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Contracts to Devise Realty -- Sufficiency of Will as Memo for Statute of Frauds

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Contracts to Devise Realty—Sufficiency of Will as Memo for Statute of Frauds

Upon breach of a contract to devise realty, an aggrieved party may be awarded specific performance of the contract or damages only if the contract complies with the Statute of Frauds.[1] Consequently, courts are often called upon to decide whether a certain contract to devise meets with the Statute's requirements, especially the requirement of a writing. In *Rape v. Lyerly*[2] the North Carolina Supreme Court held for the first time that a revoked will constituted a written memorandum of an oral contract to devise sufficient to comply with North Carolina's Statute of Frauds.[3] Through the legal fiction of a constructive trust, the court granted specific performance of the contract. Upon examination, the conclusions of the court appear to be sound ones.

The *Rape* case arose out of an alleged oral contract between James Lyerly and the Rapes.[4] In return for the Rapes' living with him and serving his needs, Lyerly promised to leave his property to Mrs. Rape, his daughter, by will. In 1959 Lyerly executed and delivered to the Rapes a will devising to Mrs. Rape all of his real property.[5] The Rapes fully performed their promise; yet Lyerly in 1969 executed a second will, revoking the 1959 will and devising only part of his real estate to the Rapes.[6] At Lyerly's death, Mrs. Rape's surviving children brought suit to enforce specifically the provisions of the oral contract. The other devisees under the 1969 will defended on the ground that the Statute of Frauds makes void any oral contract to convey real estate. Affirming a

1. North Carolina's Statute of Frauds is N.C. GEN. STAT. § 22-2 (1965). It provides: "All contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . . ."

2. 287 N.C. 601, 215 S.E.2d 737 (1975).

3. *Id.* at 615, 215 S.E.2d at 746.

4. The Rapes are Mildred Lyerly Rape, deceased daughter of James Lyerly, and Basil M. Rape. *Id.* at 610, 215 S.E.2d at 743.

5. 287 N.C. at 604, 215 S.E.2d at 739. The will stated:

> "Fourth: It is my opinion that $16,000.00 is a fair market value of my real property lying in Steele Township, Rowan County, N.C. Since my daughter, Mildred Lyerly Rape and my son, Woodrow W. Lyerly have obligated themselves to care for my wife and myself during our lifetime, all of my real property, I give and bequeath to Mildred Lyerly Rape upon payment by her to the following: 1st. To my son, Woodrow W. Lyerly the sum of $6,000.00. 2nd. To my son, Gray Lyerly the sum of $1,000.00 3rd. To my daughter, Katherine Lyerly Mack the sum of $1,000.00."

6. *Id.* at 605, 215 S.E.2d at 740.

superior court judgment for the Rapes,[7] the North Carolina Court of Appeals determined that the 1959 will "provided a sufficient memorandum of the agreement to comply with the Statute of Frauds."[8] On appeal, Chief Justice Sharp, writing for the North Carolina Supreme Court, agreed with the lower courts and ordered specific performance of the contract for the plaintiffs' benefit.

Although the Statute of Frauds speaks only of contracts to "sell or convey" land, North Carolina cases clearly establish that the scope of North Carolina's Statute of Frauds[9] includes contracts to devise.[10] Thus oral contracts to devise realty not evidenced by a sufficient writing, memorandum, or note are void and unenforceable.[11] Upon breach of parol contracts to devise, only actions in *quantum meruit* or implied assumpsit will lie in favor of an aggrieved party.[12] In *quantum meruit* actions, the promisee recovers only the value of the services that he has rendered; the promisee cannot recover the benefit of his bargain or the value of the realty that had been promised him.[13] The few North Carolina cases that awarded money damages for the breach of or specifically enforced an oral contract to devise not evidenced by a writing[14] have been expressly or impliedly overruled.[15]

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7. Rape v. Lyerly, 23 N.C. App. 241, 208 S.E.2d 712 (1974).

8. *Id.* at 247, 208 S.E.2d at 716.

9. N.C. GEN. STAT. § 22-2 (1965).

10. *See, e.g.*, Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970); Jamerson v. Logan, 228 N.C. 540, 46 S.E.2d 561 (1948); Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Neal v. Wachovia Bank & Trust Co., 224 N.C. 103, 29 S.E.2d 206 (1944); Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

11. *See, e.g.*, Pickelsimer v. Pickelsimer, 257 N.C. 696, 127 S.E.2d 557 (1962); Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Humphrey v. Faison, 247 N.C. 127, 100 S.E.2d 524 (1957); Clapp v. Clapp, 241 N.C. 281, 85 S.E.2d 153 (1954); Daughtry v. Daughtry, 223 N.C. 528, 27 S.E.2d 446 (1943); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933).

12. *See, e.g.*, Pickelsimer v. Pickelsimer, 257 N.C. 696, 127 S.E.2d 557 (1962); Gales v. Smith, 249 N.C. 263, 106 S.E.2d 164 (1958); Jamerson v. Logan, 228 N.C. 540, 46 S.E.2d 561 (1948); Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Grady v. Faison, 224 N.C. 567, 31 S.E.2d 760 (1944); Neal v. Wachovia Bank & Trust Co., 224 N.C. 103, 29 S.E.2d 206 (1944); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933); Brown v. Williams, 196 N.C. 241, 145 S.E. 233 (1928); Edwards v. Matthews, 196 N.C. 39, 144 S.E. 300 (1928); Faircloth v. Kinlaw, 165 N.C. 228, 81 S.E. 299 (1914); Miller v. Lash, 85 N.C. 45 (1881); Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

13. *See, e.g.*, Wells v. Foreman, 236 N.C. 351, 72 S.E.2d 765; Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Grady v. Faison, 224 N.C. 567, 31 S.E.2d 760 (1944); Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937).

14. Lipe v. Citizens' Bank & Trust Co., 207 N.C. 794, 178 S.E. 665 (1935); Hager v. Whitener, 204 N.C. 747, 169 S.E. 645 (1933); Redmon v. Roberts, 198 N.C. 161, 150 S.E. 881 (1929); Lipe v. Houck, 128 N.C. 115, 38 S.E. 297 (1901).

15. Pickelsimer v. Pickelsimer, 257 N.C. 696, 127 S.E.2d 557 (1962); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933).

Other North Carolina cases on contracts to devise realty clearly establish that a written contract to devise is enforceable.[16] Although an aggrieved party to a written contract to devise is entitled to bring an action to recover money damages, both according to the general rule[17] and to a few North Carolina cases,[18] the more common remedy for breach is in the nature of specific performance.[19] North Carolina case law often speaks of specifically enforcing a contract by making one of the testator's devisees or heirs at law a constructive trustee of the realty for the aggrieved plaintiff.[20] Some cases purport to grant specific performance only when it would be equitable to do so,[21] but North Carolina courts have yet to deny a claimant recovery on equitable grounds.

When a promisor performs his oral contract to devise realty by executing a will and then revokes, the issue becomes whether a will can constitute a memorandum of the contract sufficient for the Statute of Frauds.[22] Prior to *Rape*, no appellate court case in North Carolina had held that a revoked will is a sufficient memorandum for this purpose.[23]

16. *See, e.g.*, Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972); McCraw v. Llewellyn, 256 N.C. 213, 123 S.E.2d 575 (1962); Clark v. Butts, 240 N.C. 709, 83 S.E.2d 885 (1954); Chambers v. Byers, 214 N.C. 373, 199 S.E. 398 (1938); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933); Stockard v. Warren, 175 N.C. 283, 95 S.E. 579 (1918); Earnhardt v. Clement, 137 N.C. 91, 49 S.E. 49 (1904); Price v. Price, 133 N.C. 494, 45 S.E. 855 (1903); East v. Dolihite, 72 N.C. 562 (1875).

17. B. SPARKS, CONTRACTS TO MAKE WILLS 136 (1956).

18. Halsey v. Snell, 214 N.C. 209, 198 S.E. 633 (1938).

19. The remedy is "in the nature of specific performance" because the effect of the contract is carried out. Truly, there could not be specific performance of an act made physically impossible by the promisor's death. Yet, as SPARKS, *supra* note 17, at 156 notes, it is pointless to say that specific performance actually is not being carried out.

20. *See, e.g.*, Chambers v. Byers, 214 N.C. 373, 377-78, 199 S.E. 398, 401 (1938); Stockard v. Warren, 175 N.C. 283, 285, 95 S.E. 579, 580 (1918), *quoting from* an annotation following Naylor v. Shelton, 102 Ark. 30, 143 S.W. 117 (1912), in 31 Am. & Eng. Ann. Cas. 1917A, 394, 399:

> "[W]hile a court of chancery is without power to compel the execution of a will, and therefore the specific execution of an agreement to make a will cannot be enforced, yet if the contract is sufficiently proved and appears to have been binding on the decedent, and the usual conditions relating to specific performance have been complied with, then equity will specifically enforce it by seizing the property which is the subject matter of the agreement, and fastening a trust on it in favor of the person to whom the decedent agreed to give it by his will."

See also Clark v. Butts, 240 N.C. 709, 83 S.E.2d 885 (1954).

21. *See, e.g.*, Earnhardt v. Clement, 137 N.C. 91, 49 S.E. 49 (1904), requiring that the contract be for a valuable and fair consideration, be fair and just and mutual, not be procured by undue influence or imposition, be performed fully and faithfully by the aggrieved, and not result in an oppressive or harsh or inequitable decree.

22. Where a promisor performs his oral contract to devise realty by executing a will which is subsequently declared invalid, also at issue is whether the will can constitute a memorandum of the contract sufficient for the Statute of Frauds.

23. 23 N.C. App. at 246, 208 S.E.2d at 716.

One North Carolina Supreme Court decision, *McCraw v. Llewellyn*,[24] held that a particular revoked will did not of itself constitute a sufficient memo and, in so holding, implied that a revoked will could constitute a sufficient memo for Statute of Frauds purposes. As a general rule, commentators[25] and courts[26] have agreed that a revoked will can serve as a sufficient memo of a contract to devise. Courts in a substantial number of other jurisdictions have implied, while holding that the specific will at issue was not evidence of an oral contract, that a revoked will could be a sufficient memo of a contract to devise.[27]

In deciding whether a revoked will is a memo of the oral contract sufficient to satisfy the Statute of Frauds, at issue is the content of the writing, not its form.[28] Generally required are the names of the parties, the signature of the party to be charged, the terms and conditions of the contract, a description of the property, and all essential elements of the undertaking.[29] North Carolina cases require the will to include a written expression of the intent and obligation of the parties[30]—specifically, the price for the realty,[31] a description of the realty,[32] and the

24. 256 N.C. 213, 123 S.E.2d 575 (1962).

25. *See e.g.*, Annot., 94 A.L.R.2d 921 (1964).

26. *See, e.g.*, Potter v. Bland, 136 Cal. App. 2d 125, 288 P.2d 569 (Dist. Ct. App. 1955); Maddox v. Rowe, 23 Ga. 431 (1857); Holsz v. Stephen, 362 Ill. 527, 200 N.E. 601 (1936); Falk v. Fulton, 124 Kan. 745, 262 P. 1025 (1928); Nelson v. Schoonover, 89 Kan. 388, 131 P. 147 (1913); Berg v. Moreau, 199 Mo. 147, 97 S.W. 901 (1906); Woods v. Dunn, 81 Ore. 457, 159 P. 1158 (1916); *In re* Anderson's Estate, 348 Pa. 294, 35 A.2d 301 (1944); Shroyer v. Smith, 204 Pa. 310, 54 A. 24 (1903); Upson v. Fitzgerald, 129 Tex. 211, 103 S.W.2d 147 (1937); *In re* Lube's Estate, 225 Wis. 365, 274 N.W. 276 (1937).

27. Brought v. Howard, 30 Ariz. 522, 249 P. 76 (1926); Kobus v. San Diego Trust & Sav. Bank, 172 Cal. App. 2d 574, 342 P.2d 468 (Dist. Ct. App. 1959); Luders v. Security Trust & Savings Bank, 121 Cal. App. 408, 9 P.2d 271 (Dist. Ct. App. 1932); Southern v. Kittredge, 85 N.H. 307, 158 A. 132 (1932); Gilbert v. Gilbert, 66 N.J. Super. 246, 168 A.2d 839 (App. Div. 1961); Hunt v. Hunt, 55 App. Div. 430, 66 N.Y.S. 957 (1900), *aff'd*, 171 N.Y. 396, 64 N.E. 159 (1902); Wilson v. Dunkle, 71 Ohio L. Abs. 483, 132 N.E.2d 483 (Licking County C.P. 1955); Eslick v. Friedman, 191 Tenn. 647, 235 S.W.2d 808 (1951); McClanahan v. McClanahan, 77 Wash. 138, 137 P. 479 (1913); Gray v. Marino, 138 W. Va. 585, 76 S.E.2d 585 (1953); Estate of Rosenthal, 247 Wis. 555, 20 N.W.2d 643 (1945).

28. Annot., *supra* note 25, at 926.

29. *See, e.g.*, 72 AM. JUR. 2d *Statute of Frauds* § 305 (1974); RESTATEMENT (SECOND) OF CONTRACTS § 207 (Tent. Draft Nos. 1-7, 1973); Annot., *supra* note 25, at 932.

30. McCraw v. Llewellyn, 256 N.C. 213, 123 S.E.2d 575 (1962); Chason v. Marley, 224 N.C. 844, 32 S.E.2d 652 (1945); Kluttz v. Allison, 214 N.C. 379, 199 S.E. 395 (1938); Keith v. Bailey, 185 N.C. 262, 116 S.E. 729 (1923).

31. Hall v. Misenheimer, 137 N.C. 183, 49 S.E. 104 (1904).

32. Lane v. Coe, 262 N.C. 8, 136 S.E.2d 269 (1964); Searcy v. Logan, 226 N.C. 562, 39 S.E.2d 593 (1946); Hodges v. Stewart, 218 N.C. 290, 10 S.E.2d 723 (1940).

names of both parties to the contract.[33] Those cases from other jurisdictions which have considered the issue of sufficiency look most frequently to one factor in their determination: whether the will in its dispositions makes reference to the alleged oral contract.[34]

In *Rape v. Lyerly* the North Carolina court held that a revoked will could constitute a sufficient memorandum of an oral contract to satisfy the Statute of Frauds; yet it may be argued that the will in *Rape* was not a sufficient memorandum of the contract. For example, one might argue that the actual words of disposition used by Lyerly in his will do not refer to a contract to devise. Lyerly stated that he devised his realty "since" Mildred Rape had "obligated" herself to care for him.[35] Such dispositive terms are amenable to two constructions. First, the testator could be merely coupling his devise with an explanation for his generosity to Mildred Rape.[36] Such a construction compels the finding that the will is not a memo of the contract, because a memo must show not merely the appreciation and intention of one of the parties, but rather the promises and obligation running between the parties to the contract.[37]

Under the second possible construction, the testator could be recording the promises and obligations of each party to a contract to devise. That the devise was to Mildred Rape "since" she served Lyerly does not, of itself, show the contractual nature of the devise; "since" merely shows the causal relation between the devise and the service. The use of the words, "ha[d] obligated", in Lyerly's will, on the other hand. does show the contractual nature of the devise. Obligation generally refers to duty or promise arising from legal compulsion; here the only legal obligation to which the testator could have intended to refer is that of contract. Moreover, only infrequently or inadvertently does obliga-

33. Elliot v. Owen, 244 N.C. 684, 94 S.E.2d 833 (1956).

34. Kobus v. San Diego Trust & Sav. Bank, 172 Cal. App. 2d 574, 342 P.2d 468 (Dist. Ct. App. 1959); Busque v. Marcou, 147 Me. 289, 86 A.2d 873 (1952); Southern v. Kittredge, 85 N.H. 307, 158 A. 132 (1932); Gilbert v. Gilbert, 66 N.J. Super. 246, 168 A.2d 839 (App. Div. 1961); *In re* Anderson's Estate, 348 Pa. 294, 35 A.2d 301 (1944); Eslick v. Friedman, 191 Tenn. 647, 235 S.W.2d 808 (1951); Upson v. Fitzgerald, 129 Tex. 211, 103 S.W.2d 147 (1937); McClanahan v. McClanahan, 77 Wash. 138, 137 P. 479 (1913); *cf.* Falk v. Fulton, 124 Kan. 745, 262 P. 1025 (1928); *but see* Shroyer v. Smith, 204 Pa. 310, 54 A. 24 (1903).

35. *See* note 5 *supra.*

36. Explanatory clauses in wills are not uncommon and serve the useful purpose of educating family members to the reasons behind the testator's dispositive scheme.

37. *See* Brown v. Williams, 196 N.C. 247, 145 S.E. 233 (1928), finding that a will was not a memo of a contract to devise. *See also* Luders v. Security Trust & Sav. Bank, 121 Cal. App. 408, 9 P.2d 271 (Dist. Ct. App. 1932), holding that a devise for the devisee's faithful service to the testator did not serve as a memo of a contract to devise.

tion refer to an unenforceable, gratuitous promise or to a moral obligation; such a usage is not generally to be expected in a legal document. The dispositive terms of the will record the promises and obligations of the contract and, in doing so, make the reference to a contract that is required by most cases[38] deciding whether a revoked will serves as a memo of a contract.[39]

Lyerly's will identified both parties to the contract and stated the contract's terms and conditions: devise in return for services. The testator's signature at the will's excution served as the signature of the party to be charged; his reference to the location of the realty was a satisfactory description of it.[40] Arguments that the will was not a sufficient memo were properly rejected by the court.

An objection that can be made to the *Rape* case concerns that portion of Chief Justice Sharp's opinion dealing with the right to revoke a will executed pursuant to a contract.[41] A will is ambulatory and always revokable,[42] regardless of a contract to devise or not to revoke. However, the opinion in *Rape*, without stating that a will can never be irrevocable, quotes extensively from sources explaining that a will cannot be revoked to defeat contractual obligations. To say, as is sometimes said in courts of equity, that relief is granted because a will becomes irrevocable when executed in compliance with an enforceable contract[43] is incorrect.[44] The meaning of such statements is that, regardless of revocation, equity will impress a constructive trust upon the devised realty in favor of the contractual promisee.[45]

The distinction between one's right to revoke a will and one's right

38. *See* note 34 *supra.*

39. *See also* Woods v. Dunn, 81 Ore. 457, 159 P. 1158 (1916), where a devise in return for the home and care of devisee was a sufficient reference to and definition of the contract to devise.

40. For cases dealing with the sufficiency of the description of realty in a memo for Statute of Frauds purposes, see, *e.g.*, Carlton v. Anderson, 276 N.C. 564, 173 S.E.2d 783 (1970); Lane v. Coe, 262 N.C. 8, 136 S.E.2d 269 (1964); Searcy v. Logan, 226 N.C. 562, 39 S.E.2d 593 (1946); Hodges v. Stewart, 218 N.C. 290, 10 S.E.2d 723 (1940); Shroyer v. Smith, 204 Pa. 310, 54 A. 24 (1903).

41. 287 N.C. at 618, 215 S.E.2d at 748.

42. *Cf.* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 218, 224 (1953); 94 C.J.S. *Wills* §§ 117, 127(2) (1956); 1 H. UNDERHILL, A TREATISE ON THE LAW OF WILLS § 289 (1900).

43. Johnston v. Tomme, 199 Miss. 337, 24 So. 2d 730 (1946); Annot., 3 A.L.R. 172 (1919); B. SPARKS, CONTRACTS TO MAKE WILLS 111 (1956); Costigan, *Constructive Trusts based upon Promises Made to Secure Bequests, Devises, or Intestate Succession*, 28 HARV. L. REV. 237, 250 (1915).

44. B. SPARKS, *supra* note 43, at 111.

45. Costigan, *supra* note 43, at 250.

to rescind a contract needs to be drawn. The correct relation between these rights is that the right to revoke does not give one the right to rescind. The opinion in *Rape* fails to state this distinction and incorrectly implies that one's inability to rescind a valid contract bars revocation of the will executed pursuant to the contract. By citing cases[46] from other jurisdictions that directly state that execution of a will pursuant to a contract bars revocation of it,[47] *Rape v. Lyerly* propounds incorrect theories and promotes confusion about the justification for specific performance of a contract to devise. The correct justification rests simply upon the breach of contract to devise.

In conclusion, the North Carolina Supreme Court improperly justified the remedy that it awarded. Nonetheless, the remedy, conclusions, and holding of the court in *Rape v. Lyerly* are proper ones. The court's holding, that a revoked will can provide a sufficient memorandum of an oral agreement for Statute of Frauds purposes, had no North Carolina precedent but is supported by the weight of authority from other jurisdictions. Notwithstanding the North Carolina courts' ability to enforce an oral contract to devise realty evidenced by a will, promisees are well advised to insist upon a separate written instrument containing the promise to devise.

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Criminal Law—A Survey and Appraisal of the Law of Entrapment in North Carolina

In attempting to apprehend persons involved in the so-called victimless crimes,[1] modern law enforcement officers have found it necessary to set traps that are often quite elaborate to obtain evidence needed for conviction. In setting a trap, it is often necessary for the law officer or his agent to actually participate in the criminal act. The

46. 287 N.C. at 615, 215 S.E.2d at 748.

47. *See, e.g.*, Johnston v. Tomme, 199 Miss. 337, 24 So. 2d 730 (1946). *See also In re* Estate of Ranthum, 249 Iowa 790, 89 N.W.2d 337 (1958); Brock v. Noecker, 66 N.D. 567, 267 N.W. 656 (1936).

1. "Victimless crimes" include crimes in which there is no "victim" or in which the "victim" is a willing participant. Crimes relating to prostitution, homosexuality, narcotics, liquor sales, and gambling are common examples. *See* Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 874-75 (1963).