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Vermont Superior Court
Orange Unit
23-CV-02848

STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
Orange Unit — Case No. 23-CV-02848

JOHN DURKEE, EXECUTOR OF THE ESTATE OF DECEDENT [KENNETH] H. BLAISDELL, JR.,
Plaintiff,

v.

TRINI BRASSARD, COURTNEY BRASSARD, BRIAN FALZO, DANIEL BRASSARD, AND BRASSARD SUGARWORKS AND MAPLE SUPPLY, LLC,
Defendants.

TRINI BRASSARD'S OBJECTION TO PLAINTIFF'S MOTION TO DISMISS FIRST AMENDED COUNTERCLAIM FOR ALLOWANCE OF CLAIMS

Defendant, Trini Brassard ("Ms. Brassard"), by and through her attorneys, Brannen & Loftus, PLLC, hereby objects to *Plaintiff's V.R.C.P. 12(b)(6) Motion to Dismiss Defendant Trini Brassard's First Amended Counterclaim for Allowance of Claims*, filed September 20, 2023 (hereinafter, "Plaintiff's Motion"). Plaintiff's Motion fails to satisfy the requirements of V.R.C.P. 12(b)(6), as it fails to demonstrate beyond doubt that there are no facts or circumstances that would entitle Ms. Brassard to her requested relief. In further support, Ms. Brassard states as follows:

1. Ms. Brassard filed her *First Amended Counterclaim for Allowance of Claims* on August 30, 2023, in which she brought a counterclaim against Plaintiff for his improper decision to disallow two (2) claims previously asserted by Ms. Brassard against the Estate of Decedent, Kenneth H. Blaisdell, Jr. ("the Estate") in the underlying probate matter, *In Re: Estate of Kenneth H. Blaisdell, Jr.*, Vermont Superior Court, Orange Probate

Division, Case No. 21-PR-04895, for the caregiving and business management services Ms. Brassard rendered to Decedent from on or about July 18, 2013, until Decedent's death on April 10, 2021.

2. During the time that Ms. Brassard was providing such services, Ms. Brassard and Decedent had "agreed that Ms. Brassard would temporarily forego compensation for the services that she provided to Decedent…and further agreed that she would be compensated from the assets of Decedent's estate following his death." *Trini Brassard's First Amended Counterclaim for Allowance of Claims and Demand for Trial by Jury*, filed August 30, 2023, at ¶ 11 (hereinafter, "Ms. Brassard's Counterclaim").

3. On September 20, 2023, Plaintiff filed his motion to dismiss Ms. Brassard's Counterclaim, arguing that Ms. Brassard's claims fail "[u]nder both Vermont statutory and common law[.]" Plaintiff's Motion at pg. 3.

4. "In determining whether a complaint can survive a motion to dismiss under Rule 12(b)(6), courts must take the factual allegations in the complaint as true, and consider whether 'it appears beyond doubt that there exist <u>no facts or circumstances</u> that would entitle the plaintiff to relief.'" *Colby v. Umbrella, Inc.*, 184 Vt. 1, 5-6 (2008) (*quoting Alger v. Dep't of Labor & Indus.*, 181 Vt. 309, 317 (2006)) (emphasis added). "Motions to dismiss for failure to state a claim are disfavored and are rarely granted." *Colby*, 184 Vt. at 6.

5. Plaintiff first argues that Vermont's now-repealed-and-replaced "Powers of Attorney" statute, 14 V.S.A. § 3501 *et seq*. (repealed July 1, 2023), should apply to Ms. Brassard's request for compensation for the business management services that she rendered to Decedent. Plaintiff's Motion at pg. 4-5.

6. Plaintiff alleges that Ms. Brassard is seeking compensation "for management services as [Decedent's] agent[,]" Plaintiff's Motion at pg. 2, and such claim for compensation was barred under 14 V.S.A. § 3504 (repealed July 1, 2023), which stated, in relevant part, "[n]o agent may compensate…herself for duties performed under a power of attorney with funds or property belonging to the principal unless the terms of the power of attorney explicitly provide for compensation."
7. Even if the now-repealed version of the statute were applicable to this case, Plaintiff would not be entitled to judgment as a matter of law, because Ms. Brassard did not "compensate herself" for the services she rendered as agent under the power of attorney ("POA"). Rather, she is seeking compensation through this judicial process.
8. However, as noted in Plaintiff's Motion, Vermont's newly enacted Uniform Power of Attorney Act, which Plaintiff essentially concedes is the version of the statute applicable to this case, altered this rule and now provides that "an agent is entitled to reimbursement of expenses reasonably incurred…and to compensation that is reasonable under the circumstances." 14 V.S.A. § 4012.
9. The new statute further states "this chapter applies to a power of attorney created before, on, or after July 1, 2023…[and] this chapter applies to a judicial proceeding concerning a power of attorney commenced before July 1, 2023 unless the court finds that application of a provision of this chapter would…prejudice the rights of a party[.]" 14 V.S.A. § 4063(1), (3) (emphasis added).
10. Plaintiff argues against the application of the newly enacted statute on the basis that "[t]he counterclaim amount sought would substantially alter the Decedent's estate plans[,]" Plaintiff's Motion at pg. 5, and "it would be wholly inequitable to apply the

brand new statute…where the parties relied upon current law when enacting the POA; the POA was governed by the repealed statute for the entire length of its validity; and the claims made…were done so under the repealed statute." *Id*.

11. Plaintiff concludes, "acts of an agent are governed by the applicable law at the time, as 'any exercise of authority under the POA which occurs after the statute's effective date must conform with the entire statute[,]'" Plaintiff's Motion at pg. 6. (*citing In Re: Estate of Lovell*, 190 Vt. 99, 104 (2011), and, therefore, Ms. Brassard's claims should be denied under the now-repealed statute.

12. Initially, Plaintiff's argument that "the counterclaim amount sought would substantially alter the Decedent's estate plans[,]" Plaintiff's Motion at pg. 5, is merely slight-of-hand, as *any* creditor's claim against the Estate, if sizable enough, has the potential to "substantially alter the Decedent's estate plans[,]" and, what's more, Plaintiff has consistently rejected Ms. Brassard's claims outright and in their entirety, notwithstanding his ability to allow part of the claims in an amount that would lessen or negate any potential impact on Decedent's estate plans. *See* 14 V.S.A. § 1206(a) ("[e]very claim which is disallowed in whole <u>or in part</u>…"); V.R.P.P. Rule 64 ("[i]f a claim is disallowed…the executor shall…file a written statement showing why the claim should be rejected <u>or should be reduced in amount</u>.") (Emphasis added).

13. The new statute, written to apply to any "power of attorney created before, on, or after July 1, 2023[,]" 14 V.S.A. § 4063(1), as well as those "judicial proceeding[s] concerning a power of attorney commenced before July 1, 2023[,]" shows the Legislature clearly anticipated that the statute would be applied uniformly to all existing powers of attorney, regardless of their date of creation or when any relevant judicial proceeding commenced

(subject to the restriction predicated on prejudicial effect to a party), and it could easily be argued that allowing *any* former agent to assert similar claims for compensation under the new statute would "prejudice" the rights of the party seeking to avoid payment.

14. It is highly unlikely that the Legislature would have written the new statute to apply in such a manner if a claim of "prejudice" could so easily thwart the payment of otherwise valid claims.
15. Further, Ms. Brassard's claim for compensation for services rendered is not an "exercise of authority" under the Power of Attorney that is required to "conform with the entire statute[,]" as noted in *In Re: Estate of Lovell*.
16. Ms. Brassard acknowledges that, had she previously compensated herself during her time as Decedent's agent and then sought to retroactively validate that act, she would be prevented from doing so under the new statute and relevant common law.
17. However, because Ms. Brassard is not seeking to retroactively validate a prior "exercise of authority" under the Power of Attorney, and is only seeking compensation for past services rendered, the case law cited by Plaintiff is inapplicable.
18. Finally, assuming that the now-repealed statute applies to the present matter, Plaintiff's invocation of 14 V.S.A. § 3504(d) fails because, contrary to Plaintiff's assertion, Ms. Brassard's claim for compensation is not only "for duties performed under a power of attorney[,]" 14 V.S.A. § 3504(d) (repealed July 1, 2023), but is instead for her services rendered to Decedent <u>as the manager of Decedent's farming business</u>, many of which services did not require invocation of or reliance upon her authority as agent under the POA.

19. Had Ms. Brassard not agreed to take on the role of business manager for Decedent in return for deferred compensation from the assets of his estate following his death, which role was separate and apart from Ms. Brassard's role as Decedent's agent under the Power of Attorney, it would have been necessary to hire a third party to provide such business management services in exchange for compensation which, as Ms. Brassard discusses in her Counterclaim, "would not have been possible without selling business assets critical to the continued operation of the farm[.]" Ms. Brassard's Counterclaim at ¶ 11.

20. In accordance with the terms of her agreement with Decedent, on December 17, 2021, Ms. Brassard filed her *Written Statement of Claim* in the underlying probate matter relative to "management services provided to the decedent from July 14, 2013 to November 6, 2021[,]"[1] and, following Plaintiff's disallowance of the claims on January 12, 2022, Ms. Brassard filed her *Petition for Allowance of Claims* on March 8, 2022, in which she again stated that her first claim against the Estate was for "business management services for the decedent[.]"[2]

21. Ms. Brassard has <u>never once</u> asserted a claim for compensation for performance of services specific to or limited to her duties as an agent under the POA. As such, neither the repealed version of the POA statute nor the version that replaced it bars her claims as a matter of law.

22. Plaintiff's next argument, regarding Ms. Brassard's claim for compensation for the caregiving services provided to Decedent, is, essentially, that the existence of an

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[1] *Written Statement of Claim*, filed December 17, 2021, *In Re: Estate of Kenneth H. Blaisdell, Jr.*, Vermont Superior Court, Orange Probate Division, Case No. 21-PR-04895.
[2] *Petition for Allowance of Claims*, filed March 8, 2022, *In Re: Estate of Kenneth H. Blaisdell, Jr.*, Vermont Superior Court, Orange Probate Division, Case No. 21-PR-04895.

agreement for deferred compensation is unsupported by the facts, but "[t]he purpose of a motion to dismiss is to test the law of the claim, not the facts which support it." *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002).

23. Plaintiff argues that Ms. Brassard's counterclaim "fails plead [*sic*] any plausible facts that she and Decedent had an express agreement for her to receive compensation for caregiving services[,]" Plaintiff's Motion at pg. 7-8, that "Ms. Brassard's counterclaim pleads facts which are not sufficient to support these claims, namely conversations she had with Decedent[,]" Plaintiff's Motion at pg. 8, and "[a]bsent other factual allegations proving this in support of her Counterclaim, it should be dismissed." *Id*.
24. Plaintiff, citing 100-year-old precedent, *Peters v. Estate of Poro*, 96 Vt. 95 (1922), argues "[g]enerally speaking, it is assumed that when a family member offers caregiving services to another family member, it is a gift, and not a service for which compensation would be sought[,]" Plaintiff's Motion at pg. 7, and further states, "Vermont case law has few exceptions to this rule; however, where there are exceptions, they do not apply to Ms. Brassard's situation." *Id*.
25. Plaintiff acknowledges "[t]he rule…does not preclude recovery in every circumstance[,]" but cites *Hall v. Fletcher*, 99 Vt. 199 (1924), in support of his argument that "each claim must rebut the presumption in order to succeed." Plaintiff's Motion at pg. 7, footnote 3.
26. Plaintiff's arguments are a misstatement of the case law and are refuted by the text of the very decisions Plaintiff cites in support, as the Court's reasoning in *Peters* and *Fletcher* <u>does not</u> establish any "presumption" or lead to the conclusion that caregiving services provided to a family member are "assumed" to be a gift.
27. In *Peters*, the Court stated:

> *The defendant assumes that there was no evidence of an express contract, and invokes the rule that where services are rendered to a deceased person by members of his own family, they are presumed to have been rendered for love and affection, and that a contract to pay therefor will not be implied. We have no cases that go to this extent.*
>
> *It is well settled that where services are rendered by a child to a parent…an implied promise to pay for the services is not inferred from the mere fact that they have been performed.*
> *…*
> *But with us the only effect of this rule is to take the case out of the general rule of the law of contracts, that, whenever valuable service is rendered with the knowledge and approval of the recipient, an obligation to pay therefor will be presumed, in the absence of a showing to the contrary. The validity of the claim is an open question; but to warrant recovery in such a case the plaintiff…must show that the services were rendered either under an express contract or with a mutual understanding and expectation of payment, though such contract or such understanding and expectation may be inferred from the circumstances.*

Peters v. Estate of Poro, 96 Vt. at 101 (internal citations omitted) (emphasis added).

28. Likewise, in *Fletcher*, the Court stated:

> *No express contract to pay his wife's support is claimed to have existed between the plaintiff and defendant, and, this being so, the defendant contends that since the relation between the plaintiff and the defendant's wife was that of parent and child, no recovery can be had[.]*
> *…*
> *But the rule recognized in the cases cited does not go to that extent. Nor does the mere fact of the relationship preclude recovery upon a contract implied in fact or rebut any presumption that may arise from the circumstances of the particular case. The relationship is but a circumstance to be considered by the jury with the other circumstances of the case, and may or may not rebut the ordinary presumption that valuable services are to be paid for when considered in connection therewith.*

Hall v. Fletcher, 99 Vt. at 201-02 (emphasis added).

29. Indeed, the Court's decision in *Fletcher* makes it clear that "the ordinary presumption" is the opposite of what Plaintiff claims it is – namely, that "valuable services are to be paid for when considered in connection therewith." *Id*.

30. Putting aside Plaintiff's invocation of Vermont's "Dead Man's" statute, 12 V.S.A. § 1602, which merely prevents Ms. Brassard from "testify[ing] in…her own favor" as to the terms of her agreement with Decedent, Ms. Brassard will introduce evidence at trial concerning "the circumstances under which the services were performed, the situation and surroundings of the parties, their pecuniary circumstances and the declarations of the party sought to be charged[,]" *Peters*, 96 Vt. at 102, and will produce witnesses who were not parties to the agreement between herself and Decedent and who will corroborate her claims concerning the surrounding circumstances and Decedent's wishes and expectations regarding deferred compensation for Ms. Brassard's caregiving and business management services.

31. Further, it would be premature for the Court to rule as a matter of law that Ms. Brassard will not be permitted to testify under any circumstances about the terms of her agreement with her father, as the Vermont Supreme Court has expressly recognized circumstances, which may be determined only as the evidence is received at trial, under which a party to a contract with a decedent *may* testify about the terms of the contract – *see, e.g. In re: Estate of Farr v. Farr*, 150 Vt. 196, 199-200 (1988). As the Court stated in *Estate of Farr*:

> The dead man's statutes must be construed in favor of the challenged witness. The statutes were created as exception to the broad common law rule that disqualified interested parties from testifying in their own favor – thus, they are statutes intended to *allow* otherwise inadmissible evidence rather than statutes intended to create rules of disqualification. We must also recognize that the statutes can be the cause of tremendous injustice by

> preventing proof of reasonable and valid claims. While measuring the wisdom of legislation is a task for the Legislature, we must construe the legislation so as not to lead to unreasonable or irrational results.

Id. at 199 (internal citations omitted; emphasis added).

32. "[T]he case is for the jury if the services are performed under circumstances that reasonably justify an expectation and understanding on the part of both parties that there was to be pecuniary compensation[,]" *Peters*, 96 Vt. at 103 (citing *Drown's Guardian v. Chesley's Estate*, 92, Vt. 19, 26 (1917)), and a jury considering such evidence could reasonably conclude that an expectation and understanding concerning deferred compensation existed between Ms. Brassard and the Decedent relative to Ms. Brassard's caregiving and business management services, that Ms. Brassard had a valid, binding agreement with Decedent, and that Ms. Brassard's claims against the estate should be allowed.
33. Finally, assuming for the sake of argument that Plaintiff is correct and the law has previously recognized some kind of "presumption" whereby caregiving services provided to family members are assumed to be a gift, any such presumption should be discarded as a matter of public policy, particularly in light of the realities of life in modern society.
34. When it was common for multiple generations to live under the same roof and support each other through old age and ill health, as it was a century ago, such a presumption may have had some arguable validity, but extended families no longer live together as they once did, and a person who now decides to provide caregiving services to an infirm loved one makes the choice to take on a heavy set of additional burdens, both financial and otherwise.

35. Public policy should support those who willingly choose to take on such burdens by providing an avenue for compensation, through either quantum meruit or unjust enrichment, rather than forcing them to choose between abandoning their family in times of genuine need, engaging in "negotiation" and legal wrangling over a binding, written legal agreement governing the terms of services to be provided to the family member in need, or taking on a duty that necessitates hardship and, potentially, deliberate self-impoverishment.

36. In this case, Ms. Brassard's father, the Decedent, required care immediately upon his discharge from the hospital following his stroke in July 2013, and Ms. Brassard continued to provide for his care for more than seven (7) years, making great personal sacrifices to do so.

37. Disallowing Ms. Brassard's claim for compensation because her familial relationship with Decedent creates a "legal presumption" against the expectation of payment is repugnant as a matter of public policy, and any such presumption, if there ever was one, should be discarded as anachronistic and calculated to lead to "tremendous injustice."

38. For the reasons stated herein, Plaintiff has failed to show "beyond doubt that there exist no facts or circumstances that would entitle [Ms. Brassard] to relief[,]" *Colby*, 184 Vt. at 5-6, and his motion to dismiss should be denied.

WHEREFORE, Trini Brassard respectfully requests that this Court:

A. Deny *Plaintiff's V.R.C.P. 12(b)(6) Motion to Dismiss Defendant Trini Brassard's First Amended Counterclaim for Allowance of Claims*, filed September 20, 2023; and

B. Grant such further relief as the Court deems just and fair under the circumstances.

DATED at Hanover, New Hampshire this 4th day of October, 2023.

Respectfully submitted,

TRINI BRASSARD

By: ______________________________

Barney L. Brannen, VT Bar #2671
BRANNEN & LOFTUS, PLLC
80 South Main Street
Hanover, NH 03755
(603) 277-2971
bbrannen@brannen-loftus.com