especially in working at the bakery, an argument can be made that plaintiff has not just partially but fully complied with her obligations under the contract. In other words, plaintiff’s services constituted the purchase price for the residence, and that price has been paid in full. Cf. *Callon v Callon*, 185 NW2d 762, 765-766 (Iowa, 1971).<sup>7</sup> I also believe that an argument can be made that plaintiff’s performance was made in reasonable reliance on the contract and that relief should not be barred by the statute, given the circumstances. Corbin II, *supra* at § 425, p 437. There is evidence that decedent made the promises alleged, that plaintiff sold her Chicago home and moved to South Haven, divested herself of funds that could be used to purchase another home, fully performed her obligations regarding the bakery, spent time and money on maintaining and improving the Blue Star residence, and was told by decedent’s daughter that she could stay in the home following decedent’s death. I believe that under these circumstances, a reasonable argument can be made in favor of equitable relief.

The equitable remedies available to plaintiff include specific performance of the contract, *Boelter*, *supra* at 451, and the imposition of a constructive trust, *Arndt v Vos*, 83 Mich App 484, 488; 268 NW2d 693 (1978) (“[W]hile the agreement in the instant case is not in writing, parol evidence is admissible to establish its existence since the statute of frauds is not a bar to . . . the imposition of a constructive trust and for specific performance of the oral agreement.”). Further, for the reasons previously stated, I do not believe that equity is barred by any presumption of gratuity.

Assuming arguendo that the alleged agreement was a contract to make a will, I still believe that summary disposition was improper. “Arguably,” the *McKim* Court observed, “in the absence of an express contract or a contract implied in fact, our Legislature left open the possibility that recovery may be sought under a contract implied in law or quantum meruit theory.” *McKim*, *supra* at 460-461. In *McKim*, the availability of these remedies was precluded because of the existence of the intimate relationship between the parties “before the alleged

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<sup>7</sup> At issue in *Callon* was a specific provision exempting application of the statute of frauds when all or a portion of the purchase price had been paid. *Callon*, *supra* at 765. The *Callon* court concluded that the “‘purchase money’ referred to in [the statute at issue] . . . includes a performance of services in the future under a promise so to do when the services are thereafter performed.” *Id.* at 765-766. Although MCL 566.106 is not affected by a similar provision, I believe the above reasoning is equally applicable to the case before this Court.

agreement had been raised.” *Id.* at 461. Again, this is not the case here. For the reasons previously stated, I believe that a triable issue of fact exists on whether these equitable remedies are appropriate under the circumstances. Additionally, the rule of *Pierson’s* is inapplicable given that the agreement here was not merely for personal services. Of course, an argument can be made that the services rendered by plaintiff are capable of valuation and thus a remedy outside equity is available. While such an argument could mean that equitable remedies are inappropriate, the possibility of the argument does not justify the grant of summary disposition in favor of defendant. The place to make this argument is at trial.

As for MCL 700.2154, I believe the part performance doctrine should also apply when performance is made in reliance on an oral promise to devise land in a will. Corbin II, *supra* at § 432, p 441. As noted above, in Michigan, the part performance doctrine applies to cases involving the conveyance of an interest in property even though MCL 566.106 does not include a specific “part performance” provision. The reason for this is because of our court’s recognition that in certain circumstance, equity calls for the imposition of a remedy even in the absence of a writing. I believe this reasoning is equally applicable when the statute of frauds in issue is MCL 700.2154. Cf. *Callon, supra*. If plaintiff can establish the existence of a contract, an absolute bar to recovery imposed by MCL 700.2154 would be inconsistent with a well-established jurisprudence acknowledging a Michigan court’s power to act in equity when justice so requires.

Accordingly, I would reverse the grant of summary disposition to defendant.

/s/ Donald E. Holbrook, Jr.