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Contracts to Make a Will

They can be used for estate plans and charitable giving.

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A donor wanted to make a charitable gift at death. We suggested an irrevocable pledge payable on death. Then, a question arose that was never before asked of us: "Can a donor make an irrevocable charitable bequest by a contract to make a will?"

To the law books (computers) we went. We found nothing specifically on contracts to make charitable gifts by will but a plethora[1] of cases on the topic. We have more than charitable gifts on our minds, so the following takes a broad look at estate plans involving contracts to make a will.

Enforceability and Use

State law governs whether a contract to make a will is enforceable. Unlike charitable pledges, those contracts are enforceable only if all the elements of a contract (offer, acceptance and consideration) are met. Contracts to make a will (or not make a will or revoke a will) are most common between married couples, as well as when individuals wish to benefit a caregiver or important companion.

To be enforceable, most states require the agreement be in writing, signed by the decedent (while living, of course) and involve reliance or some form of consideration. These requirements apply whether the situation involves a promise to leave property at death or a contract to make a will. Other states mandate clear and convincing evidence of a contract if no writing exists.

A contract to make a will is also used for other estate plans. Take a married couple with no children who want to benefit the surviving spouse on the first spouse's death and then their respective families on the second death. The couple could enter into a contract to make mutual wills. Each spouse promises to leave all their assets to the other and then equally to their respective families.

Another option is for them to create inter vivos trusts. These contracts intend to assure that surviving spouses don't change their wills after the first spouse's death.[2]

A will contract can also involve a promise to include a caregiver in the will if the caregiver provides specified services. Be alert to undue influence in this area.

Clients may also use will contracts in a divorce or legal separation**.** Divorcing spouses may promise to leave assets to the children of their marriage so that subsequent children or new spouses don't interfere with that portion of the inheritance.

Business partners may use a contract to make a will in place of a buyout, promising to bequeath certain partnership interests to one another. And a prenuptial agreement can include an agreement to make a will.[3]

For a good laugh, see the YouTube video of a 55-second scene in the TV sitcom *Seinfeld*, in which George asks his fiancée, Susan, to sign a prenuptial agreement.[4]

Clear and Unambiguous

The writing must be clear and unambiguous. *Read v. McKeague*[5] involved a letter written by a decedent promising specified property to his spouse, a charity and his sister. It provided that "with the exception of a *slice* to the church and to my sister, I'd will you everything I possessed."[6] Unable to decipher the meaning of the word "slice," the court held that the letter was too vague to be a contract to make a will. Moreover, earlier cases using parol evidence to explain an underlying ambiguity in a contract weren't applicable because a contract hadn't even been created. The terms of the writing were too vague. If you've ever divided a pizza with those at your table, you know all slices aren't the same.

Surprise! Even seemingly clear wills can be a point of contention among family members. Married couples often execute reciprocal or "I love you wills," which leave everything to one another at the first death and then to agreed-on beneficiaries on the second death. Difficulty arises when surviving spouses later change their wills.

Another surprise! It can get even more contentious if it's a second marriage with children from previous relationships. As the case law shows, it's hard to prove that a contract to make a will existed between the spouses absent specific language in the wills demonstrating the spouses' intent.

Revocation

Tweedie v. Sibley[7] involved a son's argument that his mother breached a contract to make a will. The son's parents executed wills leaving all assets to one another and forgiving the son's indebtedness to them on the survivor's death. After the first spouse's death, the son's debt repayments weren't consistent, and he ended up in arrears. The mother later revoked her will and executed a new one without the debt forgiveness provision. The son argued that other business arrangements made at the time the wills were executed established his parents' common purpose. The court disagreed, stating that when spouses execute simultaneous wills, it doesn't automatically mean that they've bound themselves not to revoke them.

Similarly, in *Keith v. Lulofs*[8] a Virginia appellate court upheld a trial court decision that wills executed by two spouses weren't irrevocable, reciprocal wills. Lucy and Arvid Keith both entered their marriage with one child each from previous relationships. They executed wills that left all their assets to one another on the first death. At the survivor's death, any remaining assets would be divided equally between the two children. A few years later, they took out an insurance policy naming both children as equal beneficiaries.

Arvid died first. Two months after his death, Lucy revoked her will and executed a new one leaving her entire estate to her daughter. She also updated the life insurance beneficiary to name only her daughter.

Arvid's son challenged the new will but ultimately wasn't able to provide clear and satisfactory evidence to prove that the wills reflected a contractual agreement to bind the survivor. The court pointed out the difference between the law of wills and the law of contracts. Unlike contracts, wills are almost always unilaterally changeable. A will isn't irrevocable simply because it mirrors another individual's will. The language in the wills in this case wasn't sufficient to form a contract. Moreover, the son couldn't produce any corroborating evidence that the wills were meant to be contracts. Neither the daughter nor the drafting attorney offered any testimony supporting his position. Thus, Lucy's new will prevailed. The court noted that holding otherwise would create a significant risk that others might inadvertently bind themselves to the provisions of their wills if they happen to mirror another's document.

Cohabitation Agreements

Unmarried couples often also wish to provide for one another and their joint descendants. They can accomplish this by using cohabitation agreements. Not surprisingly, enforceability is governed by state law.

The agreements can divvy up expenses, divide property if they break up and dictate what happens to property on a partner's death.

Movie fans, here's a real-life situation involving actor Lee Marvin: He argued in a California court that he didn't owe his longtime partner, Michelle Triola Marvin, any part of the property they acquired during their relationship or any continuing support once they went their separate ways.

The court sorted out several years of conflicting decisions about cohabitating California unmarried couples. Ultimately, the court looked at multiple legal principles regarding cohabitation agreements. When unmarried couples want to enter into a contract, they can do so by a written agreement or orally. If no written or oral contract exists, the court may look for an implied contract. Or, if there isn't an implied contract, the court can, as a matter of equity and fairness, find a reasonable solution. Movie fans may also remember that the court in this case gave rise to the term "palimony" (in essence, alimony from a pal).

The California Supreme Court, way back in 1976, acknowledged that non-marital relationships were becoming increasingly more common. It noted that as long as the relationship wasn't based solely on "sexual favors" cohabitation of unmarried individuals, the non-marital relationship shouldn't be viewed as an illegal act in itself. However, the court also pointed out that marital property laws still wouldn't apply.[9]

Oral Contracts

Oral promises[10] to make a will or to leave a specific devise aren't enforceable. *Congregation Kadimah Toras-Moshe v. DeLeo*[11] held that an oral promise made by an individual before he died wasn't binding on his estate. There wasn't reliance or consideration, and thus, the court noted it would be against public policy to uphold the oral promise against the estate. But in some cases, an oral promise, although not enforceable because it's not in writing, could be a foundation for an implied contract.[12]

Young v. Young[13] involved an oral promise between a husband and wife to make mutual wills. In 1910, they agreed that the husband would convey real estate to the wife in exchange for executing wills that left all their respective property to each other. The husband conveyed the real estate, and they both executed wills complying with the oral agreement. Later, the wife destroyed her will and claimed she owned the property free from any claim by her husband. The court noted that oral contracts to make a will can't be enforced. However, because the wife didn't purchase the property, revoking her will caused the consideration for the agreement to fail. The court allowed the husband to recover the property, not because the oral contract was valid, but because he was entitled to be made whole in equity.

In *Eaton v. Eaton,*[14] a father initially devised real property to one of his three sons but later orally promised it to all three sons if they made certain improvements to the property. Before the father died, the sons began construction on the home on the property. Less than a year after his oral promise, but before the sons could complete the improvements, the father died. The son receiving the property under the will was also named as executor. He allowed his brothers to complete the construction and later informed them that he didn't intend to honor his father's oral promise. The brothers sued him; the court upheld their claim for specific performance on the contract to make a will. Delaware recognizes the validity of written contracts to make a will, but not oral promises to make a will. But with clear and convincing evidence of part performance, a court could enforce a partly performed oral contract to make a will. In this case, the court found that the brothers met their burden of showing an enforceable oral contract to make a will.

Naming Rights

Unless a charity promises something in return, it's unlikely that a court would enforce a promise by a donor to make a will. A charity can offer naming rights in return for a promise. In that case, the donor and the charity should enter into a detailed agreement that includes what's being named and the duration of the naming right. Not including these details can cause problems. In 1969, the Hofheinz family gave $1.5 million to the University of Houston (UH), which named the Hofheinz Pavilion in their honor. In 2016, UH sought donations to renovate the pavilion and offered naming rights to the donors who offered the largest contributions. The Hofheinz family sued to enforce the original agreement, but they ultimately settled for other name changes around the school.[15]

Avoiding perpetual naming rights would have helped UH. Let the donor know at the outset if a name isn't going to be permanent. The charity might need flexibility later to bring in additional funds. Some charities include a specified number of years, but others might require the donor to make a specific contribution for the upkeep of a named building. Charities can also benefit from having a published policy on naming rights to assure the charity is consistent on naming opportunities. The policy can be included in a general gift acceptance policy or stand on its own. The policy should cover how long the naming rights last, the process for changing the name and a minimum gift threshold to even receive a naming right.[16]

Several years after a building is named, it may become obsolete. The charity should have a procedure to either transfer the name to a different facility or terminate the right. As seen in recent years, a charity may have serious reasons to distance itself from a past donor.[17] A "morals" clause might be a good way to automatically rescind a naming right if the donor engages in an activity that goes against the charity's values or harms its reputation. Finally, it's important for the charity to be clear about how the name will be displayed and any future promotional expectations. The donor and the charity should agree on how the display will appear and whether any future consent from the donor is needed to display the name.[18]

Potential Litigation

Contracts to make a will are sometimes useful. So go for it if it's the best plan for your client's situation. But keep potential litigation in mind.

Disinherited beneficiaries in alleged violations of contracts to make a will can face challenges. Some courts don't favor those contracts. Courts must consider the language in the wills themselves, the circumstances surrounding the execution of the wills and a number of other factors.

In *Smith v. Turner,*[19] the court examined whether wills executed by a married couple were mutual wills under Georgia law. The husband's will left his wife all his property, but if she didn't survive him, the property would be distributed among his children. The wife's will provided that all her assets would pass to her husband if he survived her. If he didn't survive her, her assets would also be distributed among her husband's children. On her husband's death, some of his children contested his will, and the wife subsequently changed her will to disinherit those children. The children sued, claiming the wills were mutual. The court held that because neither will contained an express

statement that they were mutual, and there wasn't evidence of an express contract to make a will, they weren't mutual wills.

A Michigan case, *Teason v. Miles*[20] is an example of the court taking great care to avoid a finding of fraud in a contract for will situation. In that case, a mother died intestate leaving two sons. One son worked on the family farm and supported his mother for the last several years of her life. In exchange for his dedication, she promised her son she'd leave him 40 acres of the farm at her death. The mother died without making a will and didn't make any formal contract with her son. The court relied instead on testimony by friends and family that described the many times the mother expressed her gratitude for her son's work and her promise to leave him the land. The court also looked to an undelivered letter the mother had written to her attorney requesting he draw up a will leaving the land to her son. In this case, because the facts were so clear, the court held that the son was entitled to the acreage. We wouldn't bet the farm or ranch on another court's reaching this result.[21]

The plaintiff, Thomas Fitzgerald, in *In re O'Connor's Estate*[22] wasn't so lucky. He rented a room from the decedent, Laura O'Connor, helped her with shopping and prepared her meals. When she moved to another location, he visited her every day. Laura signed a statement leaving all of her assets to Thomas, but it was handwritten by Thomas and wasn't a valid will. The court held that it wasn't sufficient as a contract to compensate Thomas for his services.

The plaintiff, Gloria Riendeau, in *Riendeau v. Grey*[23] put quantum meruit to work when arguing that she was entitled to compensation for 10 years of caregiving that she provided to Edward Orzech and his wife. The court stated that when there isn't a blood relation, the assumption is that the caregiver expects to be paid. Here, Gloria and her family leased real property from the Orzechs. In 1997, Gloria began caring for Mrs. Orzech, and she continued to do so until Mrs. Orzech died in 2000. At that point, she began caring for Mr. Orzech until his death in 2008. Initially, Gloria received $800 per week, but the payments ended after only two weeks. The court, relying on testimony and evidence, held that Gloria was entitled to compensation for the time she spent caring for the Orzechs.

However, in *In re O'Connor's Estate,*[24] an opinion light on facts and legal analysis, the claim based on quantum meruit was denied.

Facts and Circumstances

To sum up, you gotta know state law and the facts of each situation. You may think you hear Elgar's *Pomp and Circumstances* at law school graduations. But they're playing *Facts and Circumstances*!

Next month, we'll discuss charitable pledges.

Endnotes

1. From the film, *The Three Amigos*. El Guapo to Jefe: "Well, you told me I have a plethora, and I would just like to know if you know what a plethora is. I would not like to think that a person would tell someone he has a plethora and then find out that person has no idea what it means to have a plethora."

2. Carolyn L. Dessin, "The Troubled Relationship of Will Contracts and Spousal Protection: Time for an Amicable Separation," 45 *Cath. U.L. Rev.* 435 (1996).

3. For example, sample forms for New Jersey premarital agreements include a provision stating that each party must execute a will in accordance with the stipulations of the agreement. Then, they can't change or revoke their wills without the other individual's written consent. 12 N.J. Forms Legal & Bus. Section 27:53.

4. *www.youtube.com/watch?v=sEsIV79ixok* .

5. *Read v. McKeague*, 252 Mass. 162 (1925).

6. *Ibid*., at p. 164.

7. *Tweedie v. Sibley*, 25 Mass. App. Ct. 683 (1988).

8. *Keith v. Lulofs*, 724 S.E.2d 695 (Va. 2012).

9. *Marvin v. Marvin*, 18 Cal. 3d 660 (1976).

10. "An oral contract isn't worth the paper it's written on." Generally attributed to 20th century movie mogul Samuel Goldwyn.

11. *Congregation Kadimah Toras-Moshe v. DeLeo*, 405 Mass. 365 (1989).

12. *Raine v. Shea*, 259 Mass. 412 (1927).

13. *Young v. Young*, 251 Mass. 218 (1925).

14. *Eaton v. Eaton*, No. CIV.A. 286-S, 2005 WL 3529110 (Del. Ch. Dec. 19, 2005).

15. Frank Monti, "Whatever About the Rule of Law: Naming Rights and Sleeping Watchdogs," *Inside Philanthropy: Who's Funding What, and Why* (Sept. 21, 2016).

16. George E. Constantine, Cynthia M. Lewin, Yosef Ziffer and Andrew L. Steinberg, "Whose Name Is It Anyway? Four Best Practices for Negotiating Naming Rights Deals," Venable LLP (Aug. 14, 2018).

17. Conrad Teitell, Heather J. Rhoades and Brianna L. Marquis, "No Thank You," *Trusts & Estates* (January 2020).

18. *Supra* note 16.

19. *Smith v. Turne*r, 223 Ga. App. 371, 372 (1996).

20. *Teason v. Miles*, 368 Mich. 414, 415 (1962).

21. This expression is said to have originated in the Wild West. If an individual thought he had a sure bet in a poker game, he'd actually bet his ranch or farm.

22. *In re O'Connor's Est*., 236 N.Y.S.2d 972, 972 (Sur. 1962).

23. *Riendeau v. Grey*, No. LLICV106003211S, 2012 WL 954077, at *2 (Conn. Super. Ct. March 5, 2012).

24. *Supra* note 22.