

Mutual wills enforceable upon repudiation during recalcitrant promisor's lifetime

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IV. CONTRACT LAW

A. *Mutual Wills Enforceable Upon Repudiation During Recalcitrant Promisor's Lifetime*

Courts generally recognize mutual agreements to dispose of property by will as valid contracts.¹ In *Thompson v. Thompson*,² the Supreme Court of Rhode Island considered whether an oral agreement between spouses for mutual wills could be enforced upon repudiation during the breaching promisor's lifetime.³ Applying principles of contract law to the alleged agreement to devise property by will, the court held the mutual agreement enforceable upon repudiation *prior* to the death of the surviving but recalcitrant promisor who breached the contract.⁴

On October 12, 1973, Dr. Edward Thompson (Edward) executed a will pursuant to an oral agreement with his third wife, Virginia Thompson (Virginia).⁵ The agreement provided that Virginia would place all the estate's assets, as well as her own, in a trust fund from which she would receive the income of the trust and trustee-approved portions of the principal, with the remainder to be distributed upon her death among Edward's four children.⁶ Edward died testate, predeceasing Virginia, who failed to create a trust for the assets from Edward's estate.⁷

Alexander Thompson (Alexander), Edward's son, brought an action in his capacities as beneficiary and administrator of Edward's estate.⁸ Alexander alleged, *inter alia*, that Virginia breached the oral agreement with Edward to execute mutual wills requiring her to create a trust fund for her benefit while living with the remainder to be distributed

1. See, e.g., *Ex parte Simons*, 247 U.S. 231, 239 (1918) (contracts to make provisions by will valid and enforceable); *Brewer v. Simpson*, 53 Cal. 2d 567, 585, 349 P.2d 289, 297, 2 Cal. Rptr. 609, 617 (1960) (will constitutes true written memorandum of oral agreement); *Teske v. Dittberner*, 70 Neb. 544, 544, 98 N.W. 57, 57 (1903) (promise to devise property sufficient agreement).

2. 495 A.2d 678 (R.I. 1985).

3. *Id.* at 679.

4. *Id.* at 681-82.

5. *Id.* at 679-80.

6. *Id.* at 679.

7. *Id.* at 679-80. Edward died eleven days after executing his will. *Id.* at 679. When Edward executed the will, his attorney informed him that most assets were held jointly with Virginia and would pass to her independently of the will, leaving no assets with which to fund the trust. *Id.* at 679-80. The court found that no trust had been established, and it could not determine precisely what happened in the probate of Edward's estate. *Id.*

8. *Id.* at 679. Alexander commenced this action in 1978, five years after Edward's death. *Id.*

to Edward's children upon her death.⁹ The superior court dismissed the action for failure to state a claim upon which relief could be granted, reasoning that Alexander's claim ripened only when Virginia died without performing her obligations under the agreement.¹⁰ The Rhode Island supreme court vacated the lower court's decision, holding that an oral contract to dispose of property by will constitutes an enforceable agreement upon the promisor's repudiation, rather than upon the promisor's death.¹¹

The majority of courts recognize contracts to dispose of property by will as valid, provided the requisites for enforceable contracts are met.¹² Most courts, however, view agreements of this nature with caution, requiring clear and convincing proof of their existence.¹³ In

9. *Id.* at 679-80. Alexander alleged that Edward executed his will pursuant to an oral contract to make wills in favor of the other spouse, that Virginia failed to establish the trust and/or execute the will as agreed, that Virginia wrongfully converted assets belonging to the estate, that Edward fully performed his part of the agreement, and that Virginia was likely to use and possibly conceal assets. *Id.* at 680. Virginia denied the existence of an oral agreement and counterclaimed seeking damages for harassment and humiliation resulting from the complaint. *Id.* Alexander sought a declaratory judgment of the parties' rights, an injunction, an accounting, specific performance of the oral agreement, and imposition of a trust for the beneficiaries. *Id.*

10. *Id.* at 680. The superior court granted Virginia's motion to dismiss pursuant to Rhode Island Superior Court Rule 12(b)(6), holding the claim lacked justiciability until Virginia, the promisor, died without performing the contract. *Id.*

11. *Id.* at 682. The court remanded the case to determine whether the complaint sufficiently alleged a repudiation. *Id.*

12. See, e.g., *Ex parte Simons*, 247 U.S. 231, 239 (1918) (contracts to make provisions by will valid in accord with law of England); *Daniels v. Aharonian*, 63 R.I. 282, 289, 7 A.2d 767, 770 (1939) (contract must first satisfy all requirements of contract formation before court may remediate); *Spencer v. Spencer*, 25 R.I. 239, 241, 55 A. 637, 637 (1903) (agreement upheld to dispose of property by will); see also *Johnson v. Starr*, 321 Mass. 566, 569, 74 N.E.2d 137, 139 (1947) (defendant's promise to devise certain property in will enforceable); *Duval v. Duval*, 54 N.J. Eq. 581, 588-89, 35 A. 750, 753 (1896) (contract for services and property by devise enforceable); *Lawton v. Thurston*, 46 R.I. 317, 318, 128 A. 199, 199 (1925) (agreement to dispose of property by will valid and enforceable). See generally 1 BOWE-PARKER, PAGE ON WILLS §§ 10.1-.4 (1960 & Supp. 1985) (one may agree to bind oneself to reasonable testamentary disposition); B. SPARKS, CONTRACTS TO MAKE WILLS 1-5 (1956) (proposition of validity of contract to leave property at testator's death accepted as early as 1682).

Such contracts were in use from the beginning of common law and require an offer, acceptance, and consideration. *Id.* See *Richardson v. City Trust Co.*, 27 F.2d 35, 38 (7th Cir. 1928) (contract to make will valid upon consideration received). See generally RESTATEMENT (SECOND) OF CONTRACTS § 1 and comments (1981) (contract is promise for which law gives remedy upon breach).

13. See, e.g., *Ex parte Simons*, 247 U.S. 231, 239 (1918) (contracts for wills must be approached with great caution in matters of proof); *Pohle v. McAleer*, 78 R.I. 512, 516, 82 A.2d 869, 871 (1951) (contracts to make wills viewed with suspicion, requiring proof by clear and convincing evidence); *Baumgartner v. Seidel*, 75 R.I. 243, 247, 65 A.2d 697, 698-99 (1949) (clear convincing evidence necessary to prove oral contract to make will since testator dead and cannot testify). See generally B. SPARKS, *supra* note 12, at 24-26 (contracts to make wills

construing oral contracts for the devise of real property, courts also carefully determine whether the agreement is within the statute of frauds or one of its exceptions.¹⁴

Although courts agree that rules for construing contracts to make wills are similar to those for construing contracts in general, they disagree on whether an action accrues during the lifetime of the promisor who breached the agreement.¹⁵ A minority of jurisdictions hold that an action accrues only upon the promisor's death since breach cannot be assured so long as the promisor lives.¹⁶ The general rule, however, recognizes an action upon the promisor's repudiation, since this prevents breaching parties from benefitting from their wrongs and allows promisees prompt adjudication of contractual responsibilities.¹⁷

In determining whether an oral agreement for mutual wills may be enforced during the breaching promisor's lifetime, the Rhode Island supreme court first recognized the validity of agreements to dispose of property by will.¹⁸ Reasoning that there is no difference in principle

require higher degree of evidence than that required to sustain other contracts). The policy consideration for this standard of proof is to discourage temptation to set up false claims against a decedent's estate after the decedent's opportunity to refute such claims is past. *Id.*

14. See *Lambert v. Lambert*, 82 R.I. 166, 170-71, 106 A.2d 729, 731 (1954) (agreement taken out of statute of frauds where complainant completed performance which referred exclusively to contract); *Baumgartner v. Seidel*, 75 R.I. 243, 246, 65 A.2d 697, 699 (1949) (complainant sufficiently performed to take agreement out of statute of frauds). See generally R.I. GEN. LAWS § 9-1-4 (1969) (statute of frauds requires contracts beyond one year or those involving real property to be in writing and signed by party to be charged); *BOWE-PARKER*, *supra* note 12, at § 10.13 (exceptions to statute of frauds exist including doctrine of part performance); *SPARKS*, *supra* note 12, at 41 (provision exists in statute of frauds against oral contracts for transfer of title to real estate).

15. See *BOWE-PARKER*, *supra* note 12, at §§ 10.20-21 (authorities disagree on whether promisee may enforce contract upon breach during promisor's lifetime). Compare *Ex parte Simons*, 247 U.S. 231, 239 (1918) (contract to make will, as with other contracts, gives rise to action at time of breach) and *Lovett v. Lovett*, 87 Ind. App. 42, 42, 157 N.E. 104, 104 (1927) (action lies during lifetime of promisor who repudiates contract to make will) with *Wold v. Wold*, 138 Minn. 409, 414-15, 165 N.W. 229, 231 (1917) (contract to devise property is continuing in nature, not setting in motion statute of limitations) and *Harmon v. Aughtry*, 226 S.C. 371, 375, 85 S.E.2d 284, 285 (1955) (action for breach of contract ordinarily accrues at death of promisor since breach cannot be assured so long as promisor lives).

16. See *Wold v. Wold*, 138 Minn. 409, 414-15, 165 N.W. 229, 231 (1917) (contract to devise continuous in nature and does not set statute of limitations in motion); *Harmon v. Aughtry*, 226 S.C. 371, 375, 85 S.E.2d 284, 285 (1955) (action for breach accrues only at death of promisor).

17. See, e.g., *Ex parte Simons*, 247 U.S. 231, 239 (1918) (action on contract to make will arises upon breach); *Osborn v. Hoyt*, 181 Cal. 336, 340, 184 P. 854, 856 (1919) (court rejected contention that suit prematurely commenced upon repudiation); *Old Ladies Home Ass'n v. Hall*, 212 Miss. 67, 80, 52 So. 2d 650, 655 (1951) (general rule does not require promisee to wait until promisor's death).

18. 495 A.2d at 681. The court held that the defendant's motion to dismiss was improperly granted, and Alexander's claim, if proven, would entitle him to relief in equity. *Id.*

between contracts to be performed in life or at death and that the statute of frauds does not prohibit enforcement where one party completed performance referable exclusively to the contract, the *Thompson* court found the oral contract supported by consideration and within the statute of frauds once Edward fully performed his part of the agreement.¹⁹ The court further reasoned that by allowing an action to commence upon the promisor's repudiation of the contract, the law protects the promisor and the potential beneficiary of the alleged agreement by ensuring timely adjudication of the promisor's contractual responsibilities.²⁰ Citing decisions from other jurisdictions, the Rhode Island supreme court held that a mutual agreement to dispose of property by will is enforceable once the promisor repudiates the contract, notwithstanding that the promisor remains alive.²¹

Applying principles of contract law, the *Thompson* court wisely adopted a rule allowing timely adjudication of a breach since it better protects the beneficiary's interests and the testator's intentions.²² Had the court held otherwise, a promisor could remain in breach for a lifetime, successfully avoiding all contractual responsibilities.²³ Instead, the rule is consistent with well-settled contract law allowing for timely adjudication upon a party's repudiation of a binding agreement.²⁴

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19. *Id.*

20. *Id.* at 682.

21. *Id.* at 681-82; see *Richardson v. City Trust Co.*, 27 F.2d 35, 38 (7th Cir. 1928) (written agreement to make will valid upon consideration, enforceable upon repudiation, even during promisor's life); *Old Ladies Home Ass'n v. Hall*, 212 Miss. 67, 81, 52 So. 2d 650, 655 (1951) (promisee could elect to pursue claim either upon promisor's repudiation or upon his death); *Harmon v. Aughtry*, 226 S.C. 371, 375, 85 S.E.2d 284, 285-86 (1955) (ordinarily no claim accrues until promisor's death, but exception may exist in case of repudiation).

22. 495 A.2d at 682. The court opined that the repudiating party receives a timely adjudication of contractual obligations and the beneficiary protects the estate's assets. *Id.*

23. *Id.* at 682. The court found that in the event of a repudiation, if the promisee is forced to wait until the promisor dies before maintaining an action, the promisor has effectively avoided the contract. *Id.*; see *supra* note 15 and accompanying text (discussing approaches to issue of time of repudiation).

24. See 495 A.2d at 680-82 (claim actionable upon promisor's repudiation of contract even if promisor living); *supra* note 17 and accompanying text (discussing general rule); see also *Spencer v. Spencer*, 25 R.I. 239, 240-41, 55 A. 637, 637-38 (1903) (obligation and liability for contracts same for those to be performed in life or at death).