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Wills - Oral Contract to Make Mutual Reciprocal Wills - Enforceability of after Receipt of Benefits Under

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The theory that deductibility depends upon legislative grace¹⁴ became popular shortly after the influence of the principle of "construing deductibility provisions against the government"¹⁵ ended.¹⁶ It has been frequently held that a Commissioner's finding is presumptively correct.¹⁷

The legislative history of the tax treatment of school expenses offers little prospect that the principle of the instant case will be extended to situations where the teacher is not under a legal compulsion to attend summer school in order to maintain eligibility to teach. Such expenses have always been considered personal and non-deductible where the teacher attended summer school voluntarily as a means toward professional advancement,¹⁸ though expenses occurred in analogous situations have been found deductible as "ordinary and necessary."¹⁹

WILLS—ORAL CONTRACT TO MAKE MUTUAL RECIPROCAL WILLS—ENFORCEABILITY OF AFTER RECEIPT OF BENEFITS UNDER.—The husband and wife executed mutual reciprocal wills according to their oral contract whereby each agreed to devise to the other his or her entire estate. Further provisions in the wills provided for equal distribution of the remainder, upon the death of the survivor, to the niece of W and the niece of H. Upon the death of W, H received the benefits of her will. H died, and a subsequent will by him was probated wherein his niece, D, was named sole beneficiary. D, the niece of H, is now sued in this action in her personal capacity and as executrix of the will of H, by P, the niece of W, for specific performance of the alleged oral contract entered into by H and W wherein they agreed to make the aforementioned mutual reciprocal wills. The trial court held that the evidence established the existence of such contract; that upon its breach by H he became liable to P; but, that P failed to present a proper claim for money damages to the executrix of the estate of H during the time prescribed by law and as required by the Statute of Non-claim and was therefore divested of a remedy; and that P is not entitled to equitable relief in that she had an adequate remedy at law. Upon appeal it was held that the trial court erred; that P was not divested of remedy by the provisions of

¹⁴ *Deputy v. DuPont*, 308 U.S. 488 (1940); cf. *New Colonial Ice Co. v. Helvering*, 292 U.S. 435 (1934) (one of the first cases indicating a change in policy.)

¹⁵ *Gould v. Gould*, 245 U.S. 151 (1917).

¹⁶ *White v. United States*, 305 U.S. 281 (1938).

¹⁷ *New Colonial Ice Co. v. Helvering*, 292 U.S. 435 (1934); *White v. United States*, 305 U.S. 281 (1938).

¹⁸ O. D. 892, 4 Cum. Bull. 209 (1921): "Expenses incurred by school teachers in attending summer school are in the nature of personal expenses incurred in advancing their education and are not deductible in computing net income."

¹⁹ *Denny*, 33 B. T. A. 738 (1935) (permitting actor to deduct physical training expenses); *Hempel v. Commissioner*, P-H (1947) T. C. Mem. Dec. §

47-183 (1947) (permitting opera singer to deduct expenses of voice coaching. And see *Hutchinson*, 13 B.T.A. 1187 (1928).

¹ N.D. Rev. Code § 14-0706 (1943) validates such contracts.

the Statute of Non-claim, and that P was entitled to specific performance. *O'Connor v. Immele*, 43 N. W. 2d 649 (N. D. 1950).

That a contract to make a will is valid and not opposed to public policy is so well settled as to merit little discussion.² The legal principles applicable to such contracts are not different from those governing other contracts.³ Because such contracts are usually oral and informal, difficult legal problems frequently arise. Where all necessary elements of a contract are present, such as offer, acceptance, and consideration, as in the instant case, the first hurdle which the oral contract must surmount is that of the Statute of Frauds.⁴ The courts have been virtually unanimous in declaring that, to the extent that realty is involved, these oral contracts fall within the section of the Statute of Frauds relating to the sale of interests in land;⁵ where personality is involved the matter is by no means as certain.⁶ The court in the instant case apparently assumed the contract to be within the Statute of Frauds but invoked the well-settled doctrine that the part performance of such an oral contract removes it in equity.⁷ The part performance relied upon in the instant case was the acceptance and retention by H of the benefits of W's will. An objection might be made that to permit the enforceability of such a contract would do violence to the Statute of Wills in that it permits the disposition of property at death without regard to the formal requirements of the Statute of Wills. The answer is that the property passes under the contract and not by virtue of the will;⁸ the will is merely the method selected by the parties to carry out the terms of the contract. Even after the establishment of the contract and the breach thereof the further question arises as to the remedies available. First of all, the modern view is that a third party donee,⁹ or creditor¹⁰ beneficiary may maintain an action on the contract. Since the remedy usually sought is specific performance it is necessary to establish equity jurisdiction. Nearly all the historical bases of equity jurisdiction can be summed up in the broad statement that where the legal remedy is inadequate equity will intervene to give relief.

² *Ex Parte Simons*, 247 U.S. 231, 239 (1917); *Brooks v. Yarbrough*, 37 F.2d 527, 531 (10th Cir. 1930); *Kleeburg v. Schrader*, 69 Minn. 136, 72 N.W. 59 (1897).

³ *Atkinson*, Wills § 68 (1937); *Rollison*, Wills § 188 (1939).

⁴ Some jurisdictions have negated this problem altogether by the passage of statutes invalidating oral contracts to make wills. *Ariz. Code Ann.* § 58-101 (1939); *Cal. Civ. Code* § 1624 (*Deering* 1949); *Del. Rev. Code* § 3106 (1935); *Mass. Gen. Laws c. 259* § 5 (1921).

⁵ *Hirschberg v. Horowitz*, 105 N.J.L. 210, 143 Atl. 351 (1928); *Loper v. Sheldon's Estate*, 120 Wis. 26, 97 N.W. 524 (1903.)

⁶ See *Ohlendiek v. Schuler*, 30 F.2d 5 (1929); *Appeal of Hull*, 82 Conn. 647, 74 Atl. 925 (1910).

⁷ *Carmichael v. Carmichael*, 72 Mich. 76, 40 N.W. 173 (1888); 4 *Page*, Wills § 1721 (Lifetime ed. 1941).

⁸ *Rollison*, Wills § 187 (1939); *Eagleton, Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing*, 15 *Corn. L. Q.* 358 (1930).

⁹ 2 *Williston, Contracts* § 357 (rev. ed. 1936); and see *Restatement Contracts* § 138 (1932).

¹⁰ 2 *Williston, Contracts* § 361 (rev. ed. 1936); and see *Restatement, Contracts* § 138 (1932).

The mere fact that an action at law would lie for damages for breach of the contract will not bar equity's jurisdiction if the remedy in equity is better adapted to render complete justice.¹¹ Moreover, equity has always regarded realty as unique and has given specific performance of land contracts.¹² As a practical matter, equity is in a better position to give complete relief in such cases since it can impose a constructive trust on the property as was done in the instant case. In addition equity is not bound to any stereotyped form of relief and can adjust its remedies to the requirements of the particular facts of the case.¹³ It is therefore submitted that the court in the instant case properly exercised its equitable jurisdiction.

As a defense against an action based on a contract to make mutual reciprocal wills it is sometimes urged that a failure to comply with the Statute of Non-claim forever bars any remedy. This contention usually fails, as in the instant case, in that such action is not construed as a claim against the estate of the deceased but a claim of a property interest in that estate which is itself subject to claims of creditors against the estate.¹⁴ Where the claim is properly filed within the time allowed for the filing of claims by creditors this issue does not arise.

In conclusion it may be stated that the contract-to-make-mutual-reciprocal-wills device has certain advantages in that it allows absolute freedom of action by the survivor of the contracting parties, subject only to a duty not to make excessive gifts or otherwise to attempt to disappoint the ultimate beneficiaries, with respect to the property bequeathed to such survivor. It is usable where, as in the instant case, the spouse is the prime object of the testator's bounty but where the testator wishes to insure an ultimate distribution which does not exclude secondary objects of his bounty. Unfortunately, this device all too often results in costly litigation, especially where the contract is oral and informal.

¹¹ McClintock, Equity § § 41, 45 (1936).

¹² McClintock, Equity § 42 (1936).

¹³ McClintock, Equity § 27 (1936).

¹⁴ Harris v. Craven, 162 Ore. 1, 91 P. 2d 302 (1939).