[Cite as *Larcom v. Larcom*, 2010-Ohio-3632.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Lucille Larcom

Appellant

v.

James R. Larcom

Appellee

Court of Appeals No. L-09-1269

Trial Court No. CI0200902521

DECISION AND JUDGMENT

Decided: August 6, 2010

* * * * *

David F. Wiley, for appellant.

Glen R. Hoffmann, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the September 22, 2009 judgment of the Lucas County Court of Common Pleas, which dismissed the complaint of appellant, Lucille Larcom. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following single assignment of error on appeal:

{¶ 2} "THE TRIAL COURT ERRED IN FINDING THAT THE SERVICES RENDERED BY PLAINTIFF CONSTITUTED MUTUALITY OF BENEFITS FOR WHICH PLAINTIFF WAS NOT ENTITLED TO COMPENSATION."

{¶ 3} Appellant brought suit against James Larcom, as Executor of the Estate of James's and appellant's mother, Esther Mary Caroline Marsalko, deceased. After Marsalko died, appellant learned that Marsalko had not made any special provisions in her will for appellant. Appellant had expected a bequest because she had moved in with her mother to care for her a few years prior to her death. Appellant made a claim against the estate for compensation for her services, but it was rejected. Appellant claims that the estate was unjustly enriched by her services and under the doctrine of promissory estoppel, the estate should compensate appellant for her services on a quantum meruit basis. Appellant asserted a claim for $188,000, plus interest from the date of her mother's death.

{¶ 4} Appellant testified that during the Christmas season of 2005, Marsalko asked appellant to come and live with Marsalko and take care of her. Appellant was in the process of moving out of a home she shared with her daughter and son-in-law. Appellant moved in with Marsalko and provided total care for her from December 31, 2005 until February 23, 2008, when Marsalko became ill and was hospitalized. Marsalko died on March 9, 2008.

{¶ 5} The two women generally split the household expenses equally, although appellant paid for the entire car expenses herself even though she transported Marsalko to

her appointments. Furthermore, Marsalko owned her home and did not charge appellant to live there. Appellant took care of Marsalko by providing transportation, shopping and running errands, handling her financial matters, caring for Marsalko's clothing and physical hygiene needs, preparing Marsalko's specialized meals, assisting Marsalko during the night, assisting Marsalko physically, and giving general comfort care. Because of the extensive nature of caring for Marsalko, appellant testified that she had to quit a full-time job that paid $8.50 an hour. She also was unable to keep up her social activities because Marsalko was very demanding.

{¶ 6} Appellant recalled Marsalko promising to add appellant to Marsalko's will to take care of appellant and leave her the house. Appellant's friend testified that she spent a lot of time in the home and heard Marsalko state on several occasions when appellant was absent that Marsalko was worried about appellant and wanted her to have something but that Marsalko had already arranged to have the home go to appellant's son because he had taken care of Marsalko for two years from 1995 to 1998 after a surgery. Marsalko wanted the house to go to appellant if she stayed and helped for two years like her son had. Marsalko had signed a new will in 2002 leaving the home to the grandson. Appellant's daughter also recalled several conversations with her grandmother when they were alone where Marsalko would state that she wanted to change her will to take care of appellant because she had been helping Marsalko. The granddaughter also recalled that Marsalko used the promise of including a person in her will or disinheriting them as a means to reward those who helped her and punish those who did not.

{¶ 7} Following a bench trial, the trial court found that appellant moved in with Marsalko because of appellant's immediate need for housing and Marsalko's request that appellant help take care of Marsalko. Appellant and Marsalko agreed to equally share the expenses of the household, but Marsalko did not charge rent. There was no evidence of a chronic, debilitating illness or that Marsalko was an invalid, although there was evidence that Marsalko needed some assistance. There was no express agreement that appellant would be compensated a specific amount of money for her services. However, Marsalko did express a desire and intention to provide for appellant by naming her as a beneficiary of the home.

{¶ 8} The trial court concluded that appellant and Marsalko enjoyed the mutuality of benefits from living together and that appellant was unable to overcome the presumption that they had not entered into an express agreement for compensation. Appellant sought an appeal from that decision.

{¶ 9} On appeal, appellant asserts that the trial court erred in making the following factual findings: (1) appellant had an immediate need for housing; (2) Marsalko did not have a chronic, debilitating illness; and (3) there was a "family relationship" and mutuality of benefit. Appellant also asserts that the trial court should have made the following findings: (1) while appellant was not charged for rent, her half of the household expenses exceeded the value of any rent and benefited Marsalko more than plaintiff, (2) Marsalko did not gratuitously provide a home for appellant, and (3) that

appellant cared for Marsalko in fulfillment of their agreement, which Marsalko continually acknowledged.

{¶ 10} Appellant also argues that the trial court erred as a matter of law by holding that she was required to prove an express agreement as to a specific amount of compensation for appellant's services. She argues that she was only required to prove that each party acknowledged that appellant was to be compensated.

{¶ 11} In an action to recover compensation for services rendered to a family member, a presumption arises that the rendering of services to a family member was done gratuitously. This presumption can be defeated only with clear and convincing evidence of an express contract to perform the services for compensation. *Merrick v. Ditzler* (1915), 91 Ohio St. 256, 263, and *Hinkle v. Sage* (1902), 67 Ohio St. 256, paragraphs one and two of the syllabus. An express contract is formed when there is mutual assent and consideration. *Jankowski v. Key Trust Co. of Ohio* (June 8, 2001), 6th Dist. No. L-00-1310. Furthermore, the essential terms must be definite and certain. "[E]xpressions of gratitude and an intention to do something" for the plaintiff are not express contracts to reimburse for services rendered. *Arns v. Disser* (1931), 40 Ohio App. 163, 167. Cf. *Flax v. Williams* (1937), 25 Ohio Law Abs. 680. We review the factual findings of the trial court on a manifest weight of the evidence standard. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 12} Upon a review of the facts, we find that the evidence presented supports the factual findings of the trial court. Furthermore, we find that the trial court did not err by

failing to making the findings asserted by appellant. It is clear from the evidence that Marsalko appreciated the help provided by appellant and intended to provide financial assistance to her in return but never actually carried out her plan to revise her will. There was no evidence of an express contract in this case to provide services for compensation. Therefore, we need not reach the issue of whether the agreement between the parties had to include a specific amount of compensation. We find appellant's sole assignment of error not well-taken.

{¶ 13} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE