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# Contracts to Devise Real Property

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# COMMENTS

## CONTRACTS TO DEVISE REAL PROPERTY

Contracts to devise real property are frequently entered into and are generally held to be a valid mode of transferring realty.[1]

[1]In Schirmer v. Nethercutt, 157 Wash. 172, 288 Pac. 265 (1930), the court said at p. 179: "We have had many cases where agreements to bequeath or devise personal and real property to a favored beneficiary have been upheld. There is nothing illegal or against public policy in such contracts."

Also, in Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773 (1855), the court said: "The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by conveyance, to be made at some specified future period, or upon the happening of some future event."

Very properly the courts view such contracts with suspicion,[2] especially when orally made.

In order to prove the contract to devise real property some states require that it be in writing, otherwise it will be deemed void.[3] But the majority of courts are not so strict and an oral contract if adequately proven is satisfactory. However, in proving oral contracts some states require that the contract be proven "independent of the performance"[4] while other courts including Washington are more liberal and admit evidence of performance, or change of position by the promisee as an element of proving the contract itself.[5] The intention of the promisor to contract may be shown either by acceptance of services of the promisee by the deceased promisor, or by any conduct indicating that he presently binds himself to devise or transfer title to the real property in question to the promisee, or simply by conversations of the deceased promisor with disinterested witnesses (an extremely liberal view).[6] The major problem arises when the contract rests in parole, as most often is the case, and the requirements of the Statute of Frauds[7] are encountered.

In Washington the Statute of Frauds does not bar recovery under an oral contract to devise real property if there has been part performance. In fact, in enforcing such a contract our court declared in 1921:

> "This court has more than once held that an oral contract of the character here mentioned is enforcible notwithstanding the Statute of Frauds, if there has been full or partial performance. In fact that question seems to be so well settled in this court that we deem it unnecessary to do more than cite some of the cases."[8]

In the earlier decisions, the Washington Court required that performance be rendered by both the promisor and the promisee.[9] Whatever may have been the early theory requiring such performance by both parties, modernly, the court has held generally that performance by the promisee alone is sufficient to take the contract out of the Statute of Frauds.[10] "Performance" by the promisor (which, in the main, could consist only of the execution of a will) does not alone take the contract out of the Statute of

[2]Henry v. Henry, 138 Wash. 284, 244 Pac. 686 (1926).

[3]Chandler v. Baker, 191 Mass. 579, 78 N. E. 387 (1906); Trout v. Ogilvie, 41 Cal. App. 167, 182 Pac. 333 (1919) (by amendment to the Code of Civil Procedure of 1905).

[4]Salem v. Finney, 215 N. Y. S. 553 (1926).

[5]Velekanje v. Dickman, 98 Wash. 584, 168 Pac. 465 (1917).

[6]Avenetti v. Brown, 155 Wash. 517, 291 Pac. 469 (1930).

[7]REM. REV. STAT. § 5825; see also Eidinger v. Mamlock, 138 Wash. 276, 244 Pac. 684 (1926) at p. 282.

[8]In an opinion by Judge Bridges in Andrews v. Andrews, 116 Wash. 513, 199 Pac. 981 (1921) the court citing Velikanje v. Dickman, 98 Wash. 584, 168 Pac. 465 (1917), Alexander v. Lewes, 104 Wash. 32, 175 Pac. 572 (1918), Worden v. Worden, 96 Wash. 592, 165 Pac. 501 (1917), Swash v. Sharpenstein, 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796 (1896).

[9]Swash v. Sharpstein, 14 Wash. 426, 44 Pac. 862 (1896), at p. 435: "The rule seems to be well settled that to enforce a parol contract to make a will there must have been at least some substantial thing done by the testator in his lifetime in pursuance of that contract."

[10]See cases in note 39, *infra*.

Frauds.[10a] The "full or partial performance" which is deemed necessary to "satisfy" the Statute of Frauds may consist of special services which are not compensable in money, such as nursing and caring for the promisor with services of a unique nature[11], or services of a relative[12] combined with love and affection for the promisor. Such services are alone sufficient performance to support the validity of an oral contract to devise realty in Washington.

The strict rule of sufficient part performance requires possession of the property to be devised in addition to the services rendered.[13] And such possession must be exclusively referable to the contract, and occasioned by the contract. In Washington, however, following the liberal rule, there need be no possession of the property promised,[14] although possession of the land is a factor strongly in favor of the promisee.[15] Joint possession of the premises by the promisor and the promisee is sufficient.[16]

Performance of the oral agreement might also be made, not with services, but by a change in the status quo of the promisee or the assumption of a relation with the promisor different from that which ordinarily exists in the absence of a contract.[17] Thus in *Velikanje v. Dickman,* Judge Ellis said:

[10a]McClanahan v. McClanahan, 77 Wash. 138, 137 Pac. 479 (1913), at p. 143: "The making of a will in pursuance of a contract required by the Statute of Frauds to be evidenced by a writing, did not constitute a part performance of such contract so as to render the same enforcible." See also In re Edwall's Estate, 75 Wash. 391, 134 Pac. 1041 (1913).

[11]In a note on the subject in 69 A. L. R. 14, it is stated at p. 146: "According to the great weight of authority, where it appears that the promisee in a contract of the kind under consideration occupies some peculiar relation to the promisor, or because of the latter's physical or mental condition the services performed were of a kind the value of which could not be fairly estimated according to any pecuniary standard, the contract whether oral or written will be specifically enforced if it is otherwise equitable."

Services of nursing a sick man, and massaging him at odd hours of the day and night and doing other "menial and disgusting tasks" were considered as such services which "were not measurable in money" in Velikanje v. Dickman, *supra;* see also Olsen v. Hoag, 128 Wash. 8, 221 Pac. 984 (1924).

[12]In McCullough v. McCullough, 153 Wash. 625, 280 Pac. 70 (1929), the plaintiff was a grandniece of the promisor and was allowed to recover under an oral contract to devise real property. Plaintiff's only services were to allow the promisor to "bring her up as her own daughter".

Other Washington cases where a relative was involved include: Alexander v. Lewes, 104 Wash. 32, 175 Pac. 572 (1918); Avenetti v. Brown, 58 Wash. 517, 291 Pac. 469 (1930).

[13]Leading case: Burns v. McCormick, 233 N. Y. 230, 135 N. E. 273 (1922).

[14]"Possession of the property is not a requisite where the consideration was personal care and services not measurable in money." Velikanje v. Dickman, *supra* n. 5 at p. 595.

[15]In Worden v. Worden, 96 Wash. 592, 165 Pac. 501 (1917), the court in reversing the lower court said: "It has been held that the taking of possession and making improvements under an agreement for the devise of certain land in consideration of caring for the owner until his death, is an enforcible contract."

See also note in 69 A. L. R. at page 139 (1930).

[16]Lautenschlager v. Smith, 155 Wash. 328, 284 Pac. 87 (1930); Slavin v. Ackman, 119 Wash. 48, 204 Pac. 816 (1922); Alexander v. Lewes, *supra.*

[17]69 A. L. R. 133.

"To refuse to enforce it (the contract) would work a hardship on the boy who has abandoned his contemplated scheme of life by reason of the old man's promises."[18]

Since the courts view oral agreements to devise real property with caution and suspicion, the promisee must present "proof of the most convincing nature to establish such an agreement".[19] The Washington court requires proof "beyond a reasonable doubt";[20] or "beyond all controversy"[21] (if there be any distinction). One Washington case[22] held that the same degree of evidence is not required when there is an ineffectual will made in accordance with an oral contract. But subsequent Washington cases involving similar "ineffectual" wills require evidence "beyond all reasonable doubt".[23]

A written memorandum would, of course, take the contract out of the Statute of Frauds if it qualified as a proper memorandum. Some courts have allowed a revoked and hence unenforcible will setting forth the devise of the promised real property, to come in as a sufficient memorandum of the oral contract.[24] But Washington, following the more general rule, refuses to allow a revoked will to constitute a memorandum of the contract,[25] nor can the making of a will, subsequently revoked, constitute, of itself, part performance of the oral contract to evade the Statute of Frauds,[26] but the Washington court has held that a revoked will is "strong confirmatory proof that the alleged oral contract was entered into."[27]

When the contract is in writing the confusion engendered by the Statute of Frauds in oral contract cases is replaced by other difficulties. Thus, in the recent hearings of the case of *Y. M. C. A. v. Murphy*[28] the court was perplexed by a written instrument

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[18]Velikanje v. Dickman, *supra* note 5 at p. 497.

[19]Eidinger v. Mamlock, 138 Wash. 276, 244 Pac. 684 (1926).

[20]Alexander v. Lewes, 104 Wash. 32, 175 Pac. 572 (1918).

[21]Lohse v. Spokane & Eastern Trust Co., 170 Wash. 46, 15 P. (2d) 271 (1932), wherein the court, referring to the rule of "reasonable doubt" said: "We think a better statement is, that actions of this character must be sustained by testimony which is conclusive, definite and certain and beyond all controversy." Frederick v. Michaelson, 138 Wash. 55, 244 Pac. 119 (1926). And the most recent deliberation of the court on this subject states the rule to be "beyond all legitimate controversy". Fischer v. Soames, 96 Wash. Dec. 1, 81 P. (2d) 836 (August, 1938), citing both the Alexander case and the Lohse case.

[22]Worden v. Worden, 96 Wash. 592, at p. 605, 165 Pac. 501 (1917).

[23]McCullough v. McCullough, 153 Wash. 625 at p. 629, 280 Pac. 70 (1929).

[24]Weeds v. Dunn, 81 Ore. 457, 159 Pac. 1155 (1916).

[25]McClanahan v. McClanahan, 77 Wash. 138, 137 Pac. 479 (1913).

[26]*Supra* note 10a.

[27]Worden v. Worden, 96 Wash. 592, 165 Pac. 501 (1917); Alexander v. Lewes. 104 Wash. 32, 175 Pac. 572 (1918) in which the court at p. 42 said: "Here there is a writing that may serve to help to prove the contract. The case is such, therefore, that it is not left wholly at the mercy of parol evidence. True, this writing is void, as a will, but that did not prevent it from being good to help to prove the contract." See also, Olsen v. Hoag, 128 Wash. 8, 221 Pac. 500 (1924); McCullough v. McCullough, 153 Wash. 625, 280 Pac. 70 (1929).

[28](a) 191 Wash. 180, 71 P. (2d) 6 (August, 1937), where the court affirmed the lower court's decision for the plaintiff, en banc by a 5-4 decision.

which it refused to interpret as a contract to devise, although it is submitted that such an interpretation was feasible and intended by the promisor.[29] The court found that the writing was testamentary in character and that no present interest passed, a holding which has recently been criticised.[30] It was expressly stated in the instrument that this "shall not be regarded as a gift or devise",[31] a statement which should operate to divest the instrument of its testamentary character when coupled with the stipulated acts of performance promised by the Y. M. C. A. Such a statement does not prevent the instrument from being construed as a *contract* to devise, however much it denies the making, *in itself,* of a devise or a gift. The Washington Court has, heretofore, been liberal[32] in finding a contract to devise when orally made. Surely when the contract is made more definite by a writing, the court should not pursue a stricter rule.

Judge Robinson, dissenting in the final disposition of the case, left this query:

> "Will it be sufficient in attempting to enforce such contracts (to devise) in the future to prove the contract and its performance or *is it going to be necessary to also prove that a present interest passed?*"[33] (Italics supplied.)

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(b) 193 Wash. 400, 75 P. (2d) 916 (Feb., 1938), where on rehearing the court sitting en banc reversed the lower court's decision and found for the defendant (it is to be noted that in the interim between the first and second decision Judge Simpson had replaced Judge Tolman, changing the decisive vote to the other side, 5 to 4).

(c) 95 Wash. Dec. 537 (August, 1938), denying respondent's petition for rehearing.

[29]The facts of the case are briefly these: An instrument was executed in which Murphy agreed to lease to the Y. M. C. A. a tract of land suitable for a boys' camp. The lessee was to pay taxes and to construct certain buildings, and if it failed to do so, or if it ceased to be a going concern, the lease was to terminate in the discretion of the lessor. Otherwise, the lease was to continue until the lessor died or until a guardian or trustee was appointed over the lessor's estate. In either of these events his executor or guardian was empowered and ordered to transfer the title to the lessee. The lessor died and the lessee petitioned for a decree directing the executor to deliver a deed to the land. Held: that as no present interest passed under the instrument, it was testamentary in character, and the land should go to the residuary legatees under the lessor's will.

[30]86 U. OF PA. L. REV. 792 (May, 1938); 37 MICH. L. REV. 167 (November, 1938).

[31]See paragraphs 23 and 24 as quoted by the court in the Murphy case in 191 Wash. at p. 186.

[32]*Supra* notes 5, 6.

[33]The majority opinion in Y. M. C. A. v. Murphy, 193 Wash. 400, stated at p. 409: "An instrument, however, although partly or wholly in the form of a contract is testamentary in character and operative if at all as a will, where it is to have no operation during the party's lifetime and disposes or attempts to dispose of his property at his death and not before." The court then found that "the contract discloses no intention on the part of Murphy to transfer to the respondent any present interest other than the leasehold interest"; the court held the instrument to be testamentary and invalid for not conforming to the Statute of Wills. It is to this language and holding that Judge Robinson directs his question after citing the long line of Washington cases on contracts to devise real property in which no mention is made of the requirement of a present

It is submitted that the holding in the *Murphy* case does not require that the passing of a present interest be shown in contracts to devise real property. Actually, the court did not consider the problem presented in the *Murphy* case from the point of view of a contract to devise and, in fact, originally the contending parties agreed that the instrument involved was not such a contract.[34] A necessary distinction must be drawn between a valid contract to devise and a transaction which is purely testamentary in character. The latter looks to the future and has no force or effect until the death of the "promisor" and thus is testamentary in character and must conform to the Statute of Wills.[35] A contract to devise, however, becomes binding immediately upon inception and as will be seen is enforcible under certain circumstances even before the death of the promisor.[36] Future dispositions of property, however, are not necessarily testamentary. If "some quantum of present interest" passes the transaction will not be considered a testamentary disposition of property.[37] In the *Murphy* case the court treated the transaction as a future disposition of the property involved and the issue then centered about whether a present interest passed to relieve it of its testamentary character. The view expressed by the majority suggests that in cases where the transaction is "in the form of a contract",[38] but is to have no operation during the lifetime of the promisor, it becomes of utmost importance to determine whether or not a present interest passes to the promisee. But clearly, a valid contract to devise real property is more substance than "form" and does "operate" during the party's lifetime by binding both parties thereto as in any contract. Therefore, it seems that there need be no concern over the question of whether "some quantum of present interest" passes to the promisee and the Statute of Wills does not operate to defeat a contract of this character. None of the Washington cases on such

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interest. Judge Robinson concludes as the answer to his own query that "the denial of the petition for rehearing must be construed as being tantamount to a declaration that, in the future, it will be necessary to prove the passing of a present interest and therefore, it may be said that the law is not left uncertain."

[34]In the respondent's original answering brief at page 42 there is the following: "The instrument is not a contract to make a will. Appellants err in stating that we contended below that the instrument 'must be construed as a contract to make a will.' (Ap. Br. p. 26.) We did not so contend, and we make no such contention now." Thus, it appears that the issue as to whether there was a contract to devise or not was not made and in fact the parties argued simply on whether or not a "present interest passed". It is true, however, that in its petition for rehearing and motion for judgment, the respondent included in its brief a memorandum of an anonymous attorney which contended that the true issue in the case was whether a contract to devise existed and hence that "the case has not been made to turn upon the question which is solely determinative of what the result should be". But the opinion of the court went entirely on the question of whether a present interest passed and not on whether a contract to devise existed.

[35]See 68 CORPUS JURIS 618, No. 238.

[36]See *infra* notes 43 and 44.

[37]Note 10 L. R. A. 93; 68 C. J. 618.

[38]Murphy case, *supra* 193 Wash. at p. 409.

contracts either prior[39] or subsequent[40] to the *Murphy* case gives any weight to, much less, mentions the Statute of Wills or the requirement that a present interest pass.

Once the contract to devise is established and, if oral, satisfies the Statute of Frauds, or, if written, is not testamentary in character, the promisee, in the event of breach, should be granted relief. The promisee may obtain "specific performance".[41] This is granted where the promisor dies without performing. A more difficult problem is presented where, before his death and before completion of performance, the promisor repudiates the contract or attempts to convey away all his right, title, and interest in the realty to some third party. In such a situation specific performance is not available since, by the terms of the contract, the property is not to be transferred to the promisee until the death of the promisor. But where the promisee has rendered continued performance and is ready, willing and able to continue such performance, the courts will sustain an action for damages,[42] or if damages are inadequate and the promisor threatens conveyance, equity will enjoin such conveyance,[43] or if a conveyance to a third party with

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[39]Swash v. Sharpstein, 14 Wash. 426, 44 Pac. 862 (1896); Worden v. Worden, 96 Wash. 592, 165 Pac. 501 (1917); Velikanje v. Dickman, 98 Wash. 584, 168 Pac. 465 (1917); Alexander v. Lewes, 104 Wash. 32, 175 Pac. 572 (1918); Olsen v. Hoag, 128 Wash. 8, 221 Pac. 984 (1924); Perkins v. Allen, 133 Wash. 455, 234 Pac. 25 (1925); Fields v. Fields, 137 Wash. 592, 293 Pac. 369 (1926); Frederick v. Michaelsen, 138 Wash. 55, 244 Pac. 119 (1926); Henry v. Henry, 138 Wash. 284, 244 Pac. 686 (1926); McCullough v. McCullough, 153 Wash. 625, 280 Pac. 70 (1929); Avenetti v. Brown, 158 Wash. 517, 291 Pac. 469 (1930); Lohse v. Spokane Trust Co., 170 Wash. 46, 15 P. (2d) 271 (1932); Clark v. Crist, 178 Wash. 187, 34 P. (2d) 360 (1934); Lager v. Brown, 187 Wash. 462, 60 P. (2d) 99 (1936); Resor v. Shaefer, 193 Wash. 91, 74 P. (2d) 917 (1937).

[40]Wayman v. Miller, 95 Wash. Dec. 380, 81 P. (2d) 501 (July, 1938); Fischer v. Soames, 96 Wash. Dec. 1, 81 P. (2d) 836 (August, 1938).

[41]"Strictly speaking, an agreement to dispose of property by will cannot be specifically enforced. Yet courts of equity can do what is equivalent to a specific performance of such an agreement, by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with its terms, upon the ground that it is charged with a trust in the hands of the heir at law, devisee, personal representative, or purchaser with notice of the agreement, as the case may be." Worden v. Worden, 96 Wash. 592, 165 Pac. 501 (1917), at 609. See also McCullough v. McCullough, *supra* note 12; 12 WIS. L. REV. 402.

[42]Carter v. Witherspoon, 156 Miss. 597, 126 So. 388 (1930); Stone v. Burgeson, 215 Ala. 23, 109 So. 155 (1926); Mug v. Ostendorf, 49 Ind. App. 71, 96 N. E. 780 (1911); Chantland v. Sherman, 148 Iowa 352, 125 N. W. 871 (1910), where the court said: "Such an agreement may not be specifically enforced until the death of the party agreeing to execute the will. The reason for this is that the will may be made at any time during life. But upon repudiation of such an agreement by denying its existence, or by disposing of the property to be willed, a cause of action may accrue for the enforcement of the agreement through analogous relief, recission, or the recovery of damages. Otherwise, performance might be defeated by rendering this impossible by the disposition of the property, or through inability to prove the contract after the death of the promisor." Also, Richardson v. Richardson, 114 Minn. 12, 130 N. W. 4 (1901).

[43]Lovett v. Lovett, 87 Ind. App. 42, 155 N. E. 528, 157 N. E. 104 (1927); White v. Massee, 202 Iowa 1304, 211 N. W. 839, 66 A. L. R. 1434 and

notice of the agreement has already been made, equity will impose a trust upon the property in the hands of such third party in favor of the promisee.[44] It would seem that if the contract to devise is not recorded and the third party is a bona fide purchaser for value without notice, there is no remedy available against the property conveyed or the third party, but the promisee under the contract will have to resort to an action of damages against the promisor or his estate.[45]

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## JUDICIAL REVIEW OF THE FACT FINDINGS OF THE FEDERAL TRADE COMMISSION

Section 5 of the Trade Commission Act (15 U. S. C. § 45) and Section 11 of the Clayton Act (15 U. S. C. § 21) provide that "The findings of the Commission as to facts, if supported by testimony, shall be conclusive." This follows the form of the usual statutory provision, and its settled interpretation is that the findings of the administrative board, if supported by substantial evidence, are conclusive as to issues of fact.[1]

The purpose of the creation of the Trade Commission was largely to establish an administrative tribunal consisting of a body of persons especially qualified by reason of information, experience and study to administer the federal program against unfair competition and monopoly. The Trade Commission Act took the function of gathering evidence entirely out of the hands of the courts and vested it in the Commission. The Commission was given the power to employ experts and examiners, including attorneys, economists, accountants and specialists in various fields.[2] It would seem, therefore, that by the terms "conclusive, if supported by testimony" Congress had it in mind that the administrative specialist rather than the court would determine the facts and draw the inferences therefrom.[3] The test, then, which both logic and

note (1927). See also Hayes v. Moffatt, 83 Mont. 214, 271 Pac. 433 (1928); 5 WILLISTON, CONTRACTS (Rev. Ed., 1936) § 1421.

[44]See McCullough v. McCullough, 153 Wash. 625, 631, 280 Pac. 70 (1929); Osborn v. Hoyt, 181 Cal. 336, 184 Pac. 854 (1919); Van Duyne v. Vreeland, 11 N. J. Eq. 370 (1857).

[45]Van Duyne v. Vreeland, *supra* note 44.

[1]Rankin v. Hoyt, 4 How. 327 (U. S. 1846) (custom appraiser); Decatur v. Paulding, 14 Pet. 497 (U. S. 1840) (pension board); United States v. Ju Joy, 198 U. S. 253 (1905) (immigration official); Public Clearing House v. Cayne, 194 U. S. 495 (1904) (post office department); Smelting Co. v. Kemp, 104 U. S. 636 (1881) (land office); United States v. Williams, 278 U. S. 255 (1929) (director of veterans' bureau); Murray's Lessees v. Hoboken Land & Improvement Co., 18 How. 272 (U. S. 1856) (revenue official); Gaines v. Thompson, 7 Wall 347 (U. S. 1869) (secretary of interior); Bates & Guild Co. v. Payne, 194 U. S. 106 (1904) (postmaster general); Zakonite v. Wolf, 226 U. S. 272 (1912) (secretary of commerce).

[2]Tollefson, *Judicial Review of the Decisions of the Federal Trade Commission*, 4 WIS. L. REV. 257.

[3]"If the findings of the Interstate Commerce Commission are final,