

Memorandum 81-61

Subject: Study L-603 - Probate Code (Contract Concerning a Will)

GENERAL U.S. LAW

Under general U.S. common law in the absence of statute, the validity of a contract to make a will or not to revoke a will is determined under ordinary rules of contract law. T. Atkinson, Handbook of the Law of Wills § 48, at 210-11, § 49, at 224 (2d ed. 1953). Such contracts may be within the Statute of Frauds, so that promises to devise realty, or realty and personalty together, must be in writing (subject to equitable exceptions such as estoppel). Id. § 48, at 214. Promises to bequeath personalty generally may be oral. Id. When the promise is oral, the courts generally require clear and convincing proof of the contract. See 79 Am. Jur.2d Wills § 384 (1975).

With respect to a contract not to revoke a will, litigation arises most frequently in the context of joint, mutual, or joint and mutual wills. See T. Atkinson, supra § 49, at 222-27. (A joint will is a single instrument containing two or more wills; mutual wills are separate wills having reciprocal provisions; a joint and mutual will is a joint will having reciprocal provisions. 7 B. Witkin, Summary of California Law Wills and Probate § 93, at 5610-11 (8th ed. 1974).) If a joint, mutual, or joint and mutual will is accompanied by a separate contract not to revoke, the validity of the contract is, like a contract to make a will, determined according to ordinary contract law. If there is no separate contract, some courts have nonetheless indicated that the mere fact that a will is joint permits an inference of an agreement not to revoke. T. Atkinson, supra § 49, at 226.

Occasionally a case will arise where the agreement is to refrain from disposing of property by will so that the property will descend according to the laws of intestacy. See 79 Am. Jur.2d Wills § 63 (1975). The cases are divided on the question of whether such an agreement is subject to the Statute of Frauds. See id.

CALIFORNIA LAW

Application of Statute of Frauds

California law with respect to contracts to make or not to revoke a will is more restrictive than general U.S. law, since California includes all such contracts within the Statute of Frauds, even where all of the property is personalty. See *Zaring v. Brown*, 41 Cal. App.2d 227, 231, 106 P.2d 224 (1940). The California Statute of Frauds (Civil Code § 1624) provides in pertinent part as follows:

1624. The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:

. . .

(6) An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will.

In general, therefore, a contract to make a will or not to revoke a will must be in writing; if oral such an agreement is generally unenforceable. *Notten v. Mensing*, 3 Cal.2d 469, 473, 45 P.2d 198 (1935); 1 B. Witkin, *Summary of California Law Contracts* § 223, at 197 (8th ed. 1973); 7 B. Witkin, *Summary of California Law Wills and Probate* § 94, at 5611 (8th ed. 1974). There are no California cases concerning an agreement to die intestate.

Ameliorative Rules to Avoid Strict Application of the Statute of Frauds

A number of rules have been developed to avoid the harshness that would be caused by a strict application of the Statute of Frauds:

Relation back of writing. Under general California contract law, the written memorandum is not the contract, but is merely evidence of its terms; the oral agreement is the contract. Hence, an oral agreement which is unenforceable when made may become enforceable if a written note or memorandum is later made. 1 B. Witkin, *supra* § 205, at 186. The same rule applies with respect to a contract concerning a will. See *Potter v. Bland*, 136 Cal. App.2d 125, 131, 288 P.2d 569 (1955).

Parol evidence. Under general contract law, parol evidence is frequently admitted to supply terms missing from the writing. 1 B. Witkin, *supra* §§ 207-08, at 189. The same is true with respect to a

contract concerning a will: Oral testimony is admissible concerning points on which the written agreement is silent, so long as the testimony does not contradict the writing. *Potter v. Bland*, supra at 132.

Part performance (real property). Under general contract law, the court may compel specific performance of an oral agreement to convey an estate or interest in real property when the agreement has been partly performed. Code Civ. Proc. §§ 1971, 1972; 1 B. Witkin, supra § 247, at 214. The typical part performance consists of taking possession or making substantial improvements on the property. 1 B. Witkin, supra § 248, at 215. However, where the oral promise is to make a will leaving property to a person who performed personal services for the promisor, the courts have declined to apply the doctrine of part performance to take the agreement out of the Statute of Frauds. See, e.g., *Shive v. Barrow*, 88 Cal. App.2d 838, 848, 199 P.2d 693 (1948); *Luders v. Security Trust & Savings Bank*, 121 Cal. App. 408, 410-13, 9 P.2d 271 (1932). Similarly, the courts have held that the execution of mutual wills, the death of one of the makers, and the acceptance of the benefits under such a will by the other, does not constitute a sufficient part performance to take the case out of the Statute of Frauds. See, e.g., *Notten v. Mensing*, 3 Cal.2d 469, 474, 45 P.2d 198 (1935). However, the courts have reached the result sought by the promisee by applying the estoppel doctrine, discussed next.

Estoppel to plead the Statute of Frauds. Under general contract law, if the defendant by words or conduct represents that he or she proposes to stand by the oral contract, and the plaintiff changes position in reliance on the representation, the defendant will be estopped to set up the bar of the Statute of Frauds. 1 B. Witkin, supra § 250, at 217. With respect to a contract concerning a will, the courts have applied the estoppel doctrine both in the case where the oral promise is to make a will, and where the promise is not to revoke a will. In *Walker v. Calloway*, 99 Cal. App.2d 675, 222 P.2d 455 (1950), the decedent had persuaded the plaintiff, a former wife of his, to move to California from her home in Michigan to care for him in his last illness (cancer) in return for his oral promise to leave her his property by will. Noting the disagreeable nature of the services the plaintiff gave the decedent, the court held she was entitled to have the oral promise

enforced by constructive trust. And, in the context of mutual wills, the court has held that if two people execute mutual wills and orally agree not to revoke them, one of them dies, the survivor accepts the benefits under the decedent's will, and then the survivor revokes his or her own will, a constructive fraud sufficient to raise an estoppel has been practiced, and equity will enforce a constructive trust on the property. *Notten v. Mensing*, 3 Cal.2d 469, 45 P.2d 198 (1935); see *Daniels v. Bridges*, 123 Cal. App.2d 585, 589, 267 P.2d 343 (1954); *Potter v. Bland*, 136 Cal. App.2d 125, 132-33, 288 P.2d 569 (1955).

Oral express trust. In some cases, the courts have enforced an oral promise to leave property by will by finding an oral express trust: In *Maddox v. Rainoldi*, 163 Cal. App.2d 384, 329 P.2d 599 (1958), the promisor had agreed to hold real property in trust for the common use of the plaintiffs and herself during her lifetime, with title to vest in her daughter (one of the plaintiffs) on her death. Plaintiffs had made substantial improvements on the real property in reliance on the oral declarations of the promisor. The court held that this was sufficient to take the oral declaration of trust out of the Statute of Frauds.

Quantum meruit. If the court cannot find sufficient basis to award to the plaintiff the property in the decedent's estate which was promised to be left by will under one of the above theories (relation back of writing, parol evidence to supply missing terms, part performance of agreement concerning real property, estoppel to plead the Statute of Frauds, or oral express trust), the court may nonetheless award the plaintiff the reasonable value of services rendered to the decedent (quantum meruit) in return for an unenforceable promise by the decedent to leave property to the plaintiff by will. *Drvol v. Bant*, 183 Cal. App.2d 351, 356-57, 7 Cal. Rptr. 1 (1960). See generally 1 B. Witkin, *supra* § 49, at 60, § 223, at 198, § 259, at 225.

No Inference of Contract Not to Revoke From Joint or Mutual Will

Unlike general U.S. law (discussed above), California does not infer a contract not to revoke from the fact that a will is joint, mutual, or joint and mutual: "The mere fact that a joint will contains reciprocal, or similar or identical, provisions is not of itself sufficient evidence of a contract, nor is it enough to establish a legal

obligation to forbear revocation in the absence of a valid contract." Daniels v. Bridges, 123 Cal. App.2d 585, 589, 267 P.2d 343 (1954) (joint will). Accord, Lich v. Carlin, 184 Cal. App.2d 128, 133, 7 Cal. Rptr. 555 (1960) (mutual wills).

Clear and Convincing Proof

Under California law as under U.S. law generally, clear and convincing evidence is required to prove an oral contract concerning a will. Notten v. Mensing, 3 Cal.2d 469, 477, 45 P.2d 198 (1935); Lynch v. Lichtenthaler, 85 Cal. App.2d 437, 441, 193 P.2d 77 (1948).

UNIFORM PROBATE CODE PROVISIONS

The Uniform Probate Code deals with contracts concerning wills in Section 2-701:

§ 2-701 UNIFORM PROBATE CODE Art. 2

PART 7

CONTRACTUAL ARRANGEMENTS RELATING TO DEATH

(See also Article VI)

Section 2-701. [Contracts Concerning Succession.]

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this Act, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

COMMENT

It is the purpose of this section to tighten the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to much litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a presumption that the parties had contracted not to revoke the will except by consent of both.

This section requires that either the will must set forth the ma-

terial provisions of the contract, or the will must make express reference to the contract and extrinsic evidence prove the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract. Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence.

As appears from the UPC Comment, Section 2-701 is intended to tighten two common law rules concerning contracts to make or not to revoke a will:

(1) The general U.S. rule that an oral agreement is enforceable if only personalty is involved would be tightened under the UPC, which provides that an oral agreement is enforceable only if the will makes express reference to it. However, California does not follow the general U.S. rule permitting an oral contract to bequeath personalty; under California law, such contracts are within the Statute of Frauds. Hence, the UPC would not tighten this aspect of California law. The UPC requirement of a "reference in the will" to the contract is probably roughly the same as the "note or memorandum" requirement of California law, since the California decisions have been fairly liberal in finding the note or memorandum sufficient even though lacking in certain material elements. See *Potter v. Bland*, 136 Cal. App.2d 125, 129-32, 288 P.2d 569 (1955) (will contained statement following attestation clause saying "I agree to leave my property upon my death as provided in this will"); 1 B. Witkin, supra § 207, at 189. See also *Notten v. Mensing*, 3 Cal.2d 469, 473-74, 45 P.2d 198 (1935) (a will which does not refer to the oral agreement does not constitute a note or memorandum sufficient to satisfy the Statute of Frauds); *Shive v. Barrow*, 88 Cal. App.2d 838, 848, 199 P.2d 693 (1948) (same).

(2) The rule of some jurisdictions that a contract not to revoke may be inferred from the mere fact that a will is joint would seemingly be eliminated under the UPC, although the UPC provides for no "presumption" rather than no "inference." This provision of the UPC would not change California law; California law is consistent with the UPC provision.

Does the UPC Eliminate the Various Exceptions to the Statute of Frauds?

In its 1973 critique of the UPC, the State Bar expressed concern that enactment of UPC Section 2-701 in California might overturn the various remedial doctrines by which the California courts have softened the impact of the Statute of Frauds:

[S]ituations develop where a party to an oral contract substantially or fully performed his part of the bargain that have led to exceptions to the rule requiring a written contract. Moreover, the

equitable remedy of quantum meruit has been used by the courts to give relief to persons to an alleged contract that was not reduced to writing. The adoption of UPC 2-701 may have the effect of eliminating these equitable remedies.

State Bar of California, The Uniform Probate Code: Analysis and Critique 55 (1973). (It should be noted that the doctrine of substantial performance is limited to contracts concerning real property. See discussion above.) The Joint Editorial Board for the UPC responded to this criticism by saying:

The argument is hard to follow. 2-701 is a form of statute of frauds. It is not clear why it should present any greater impediment to quantum meruit relief than California's present statute of frauds.

Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board 17 (1974).

However, although the Joint Editorial Board notes that UPC Section 2-701 "is a form of statute of frauds," the Joint Editorial Board stops short of saying that all of the ameliorative doctrines under the Statute of Frauds such as estoppel will be preserved under the UPC section. Other material published concerning the UPC seems to suggest that such doctrines may well be eliminated under the UPC:

Clearly, this provision [UPC Section 2-701] is intended to substantially limit the proof of succession contracts and to wash away all of the authority and decisions dealing with the application of the Statute of Frauds and its exceptions. As with the adoption of any new formalistic requirement, the expectations of some persons will be destroyed. Considering that one of the parties to the contract is no longer available to testify, however, it would appear to be good public policy to require some form of written evidence that the contract actually exists. In addition, the limitations themselves leave adequate room for the courts to develop reasonable interpretation of the requirement so that harm will not be caused to a substantial number of persons. The terms "material provisions" and "evidencing" and the admissibility of extrinsic evidence where the will makes reference to the contract are three concepts in the provision which give the courts adequate leeway.

L. Averill, Uniform Probate Code in a Nutshell § 11.01, at 115 (1978). See also ALI-ABA Committee on Continuing Professional Education, Uniform Probate Code Practice Manual 144 (2d ed. 19__) ("The usual statute of frauds has not proved an effective control over oral contracts. The

[Uniform Probate] Code, therefore, has a special section intended to tighten the methods by which contracts concerning succession may be proved.").

POLICY DECISION FOR COMMISSION

The Uniform Probate Code section relating to contracts concerning a will presents a policy issue of some significance. The issue might be resolved in a number of ways, including any of the following:

(1) Adopt the Uniform Probate Code section as drafted by the Uniform Commissioners. This would further the purpose of uniformity and would provide a more detailed statutory statement than the present Statute of Frauds provision. It is likely that the remedy of the person who benefits from an oral promise to make a will, not to revoke a will, or to die intestate, would be limited to restoration of the consideration given for the promise or recovery of the reasonable value of the services rendered pursuant to the promise. In other words, it is likely that the person would not recover the benefit of the contract (enforcement of the oral promise) unless the statutory requirement of a writing is satisfied. However, it is not entirely clear that the Uniform Code provision will be so limited, and a court might find an estoppel to envoke the provisions of the UPC section in an action to enforce the oral promise.

(2) Adopt the Uniform Probate Code section but add a provision that the section is to be interpreted as other Statute of Frauds provisions are interpreted. There is analogous California legislation that takes this approach. Code of Civil Procedure Section 1974 (providing that no evidence is admissible to charge a person upon a representation as to the credit of a third person unless such representation is in writing) includes a provision: "This section is a Statute of Frauds provision and is to be applied in a manner that is consistent with the manner in which [the Civil Code Statute of Frauds provision] is applied." This choice would provide a better statutory statement in the Probate Code of the law relating to contracts concerning wills but would assure that the person to whom the oral promise concerning the will was made could obtain the benefit of the bargain on an estoppel theory. The disadvantage of this choice is that it departs from the UPC language and makes case law in other states under the UPC section of no value in California.

(3) Adopt the Uniform Probate Code section but add a provision reading in substance: "Nothing in this section precludes the court in the interest of equity from requiring the restoration of the consideration given for a promise, or requiring payment of the reasonable value of services performed in consideration of a promise, to make a will, not to revoke a will, or to die intestate." This alternative would have the benefit of using the detailed language of the UPC to state the basic rule, and would make clear that the person to whom the promise was made may obtain restitution or recover the reasonable value of services. (The Comment would make clear that the person to whom the promise was made cannot recover the benefit of the bargain by enforcing the oral agreement on an estoppel theory.) The disadvantage of this choice is that it changes existing California law and departs from the UPC language.

(4) Omit the UPC section and leave the matter to the existing California statutory and case law. This choice would leave unchanged the incomplete statutory provision (found in the Statute of Frauds section of the Civil Code, not the Probate Code) in effect, would require that existing California case law (which has not yet dealt with the case of an agreement to die intestate) be used to interpret the statutory provision, and would require court decisions to deal with problems not resolved by existing case law.

Respectfully submitted,

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