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CONTRACT TO DEVISE OR BEQUEATH AS AN ESTATE PLANNING DEVICE*

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Contracts to make wills are frequently included in arrangements for the devolution of an individual's assets. Almost as frequently these contracts are created by laymen and brought into being without the advice of counsel. A reading of most of the cases dealing with this estate planning tool leaves the impression that even where legal advice has been sought counsel have done little more than give a reluctant acquiescence to a plan engineered by the client. In spite of this reluctance on the part of the legal profession contracts to make wills are still being used in large quantities. This creates a situation calling for an inquiry into the social interests served by such contracts and an evaluation of the professional responsibility toward them.

Among aged men and women of modest means, and the vast majority of the aged are of modest means, there is a strong desire to retain ownership of what property they possess until death. There is also the desire, and it might be said the necessity, to provide care, support, and maintenance, and in many instances companionship and society, for themselves. A contract to make a will is the only legal device through which this purpose can be achieved. A trust, even if it could be assumed that the person in need of such care did not object to transferring title to a trustee, would usually not yield a sufficient income to achieve the desired purpose. If a life estate with power to consume is attempted the estate is likely to be entirely consumed before the time arrives when it

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is most critically needed. The property involved often consists of real estate being used as a home. The only means of obtaining the necessary support and maintenance directly is by converting the property into money, thereby destroying the very thing that is sought to be preserved. By means of a contract to make a will such a property owner may obtain the care or nursing needed and also such intangibles as society and companionship.¹ An agreement whereby some friend or relative moves into the old person's home and provides board, lodging, or such other services as might be agreed upon in return for a promise by the elderly person to leave the property to the friend or relative concerned can well prove a genuine economic advantage to both parties to the transaction.

A contract to make a will is often the most convenient device for providing for the care of an infant child. The child may be surrendered to the promisor to be brought up as the promisor's child under an agreement by the promisor to provide for the child by will. Such contracts may or may not include agreements for adoption of the child and may be made with the child's parent,² with a social agency having responsibility for the child,³ or, under some circumstances, with the child.⁴ In return for the filial devotion which the child is called upon to render it is given a home and the prospect of an inheritance.

1. Undoubtedly more contracts to make wills are entered into for this than for any other purpose. Illustrative of the cases involving arrangements of this type the following may be mentioned: *Bolander v. Godsil*, 116 F.2d 437 (9th Cir. 1940); *Stone v. Burgeson*, 215 Ala. 23, 109 So. 155 (1926); *Scham v. Besse*, 397 Ill. 309, 74 N.E.2d 517 (1947); *White v. Masee*, 202 Iowa 1304, 211 N.W. 839 (1927); *Bless v. Blizzard*, 86 Kan. 230, 120 Pac. 351 (1912); *Brickley v. Leonard*, 129 Me. 94, 149 Atl. 833 (1930); *Nichols v. Reed*, 186 Md. 317, 46 A.2d 695 (1946); *Bird v. Pope*, 73 Mich. 483, 41 N.W. 514 (1889); *Simonson v. Moseley*, 183 Minn. 525, 237 N.W. 413 (1931); *Sutton v. Hayden*, 62 Mo. 101 (1876); *Carter v. Witherspoon*, 156 Miss. 597, 126 So. 388 (1930); *Robinette v. Olsen*, 114 Neb. 728, 209 N.W. 614 (1926); *Southern v. Kittredge*, 85 N.H. 307, 158 Atl. 132 (1932); *Davison v. Davison*, 13 N.J.Eq. (2 Beasley) 246 (1861); *Parsell v. Stryker*, 41 N.Y. 480 (1869); *Brock v. Noecker*, 66 N.D. 567, 267 N.W. 656 (1936); *Stichler Estate*, 359 Pa. 262, 59 A.2d 51 (1948); *Bruce v. Moon*, 57 S.C. 60, 35 S.E. 415 (1900); *Estate of Soles*, 215 Wis. 129, 253 N.W. 801 (1934); *Loffus v. Maw*, 3 Giff. 592, 66 Eng. Rep. 544 (1862).

2. *Rogers v. Schlotterback*, 167 Calif. 35, 138 Pac. 728 (1914); *Furman v. Craine*, 18 Calif. App. 41, 121 Pac. 1007 (1912); *Savannah Bank & Trust Co. v. Wolff*, 191 Ga. 111, 11 S.E.2d 766 (1940); *Chehak v. Battles*, 133 Iowa 107, 110 N.W. 330 (1907); *Anderson v. Anderson*, 75 Kan. 117, 88 Pac. 743 (1907); *Skinner v. Rasche*, 165 Ky. 108, 176 S.W. 942 (1915); *Van Tine v. Van Tine*, 15 Atl. 249 (N.J.Eq. 1888).

There is authority that the surrender of a child by a parent in consideration of a promise to make a will in favor of the child is in effect treating the child as property and is disruptive of the family relationship and therefore against public policy. *Hooks v. Bridgewater*, 111 Tex. 122, 131-132, 229 S.W. 1114, 1118-1119, 15 A.L.R. 216, 222-223 (1921). See Note 15 A.L.R. 223 (1921).

3. *Matter of Stevens*, 192 Misc. Rep. 179, 78 N.Y.S.2d 868 (Surr. Ct. 1948).

4. *Purviance v. Shultz*, 16 Ind. App. 94, 44 N.E. 766 (1896).

Antenuptial agreements often include property settlements which necessitate wills by one or both the parties.⁵ This is especially true where the parties to the marriage are older and one or both of them have extensive prior moral obligations concerning the disposition of their property. Contracts of this type have been recognized and enforced from a very early date.

A contract to devise or bequeath is often found to be a vital part of property settlement agreements upon divorce or separation of the spouses.⁶ It can also be a subject for a contract between an unwed mother and a putative father for the care of their illegitimate child.⁷ In each of these instances it is used because it is the most convenient tool available and because it more nearly approaches the desires of all parties concerned than would any present transfer of property.

Although contracts for the making of wills are most frequently involved in various forms of family arrangements this is by no means their sole area of usefulness. If clearly understood and wisely employed a contract to make a will is especially adaptable to some types of commercial or business needs. They have been used as devices for maintaining control of a corporation,⁸ as a means for planning the disposition of partnership assets,⁹ and as a method by which an employer is sometimes enabled to retain an especially valuable employee.¹⁰

Closely related to the problem of contracts to make wills is the

5. *DeJong v. Huyser*, 233 Iowa 1315, 11 N.W.2d 566 (1943); *Busque v. Marcou*, 147 Me. 289, 86 A.2d 873 (1952) (unenforceable because of the Statute of Frauds); *Eaton v. Eaton*, 233 Mass. 351, 124 N.E. 37 (1919); *Dickinson v. Seaman*, 193 N.Y. 18, 85 N.E. 818 (1908); *Phalen v. U.S. Trust Co.*, 186 N.Y. 178, 78 N.E. 943 (1906); *Talley v. Harris*, 199 Okla. 47, 182 P.2d 765 (1947); *Synge v. Synge* (1894) 1 Q.B. 466.

6. *Barr v. Ferris*, 41 Calif. App. 2d 527, 107 P.2d 269 (1940); *Wides v. Wides' Ex'r*, 299 Ky. 103, 184 S.W.2d 579 (1944); *Getchell v. Tinker*, 291 Mich. 267, 289 N.W. 156 (1939); *In re Hoyt's Estate*, 174 Misc. Rep. 512, 21 N.Y.S.2d 107 (Surr. Ct. 1940); *In re Tanenbaum's Estate*, 258 App. Div. 285, 16 N.Y.S.2d 507 (1939), *motion for leave to appeal denied*, 258 App. Div. 1054, 17 N.Y.S.2d 1021 (1940), *motion for leave to appeal denied*, 282 N.Y. 810, 25 N.E.2d 881 (1940).

7. *Sybilla v. Connally*, 66 Ga. App. 678, 18 S.E.2d 783 (1942); *Hehr's Adm'r v. Hehr*, 288 Ky. 580, 157 S.W.2d 111 (1941); *Moore's Adm'r v. Wagers' Adm'r*, 243 Ky. 351, 48 S.W.2d 15 (1932); *Lewis v. Creech's Adm'r*, 162 Ky. 763, 173 S.W. 133 (1915).

8. *Legro v. Kelley*, 311 Mass. 674, 42 N.E.2d 836 (1942).

9. Here as elsewhere the contract is for the transfer of property interests at death. Whether or not there is express provision for the execution of a will is not the material factor. *Hale v. Wilmarth*, 274 Mass. 186, 174 N.E. 232 (1931); *Murphy v. Murphy*, 217 Mass. 233, 104 N.E. 466 (1914).

10. *Morrison v. Land*, 169 Calif. 580, 147 Pac. 259 (1915); *Settlemares v. Corum*, 304 Ky. 105, 200 S.W.2d 105 (1947).

problem of joint and mutual wills.¹¹ Such wills might or might not be the result of a contract. Circumstances leading to the making of joint and mutual wills, as well as the circumstances leading to the various types of contracts to make wills, are situations that can easily arise even where no contract exists. There is nothing unusual about a husband and wife executing wills in similar form and with reciprocal provisions without ever having contracted to do so. Likewise a son, nephew, or other relative might exert his principal energies toward the care and maintenance of an elderly couple for no reason other than his love and respect for them. On the other hand he might contract to render such care and maintenance in consideration of a promise by the person receiving the services to make a will in his favor. These factors have led to peculiarly conflicting policy considerations in many instances. Sometimes there is displayed a tendency to find a contract upon very shallow evidence.¹² But there has also developed the rather general rule that evidence of a contract to make a will must be clear and convincing.¹³ It is this latter rule that must be kept in mind when there is an occasion to advise clients contemplating entering into contracts of this type.

The Statute of Frauds requires that in certain instances contracts to make wills must be in writing.¹⁴ Some states require by statute that

11. By the term "joint will" it is meant the wills of two or more persons expressed on one piece of paper and executed as the will of each of them. Mutual wills are the wills of two or more persons executed as separate documents but are in such form that when they are considered together they show on their face, by their reciprocal provisions or otherwise, that they were intended as part of one integrated scheme or plan. See generally Eagleton, *Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing*, 15 CORN. L. Q. 358 (1930); Partridge, *The Revocability of Mutual or Reciprocal Wills*, 77 U. OF PA. L. REV. 357 (1929).

12. *E.g.* Trindle v. Zimmerman, 115 Colo. 323, 172 P.2d 676 (1946). See also Chambers v. Porter, 183 N.W. 431, 434 (Iowa 1921) (suggesting that the mere presence of reciprocal provisions is sufficient to prove the contractual relationship).

13. *Moumal v. Walsh*, 9 Alaska 656, 662 (1940) ("clear, satisfactory and convincing"); *Crowell v. Parks*, 209 Ark. 803, 804-805, 193 S.W.2d 483, 484 (1946) (declaring that the evidence must be substantially beyond reasonable doubt); *Rolls v. Allen*, 204 Calif. 604, 608, 269 Pac. 450, 452 (1928) ("most indisputable"); *Matthews v. Blancos*, 201 Ga. 549, 563, 40 S.E.2d 715, 726 (1946) (apparently taking the extreme position that the contract must be proved beyond reasonable doubt); *Klussman v. Wessling*, 238 Ill. 568, 572, 87 N.E. 544, 546 (1909) ("clearest and most convincing"); *Soho v. Wimbrough*, 145 Md. 498, 510, 125 Atl. 767, 771 (1924) ("definite and certain, strong and convincing"); *In re Estate of LeBorius*, 224 Minn. 203, 214, 28 N.W.2d 157, 163 (1947) ("clear, positive, and convincing"); *Cox v. Williamson*, 124 Mont. 512, 525, 227 P.2d 614, 621 (1951) ("clear, cogent, and convincing"); *McGregor v. McGregor*, 25 Wash. 2d 511, 513, 171 P.2d 694, 695 (1946) (evidence required to be beyond all legitimate controversy); COLO. STAT. ANN. c. 176, §70 (1) (Supp. 1953).

14. A contract to devise real estate is within the Statute of Frauds provision requiring that contracts to convey be in writing. *Miller v. Carr*, 137 Fla. 114, 188 So. 103 (1939); *Rudd v. Planters Bank & Trust Co.*, 283 Ky. 351, 141 S.W.2d 299

all such contracts be in writing.¹⁵ When it is remembered that in most instances by the time action is brought to enforce a contract to make a will the promisor is dead and the promisee is faced with the restrictions imposed by the various "dead man statutes" as well as the requirement that the contract be proved by clear and convincing evidence, the importance of always putting the contract into writing becomes apparent. Joint and mutual wills are such uncertain quantities that they should never be executed without a full and complete declaration on their face as to whether they are or are not executed pursuant to contract.¹⁶ This suggestion is especially applicable to joint wills, devices which should be discouraged wherever possible since the desired results can be just as easily obtained and the intention of the parties more clearly expressed in separate instruments.

Once the contract has been entered into the relationship of the parties and the nature of the interests created should be analyzed in

(1940); *Donovan v. Walsh*, 238 Mass. 356, 130 N.E. 841 (1921); *Salsbury v. Sackrider*, 284 Mich. 493, 280 N.W. 926 (1938). The same is true of a contract to devise or bequeath an entire estate if the estate includes realty. *Cheatham's Ex'r v. Parr*, 308 Ky. 175, 214 S.W.2d 91 (1948); *Lemire v. Haley*, 91 N.H. 357, 19 A.2d 436 (1941); *In re Byrne's Estate*, 122 Pa. Super. 413, 186 Atl. 187 (1936); *Kessler v. Olen*, 228 Wis. 662, 280 N.W. 352, *rehearing denied*, 228 Wis. 662, 281 N.W. 691 (1938). A contract to bequeath personalty might be within the "sale of goods" provision of the Statute of Frauds. *Wallace v. Long*, 105 Ind. 522, 5 N.E. 666 (1886); *Maloney v. Maloney*, 258 Ky. 567, 80 S.W.2d 611 (1935); *Boyle v. Dudley*, 87 N.H. 282, 179 Atl. 11 (1935). Contracts to devise or bequeath are sometimes required to be in writing because they are agreements "made upon consideration of marriage." *Austin v. Kuehn*, 211 Ill. 113, 71 N.E. 841 (1904); *Tellez v. Tellez*, 51 N.M. 416, 186 P.2d 390 (1947); *Caton v. Caton*, 1865, L.R., 1 Ch. 137. But a contract to devise or bequeath is not required to be in writing as a contract not to be performed within a year since it is possible that performance might be within that time. *Appleby v. Noble*, 101 Conn. 54, 124 Atl. 717 (1924); *Berger v. Jackson*, 156 Fla. 251, 23 So.2d 265 (1945); *Heery v. Reed*, 80 Kan. 380, 102 Pac. 846 (1909).

15. CALIF. CIV. CODE § 1624 (1949); ME. REV. STAT. c. 106, § 1 (1944), as amended by P.L. c. 185 (1947); MASS. ANN. LAWS c. 259, § 5 (1933); N.Y. PERS. PROP. LAW § 31; OHIO REV. CODE ANN. § 2107.04 (1954).

16. The following cases involve wills containing statements either accomplishing this purpose or having some tendency in that direction: *Hays v. Jones*, 122 Fla. 67, 164 So. 841 (1935) (mere request that the survivor make a particular disposition of the property not evidence of a contract to that effect); *Curry v. Cotton*, 356 Ill. 538, 191 N.E. 307 (1934) (no clear declaration that a contract was made but alternating references to the instrument as "this . . . will" and "this covenant" held to indicate a will executed pursuant to contract); *Berry v. Berry's Estate*, 168 Kan. 253, 212 P.2d 283 (1949) (joint will stating on its face that it was made pursuant to contract); *In re Estate of Pennington*, 158 Kan. 495, 148 P.2d 516 (1944) (declaration in one of two mutual wills that it was made "in consideration" of the other held not to indicate a contract); *McGinn v. Gilroy*, 178 Ore. 24, 165 P.2d 73 (1946) (acceptance of a legacy which the will states is made pursuant to contract estops the legatee from denying the statement); *Hoffert's Estate*, 65 Pa. Super. 515 (1917) (statement that the parties had "agreed" not sufficient to show they had made a contract).

terms of contract principles. Failure to adhere to this rule and the attempt in some quarters to treat the transaction as a testamentary, yet enforceable, arrangement is the source of much of the confusion so prevalent in this area. The contract may concern a specified sum of money, certain identified property, or, as is more often the case, all or a specified fractional part of the property owned by the promisor at his death. In each of these instances the promisor is bound by the terms of the contract from the moment it is entered into even though he has no obligation to perform until his death. In the event of a contract to devise specific real estate he is in a position similar to that of a vendor under a contract to sell real estate. He is entitled to the use and occupation of the land and retains legal title to it. However, an inter vivos conveyance to one other than a bona fide purchaser will not deprive the promisee of his rights under the contract.¹⁷ Nor is the promisee compelled to wait until the time for performance to secure protection of his interest. If a conveyance is made to one who is not a bona fide purchaser, the promisee may proceed in equity immediately, while the promisor is still living, to have the transfer set aside¹⁸ or to obtain a decree that the grantee holds the property subject to the contract.¹⁹ If the promisor makes an inter vivos disposition of specific non-unique personal property which is the subject of the contract an action for its value may be maintained against his estate.²⁰ If the contract is for all or a fractional part of the property owned by the promisor at death, the promisor is left free to deal with his property in the way that is customary in the normal conduct of one's affairs and may dispose of it completely if it becomes necessary to his own maintenance, support, or reasonable comfort.²¹ He is free to make gifts of the type ordinarily made by one of his station in life,²² but

17. *Stone v. Lacy*, 242 Ala. 393, 6 So.2d 481 (1942); *Osborn v. Hoyt*, 181 Calif. 336, 184 Pac. 854 (1919); *Newman v. French*, 138 Iowa 482, 116 N.W. 468 (1908); *Kastell v. Hillman*, 53 N.J.Eq. 49, 30 Atl. 535 (1894); *McCullom v. Mackrell*, 13 S.D. 262, 83 N.W. 255 (1900).

18. *White v. Masseur*, 202 Iowa 1304, 211 N.W. 839 (1927); *Brackenbury v. Hodgkin*, 116 Me. 399, 102 Atl. 106 (1917); *Carmichael v. Carmichael*, 72 Mich. 76, 40 N.W. 173 (1888); *Pflugar v. Pultz*, 43 N.J.Eq. 440, 11 Atl. 123 (1887); *Davison v. Davison*, 13 N.J.Eq. (2 Beasley) 246 (1861).

19. *Clancy v. Flusky*, 187 Ill. 605, 58 N.E. 594 (1900) (promisor died during the pendency of the suit, and the decree rendered merely quieted title in the promisee); *Newman v. French*, 138 Iowa 482, 116 N.W. 468 (1908); *Hill v. Ribble*, 132 N.J.Eq. 486, 28 A.2d 780 (1942); *Van Duyne v. Vreeland*, 12 N.J.Eq. (1 Beasley) 142 (1858).

20. *Ragsdale v. Achuff*, 324 Mo. 1159, 27 S.W.2d 6 (1930).

21. See *Price v. Aylor*, 258 Ky. 1, 4, 79 S.W.2d 350, 351 (1935).

22. *Noble v. Metcalf*, 157 Ala. 295, 47 So. 1007 (1908); *Ohms v. Church of the Nazarene*, 64 Idaho 262, 130 P.2d 679 (1942); *National Life Insurance Co. v. Watson*, 141 Kan. 903, 44 P.2d 269 (1935); *Dickinson v. Seaman*, 193 N.Y. 18, 85 N.E. 818 (1908).

unreasonable gifts tending toward the dissipation of the estate may be set aside even while he is still alive.²³ In addition to the equitable relief available to the promisee he may pursue his remedy at law in many instances prior to the promisor's death. Where the promisor makes a disposition inconsistent with the contract or where there is an outright repudiation the promisee may either treat the contract as rescinded and maintain an action in quantum meruit for the value of the consideration rendered²⁴ or he may sue on the contract on the theory of an anticipatory breach.²⁵

The important consideration to keep in mind is that whether the proceeding is at law or in equity the right being enforced is a right arising out of contract. Neglect of this apparently obvious principle has led to more confusion in dealing with this type of contract than all other factors combined. Neither an action for an affirmative injunction to compel the execution of an appropriate will nor an action to enjoin the execution of an inconsistent will or to prevent the revocation of a will already executed should be entertained.²⁶ Even if relief of this type is granted it is incapable of enforcement and cannot give the promisee any effective protection.

Confusion of the contractual with the testamentary concept is particularly noticeable in the joint and mutual will cases where it is often said that either party to the transaction is free to revoke his undertaking at any time prior to the death of the other.²⁷ Of course a will

23. *Lawrence v. Ashba*, 115 Ind. App. 485, 59 N.E.2d 568 (1945); *Stewart v. Shelton*, 356 Mo. 258, 201 S.W.2d 395 (1947); *Phillip v. Phillip*, 96 Misc. Rep. 471, 160 N.Y. Supp. 624 (Sup. Ct. 1916).

24. *Mug v. Ostendorf*, 49 Ind. App. 71, 96 N.E. 780 (1911); *Canada v. Canada*, 60 Mass. (6 Cushing) 15 (1850); *Smith v. Long*, 183 Okla. 441, 83 P.2d 167 (1938); *Moorhead v. Fry*, 24 Pa. (12 Harris) 37 (1854).

25. *Edwards v. Slate*, 184 Mass. 317, 68 N.E. 342 (1903); see *Farrington v. Richardson*, 153 Fla. 907, 16 So.2d 158 (1944) (action brought within the life of the promisor but the promisor died while the suit was pending).

26. See *Stone v. Burgeson*, 215 Ala. 23, 109 So. 155 (1926) (denying a petition for an affirmative injunction to compel the execution of a will). A New Jersey court actually granted an injunction against the execution of a will inconsistent with a contract. *Duval v. Duval*, 54 N.J.Eq. 581, 35 Atl. 750 (1896), *modified and aff'd*, 56 N.J.Eq. 375, 39 Atl. 687, 40 Atl. 440 (1898). In Indiana an injunction was granted against the revocation of a will which had been executed in pursuance of a contract. *Lovett v. Lovett*, 87 Ind. App. 42, 155 N.E. 528, *rehearing denied*, 87 Ind. App. 42, 157 N.E. 104 (1927), *noted*, 3 Ind. L. J. 242 (1927); 26 MICH. L. REV. 464 (1928); 7 TENN. L. REV. 66 (1928); 1 U. OF CIN. L. REV. 498 (1928); 76 U. OF PA. L. REV. 110 (1927). Apparently no one has suggested any means of enforcing injunctive relief of the kind here described. If it could be enforced it would conflict with the basic concept of the meaning of a will.

27. Although statements to this effect are quite common they are almost invariably dicta and appear in cases where no decision on the point was called for.

can always be revoked so long as the testator is alive and *sui juris*, and if the will is the only element involved that is the end of the matter whether it be a joint or mutual will or any other type of will. If a contract has been entered into both parties are bound from the moment the bargain is made and neither is privileged to rescind without the concurrence of the other.²⁸ The only proper meaning that can be given to the frequent statement that the parties are free to rescind while both are still alive but that the survivor is bound after the death of the first to die is that while both are living a mutual rescission is possible but that after one has died there can be no mutual rescission because one of the parties is no longer capable of giving his assent.

In the event the promisor dies leaving an inconsistent will or leaving no will at all it cannot be over emphasized that the remedy of the promisee is in contract. The contract cannot be probated as a will nor can it be used to prevent probate of an inconsistent will. The testator's last will is entitled to probate regardless of what contractual arrangements he might have had.²⁹ The remedy of the promisee is through an action on the contract which may be brought in the same way as any other contract action where some future date has been set as the time for performance on one side. The death of the promisor is the event upon which performance by him is due. The promisee may bring an action at law against the personal representative for breach of contract.³⁰

See *Frazier v. Patterson*, 243 Ill. 80, 84-85, 90 N.E. 216, 218 (1909); *Luthy v. Seaburn*, 242 Iowa 184, 190-191, 46 N.W.2d 44, 48 (1951); *Wright v. Wright*, 215 Ky. 394, 400, 285 S.W. 188, 190 (1926); *Edson v. Parsons*, 155 N.Y. 555, 566, 50 N.E. 265, 268 (1898).

28. *Trindle v. Zimmerman*, 115 Colo. 323, 172 P.2d 676 (1946); *Curry v. Cotton*, 356 Ill. 538, 191 N.E. 307 (1934); *Stewart v. Todd*, 190 Iowa 283, 173 N.W. 619 (1919), *modified*, 190 Iowa 296, 180 N.W. 146 (1920); *Brown v. Webster*, 90 Neb. 591, 134 N.W. 185 (1912). *Contra*: *Stone v. Hoskins* [1905] L.R., P.D. 194.

29. *In re Rolls' Estate*, 193 Calif. 594, 226 Pac. 608 (1924); *Manrow v. Deveney*, 109 Ind. App. 264, 33 N.E.2d 371 (1941); *Matter of the Estate of Adkins*, 161 Kan. 239, 167 P.2d 618 (1946); *Sumner v. Crane*, 155 Mass. 483, 29 N.E. 1151 (1892); *Morgan v. Sanborn*, 225 N.Y. 454, 122 N.E. 696 (1919); *Van Vlack v. Van Vlack*, 181 Ore. 646, 182 P.2d 969, *rehearing denied*, 185 P.2d 575 (1947); *Hobson v. Blackburn*, 1 Add. 274, 162 Eng. Rep. 96 (1822); *Pohlman v. Untzellman*, 2 Lee 319, 161 Eng. Rep. 355 (1756). *Contra*: *Walker v. Yarbrough*, 200 Ala. 458, 76 So. 390 (1917); *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909); *Hatcher v. Sawyer*, 243 Iowa 858, 52 N.W.2d 490 (1952).

30. *Ex parte Simons*, 247 U.S. 231 (1918); *Roy v. Pos*, 183 Calif. 359, 191 Pac. 542 (1920); *Strakosch v. Connecticut Trust & Safe Deposit Co.*, 96 Conn. 471, 114 Atl. 660 (1921); *Farrington v. Richardson*, 153 Fla. 907, 16 So.2d 158 (1944); *Gordon v. Spellman*, 145 Ga. 682, 89 S.E. 749 (1916); *Thompson v. Romack*, 174 Iowa 155, 156 N.W. 310 (1916); *Small's Adm'r v. Peters*, 233 Ky. 576, 26 S.W.2d 491 (1930); *Jenkins v. Stetson*, 91 Mass. (9 Allen) 128 (1864); *Cullen v. Woolverton*, 65 N.J.L. 279, 47 Atl. 626 (1900).

The judgment recovered occupies an equal status with other bona fide debts against the estate and must be satisfied before there is anything available for distributees or legatees.³¹ If the property promised consists of specific real estate or unique chattels an action in the nature of specific performance may be maintained to recover the specific property in the same manner as if it had been a contract to sell which had not been fully executed.³² An action in the nature of specific performance will also lie in case of a contract to devise or bequeath all or a specified fractional part of the estate. In such an action the promisee is entitled to all or a fractional part of such property as remains after all outstanding bona fide obligations have been paid but before anything is given to distributees or legatees.³³ The action is in equity since the amount of the recovery depends upon the net value of the estate and the law court has no suitable machinery for the supervision of an estate accounting.³⁴

Here again it should be noted that the relief available depends upon the usual principles of contract law and the fact that the thing bargained for is the making of a will does not within itself give any special significance to the transaction. The substance of the thing agreed upon is the transfer of property to the promisee at the death of the promisor. The remedy granted by the courts seeks either to accomplish that result or to award damages for its failure. The fact that a will was the vehicle through which it was contemplated that the desired result would be achieved is merely incidental.

Since no performance by the promisor is due until the date of his death the period of the statute of limitations will not begin to run

31. Questions of priority have not often been before the courts and clear authority on this point is lacking. What is said here would seem to be the inevitable result from remedy granted in the cases cited in note 29 *supra*. See also Searcy v. Clark, 190 Ark. 1069, 82 S.W.2d 839 (1935) (involving a promissory note payable at death).

32. Fred v. Asbury, 105 Ark. 494, 152 S.W. 155 (1912); Anson v. Haywood, 397 Ill. 370, 74 N.E.2d 489 (1947); Krcmar v. Krcmar, 202 Iowa 1166, 211 N.W. 699 (1927); Legro v. Kelley, 311 Mass. 674, 42 N.E.2d 836 (1942); McDonald v. Scheifler, 323 Mich. 117, 34 N.W.2d 573 (1948); Anding v. Davis, 38 Miss. 574 (1860); Adams v. Moberg, 356 Mo. 1175, 205 S.W.2d 553 (1947); Teske v. Dittberner, 70 Neb. 544, 98 N.W. 57 (1903); Loffus v. Maw, 3 Giff. 592, 66 Eng. Rep. 544 (1862).

33. Lang v. Chase, 130 Me. 267, 155 Atl. 273 (1931); *In re Peterson*, 76 Neb. 652, 107 N.W. 993 (1906); *aff'd and explained on rehearing*, 76 Neb. 661, 111 N.W. 361 (1907); Day v. Washburn, 76 N.H. 203, 81 Atl. 474 (1911); O'Connor v. Immele, 77 N.D. 346, 43 N.W.2d 649 (1950); Estate of Soles, 215 Wis. 129, 253 N.W. 801 (1934).

34. *In re Peterson*, 76 Neb. 652, 107 N.W. 993 (1906), *aff'd and explained on rehearing*, 76 Neb. 661, 111 N.W. 361 (1907).

against the promisee's cause of action until that date.³⁵ This is true even though action on the contract is barred by the Statute of Frauds and the promisee is limited to an action in quantum meruit for the value of the services rendered under the contract and the services were actually completed several years before the promisor died.³⁶ The promisee will not be compelled to bring his action until a performance is actually due. If the action is at law for damages the claim should be filed against the estate within the period set by the usual non-claim statutes.³⁷ If the action is in equity where the claim is not against the estate, but rather a claim to title to property, there appears no reason why the action could not be brought against the heirs or devisees after the expiration of the period for filing claims against the estate.³⁸ Of course it must be assumed that the equitable doctrine of laches would apply here as well as elsewhere.³⁹

If the promisor marries after entering into a contract to devise or bequeath and his spouse survives him and claims dower or a statutory distributive share in his estate an element of uncertainty is introduced. Since an obligation was assumed by the promisor and rights acquired by the promisee prior to the marriage the normal result to expect would be that the right of the subsequent spouse to either dower or distributive share would be subject to the rights of the promisee under the contract.⁴⁰ Application of this reasoning to a contract to dispose of an entire

35. *Troxel v. Childers*, 299 Ky. 719, 187 S.W.2d 264 (1945); *Succession of Oliver*, 184 La. 26, 165 So. 318 (1936); *Ellis v. Berry*, 145 Miss. 652, 110 So. 211 (1926); *Roth v. Roth*, 340 Mo. 1043, 104 S.W.2d 314 (1937); *Poole v. Janovy*, 131 Okla. 219, 268 Pac. 291 (1928); *In re Schoenbachler's Estate*, 310 Pa. 396, 165 Atl. 505 (1933); *Green v. Orgain*, 46 S.W. 477 (Tenn. 1898).

36. *Quirk v. Bank of Commerce & Trust Co.*, 244 Fed. 682 (6th Cir. 1917); *Costello v. Costello*, 134 Conn. 536, 59 A.2d 520 (1948); *Schempp v. Beardsley*, 83 Conn. 34, 75 Atl. 141 (1910); *Poole v. Janovy*, 131 Okla. 219, 268 Pac. 291 (1928); *In re Schoenbachler's Estate*, 310 Pa. 396, 165 Atl. 505 (1933); *Goodloe v. Goodloe*, 116 Tenn. 252, 92 S.W. 767 (1905). *Contra*: *Long v. Rumsey*, 12 Calif. 2d 334, 84 P.2d 146 (1938), *noted*, 27 CALIF. L. REV. 473 (1939); *Estate of Leu*, 172 Wis. 530, 179 N.W. 796 (1920).

37. *Morrison v. Land*, 169 Calif. 580, 147 Pac. 259 (1915); *Grant v. Grant*, 63 Conn. 530, 29 Atl. 15 (1893); *Estate of Leu*, 172 Wis. 530, 179 N.W. 796 (1920).

38. *Fred v. Asbury*, 105 Ark. 494, 152 S.W. 155 (1912); *Furman v. Craine*, 18 Calif. App. 41, 121 Pac. 1007 (1912); *Oles v. Wilson*, 57 Colo. 246, 141 Pac. 489 (1914); *Brickley v. Leonard*, 129 Me. 94, 149 Atl. 833 (1930); *Svanburg v. Fosseen*, 75 Minn. 350, 78 N.W. 4 (1899); *O'Connor v. Immele*, 77 N.D. 346, 43 N.W.2d 649 (1950); *McCullough v. McCullough*, 153 Wash. 625, 280 Pac. 70 (1929).

39. *Young v. Young*, 45 N.J.Eq. 27, 16 Atl. 921 (1889).

40. *Baker v. Syfritt*, 147 Iowa 49, 125 N.W. 998 (1910); *In re Davis' Estate*, 171 Kan. 605, 237 P.2d 396 (1951); *Price v. Craig*, 164 Miss. 42, 143 So. 694 (1932); *Ralyea v. Venners*, 155 Misc. Rep. 539, 280 N.Y. Supp. 8 (Sup. Ct. 1935); *Burdine v. Burdine's Ex'r*, 98 Va. 515, 36 S.E. 992 (1900).

estate would have the effect of disabling a promisor from ever conferring any dower or inheritance rights upon a future spouse. Equity has sometimes denied enforcement of such contracts under these circumstances on the ground that enforcement would be unjust or inequitable to a surviving spouse who was unaware of the contract at the time of the marriage.⁴¹ The same protection has occasionally been extended to the surviving spouse in cases involving specific property⁴² or a legacy of a certain amount.⁴³ It is doubtful if this result is proper or desirable. If it were a contract to convey certain property or to pay a specific sum of money at a stated future date it is clear that no claim of dower or statutory share by a spouse who became such after the formation of the contract could interfere with the promisee's rights. It should be equally clear that a contract to devise or bequeath is likewise a contract for a future transfer which should not be hindered by the claims of an intervening spouse. If the contract is for an entire estate the protection given the subsequent spouse might be justified by the public policy against permanently disabling oneself from conferring a marital property right upon a future wife or husband. The burden of uncertainty thus cast upon the promisee is not an unreasonable one since he contracted for an indefinite quantity which might possibly be reduced to zero before the date of performance in any case, and even if a subsequent spouse does intervene he may still enforce the contract as to all property other than the spouse's share⁴⁴ or he may recover in quantum meruit for the value of the consideration rendered.⁴⁵

A contract to make a will is a contract and the interests created by it must be analyzed according to contract principles. It is a device born out of a social need for which there appears no other satisfactory answer and its skillful use is a responsibility of the legal profession. It is an arrangement for devolution of property but it is materially different from a will in that it is not ambulatory. While a will has no effect until death of the testator and is freely revocable until that time a contract has immediate effect and cannot be rescinded unilaterally without in-

41. *Owens v. McNally*, 113 Calif. 444, 45 Pac. 710 (1896); *Wides v. Wides' Ex'r*, 299 Ky. 103, 184 S.W.2d 579 (1944); *Van Duyne v. Vreeland*, 12 N.J.Eq. (1 Beasley) 142 (1856).

42. *Ver Standig v. St. Louis Union Trust Co.*, 344 Mo. 880, 129 S.W.2d 905 (1939).

43. *In re Hoyt's Estate*, 174 Misc. Rep. 512, 21 N.Y.S.2d 107 (Surr. Ct. 1940).

44. *Wides v. Wides' Ex'r*, 299 Ky. 103, 184 S.W.2d 579 (1944); *Ver Standig v. St. Louis Union Trust Co.*, 344 Mo. 880, 129 S.W.2d 905 (1939).

45. *See Owens v. McNally*, 113 Calif. 444, 454, 45 Pac. 710, 713 (1896).

curing a liability for breach of contract. A contract to make a will is not a proper instrument to use unless the promisor is ready to make a final and irrevocable commitment for the disposition of his property, but if it is always understood as an arrangement of this type it can be a useful tool in every estate planner's kit. There are many circumstances under which it is the only suitable means of providing for care of the aged or of infants, making family settlements, arranging for property dispositions upon divorce or separation, providing for certain types of business planning, and meeting many other everyday needs.