

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2096

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE ESTATE OF JAMES V. GAROFOLO,
DECEASED:**

ANN MARIE STRAIT AND DONALD A. STRAIT,

APPELLANTS,

v.

THE ESTATE OF JAMES V. GAROFOLO,

RESPONDENT.

APPEAL from a judgment of the circuit court for Rock County:
JAMES E. WELKER, Judge. *Reversed and cause remanded.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. Ann Marie Strait and Donald Strait appeal from the judgment entered against them dismissing their claim against the estate of James Garofolo, Ann Marie's father. Because we conclude that the circuit court did not

consider whether the Straits had established the existence of an implied contract for services, we remand to the circuit court to determine, on the facts adduced at trial, whether the Straits established that they had an implied contract for personal services, and reimbursement of expenses.

BACKGROUND

Ann Marie Strait, daughter of James Garofolo, and her husband, Donald Strait, seek to recover compensation from Garofolo's estate for services they rendered to Garofolo before his death. Shortly after his wife's death in 1986, Garofolo asked the Straits to move into his home with him. They did so. The Straits lived with Garofolo until February 1996. The Straits testified that during the time they lived with Garofolo, they cared for him and his home, they provided transportation for him, and they paid many of his bills. They also testified that it was their expectation that Ann Marie would inherit her father's estate as compensation.

In February 1996, Garofolo and the Straits had a disagreement about the house. As a result, the Straits moved out of Garofolo's home. They did not provide any more care for Garofolo before he died in October 1996. In his will, Garofolo left his entire estate to his nephew.

The Straits brought a claim against the estate for the personal care rendered by them to Garofolo during the two years prior to his death, and for the out-of-pocket expenses they incurred on Garofolo's behalf during the six years prior to his death. The court held a hearing at which the Straits testified. After the hearing, the court dismissed the Straits' claims. The court found that the Straits had not established that they had an agreement with Garofolo, and that they had not overcome the presumption that services rendered by a relative are gratuitous.

Further, the court found that any agreement that the Straits may have had ended when they moved out of Garofolo's house in February and did not care for him until his death.

ANALYSIS

The circuit court began its decision by stating that “services and items for the care and lodging performed by a relative are presumed to be gratuitous.” Citing *Estate of Blohm*, 211 Wis. 421, 248 N.W. 407 (1933), and *Estate of Ghent*, 217 Wis. 631, 259 N.W. 865 (1935). Under these cases, the presumption that services rendered by a relative are performed gratuitously can only be rebutted by an express contract for compensation. See *Ghent*, 217 Wis. at 633, 259 N.W. at 866; *Blohm*, 211 Wis. at 423, 248 N.W. at 408. The circuit court apparently followed this rule when it found “[w]hile the claimants may very well have assumed that they would be provided for by the decedent under [these] circumstances, there is nothing to suggest that there was any specific agreement in that regard.”

The supreme court, however, has departed from the rule that a presumption that services were rendered gratuitously may be rebutted only by proof of an express contract. The court has “upheld judgments awarding compensation on the basis that the contract was implied in fact even though the claimant was related to the decedent by blood or marriage.” *In re Estate of Steffes*, 95 Wis.2d 490, 503, 290 N.W.2d 697, 703 (1980).

[W]hatever the initial presumptions may be, the final determination, ... depends not on a rule of law which awards or denies compensation for services rendered depending on the family relationship of the parties or the house they live in, but upon the existence or nonexistence

of an express promise, or one implied in fact, that the services were to be paid for.

Id. at 517, 290 N.W.2d at 710. (Citations omitted.)

While the circuit court found that the Straits did not have an express contract with Garofolo, the court apparently did not consider whether the Straits had established the existence of an implied contract.

The fact to be determined is whether there was a promise, express or implied, that the services were rendered for pay. Where, as here, there is no express promise, one may be implied by the conduct of the parties, the nature of the services, their rendition and their acceptance or, on the other hand, the surrounding circumstances may support a presumption or an inference that no implied promise existed.

In re Estate of Kuepper, 12 Wis.2d 577, 581, 107 N.W.2d 621, 623 (1961).

The court did not address any facts which might create a contract implied in fact. The circuit court found that the Straits had only an expectation of compensation. While we agree that an expectation standing alone is insufficient, the claimants' expectation does have some significance when considered along with other facts. When services are performed "at the special instance of the deceased and with his knowledge and are performed by the claimant with expectation of reasonable compensation, recovery may be allowed on the basis of a contract to pay, implied in fact or law." *Steffes*, 95 Wis.2d at 497, 290 N.W.2d at 701. Since the circuit court did not address these questions of fact, we remand to the court to determine on the facts adduced at trial, whether the Straits established the existence of an implied contract for personal services rendered to Garofolo prior to his death.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

