

June 1956

Oral Contracts to Devise and Bequeath in West Virginia

H. G. U.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Contracts Commons](#)

Recommended Citation

H. G. U., *Oral Contracts to Devise and Bequeath in West Virginia*, 58 W. Va. L. Rev. (1956).

Available at: <https://researchrepository.wvu.edu/wvlr/vol58/iss4/8>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

be sheer conjecture at this time. However, the tendency is seemingly toward the public utility side. In considering the future trend, one must remember that the Supreme Court forty-one years ago said: "There must be progress, and if in its march private interests are in the way they must yield to the good of the community."²⁸

J. W. P.

ORAL CONTRACTS TO DEVISE AND BEQUEATH IN WEST VIRGINIA

Undoubtedly the rule prevails in a majority of jurisdictions in the United States that a contract whereby a person obligates himself for a valuable consideration to make a provision by will is not illegal or against public policy.¹ West Virginia is in accord with this general rule with regard to contracts to devise or bequeath which satisfy the general requirements of a contractual relationship.²

When an attempt to contract to devise is made orally however, the promisee in attempting to gain equitable relief or damages at law is faced squarely with statutory barriers which at first blush may appear insurmountable.

In an attempt to secure relief in equity upon an oral contract to devise the proponent in West Virginia is met by not one, but four separate statutes which appear to bar performance of the oral contract. The Code requires that, "no estate of inheritance or freehold or for a term of more than five years . . . shall be created or conveyed unless by deed or will."³ This statute when read in conjunction with those which explicitly require that, ". . . no will shall be valid unless it be in writing and signed by the testator . . ."⁴ and "no contract for the sale of land . . . for more than one year shall be enforceable unless the contract or some note or memorandum thereof be in writing and signed by the party to be charged thereby, or his agent,"⁵ as well as that requiring that, "no action shall be brought in any of the following cases:

". . .

²⁸ *Hadachuck v. Sebastian*, 239 U.S. 394, 410 (1915).

¹ *ATKINSON, WILLS* § 48 (2d ed. 1953); *PAGE, WILLS* § 1707 (3d ed. 1941).

² *Davidson v. Davidson*, 72 W. Va. 747, 79 S.E. 998 (1913).

³ *W. VA. CODE* c. 36, art. 1, § 1 (1931).

⁴ *Id.* c. 41, art. 1, § 3 (1931).

⁵ *Id.* c. 36, art. 1, § 3 (1931).

"(f) Upon any agreement not to be performed within a year . . . , unless . . . in writing and signed by the party to be charged thereby . . .,"⁶ do appear to create an impassable barrier. To add additional difficulty to the cause of the proponent with regard to a contract to bequeath personal property the Code provides, "no gift of any goods and chattels shall be valid unless made in writing, or by will, unless actual possession shall have come to and remained with donee. . . ."⁷

The problems presented by the statutes have been met by the West Virginia court through suits for "specific performance" of such oral contracts. It is necessary to note that the "specific performance" requested here is not that which the technical use of the words requires. As was stated in *Burdine v. Burdine's Ex'r*,⁸ "strictly speaking, an agreement to dispose of property by will cannot be specifically enforced, not in the lifetime of the party, because all testamentary papers are from their nature revocable; not after his death, because it is no longer possible for him to make a will, yet courts of equity can do what is equivalent to 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." This theory of specific performance or "quasi specific performance"⁹ apparently has been the basis for the majority of West Virginia cases upon the question.

Before attempting to trace the line of decision of the West Virginia court it should be noted that it appears the court has felt that the term *convey* incorporates in its broadest connotation *devise* and by doing so the court has relied freely upon decisions concerning questions of sale or gift of realty by oral contract. This reliance may stem from dicta found in *Seaburn's Ex'r v. Seaburn*¹⁰ where the Virginia court stated, "there can be no doubt that the word 'conveyance' in its comprehensive and perhaps in its technical sense embraces a devise . . . ," but they can be contradistinguished. The

⁶ *Id.* c. 55, art. 1, § 1 (1931).

⁷ *Id.* c. 36, art. 1, § 5 (1931).

⁸ 98 Va. 515, 519, 36 S.E. 992 (1900).

⁹ Costigan, *Constructive Trusts Based on Promises Made to Secure Bequests, Devises, or Intestate Succession*, 28 HARV. L. REV. 237, 244 (1915).

¹⁰ 56 Va. (15 Gratt.) 423, 427 (1859).

West Virginia court has stated in the case of *Mercantile Banking & Trust Co. v. Showacre*,¹¹ "the term 'conveyance' . . . we observe has been construed as broad enough to cover devise or bequest." Accepting this view, though the minority, of the term *conveyance* the law applicable to cases of oral contracts to devise and oral contracts to convey appears to be applicable to either promise, with reference to the attempt to overcome the barrier presented by the West Virginia statutes toward securing specific performance.

The West Virginia cases present no particular problem with regard to the statutory provision requiring that a contract not to be performed within a year be in writing in order for there to be an action upon the contract.¹² The court has invariably adopted the attitude that a possibility of performance within a year takes the contract out of the statute.¹³ This reasoning is in accord with the majority of jurisdictions within the United States.¹⁴

The basis for the decisions of the West Virginia court on the question of oral contracts to devise or bequeath has been the performance of services of such a peculiar character that it is impossible to estimate their value by any pecuniary standard.¹⁵ In order for the court to grant "quasi specific performance"¹⁶ of any contract it is necessary that a contract in fact exist in order for the court to do substantial justice.¹⁷ As to contracts to bequeath or devise the court has stated, ". . . a contract to make a will, if certain and definite in its terms, and upon sufficient consideration is valid, and like any other contract, and by the same rules it will be enforced."¹⁸ The law in such cases is the same substantially as in the cases of parol contracts for deeds.

Evidence necessary for the establishment of a pre-existing contractual relationship is the key factor which one encounters in the West Virginia cases, in that only by establishment of the contrac-

¹¹ 102 W. Va. 260, 264, 135 S.E. 9 (1926); *accord*, *Hays v. Harris*, 73 W. Va. 17, 81 S.E. 827 (1913); *cf.* *Stamm v. Bostwick*, 122 N.Y. 48, 25 N.E. 233 (1890). *Contra*, *Jordan v. Universalist General Convention Trustees*, 107 Va. 79, 57 S.E. 652 (1907); *Heirs v. Slaughter*, 10 Ky. (3 A.K. Marsh) 505 (1821).

¹² See note 7 *supra*.

¹³ *Hughes v. Frum*, 41 W. Va. 445, 23 S.E. 604 (1895).

¹⁴ Schnebly, *Contracts to Make Testamentary Disposition as Affected by the Statute of Frauds*, 24 MICH. L. REV. 749 (1926).

¹⁵ *Bryson v. McShane*, 48 W. Va. 126, 35 S.E. 848 (1900); *Jefferson v. Simpson*, 83 W. Va. 274, 98 S.E. 212 (1919).

¹⁶ *Costigan*, *supra* note 9.

¹⁷ *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 513, 21 S.E. 854 (1895).

¹⁸ *Davidson v. Davidson*, 72 W. Va. 747, 750, 79 S.E. 998 (1913).

tual relationship can the proponent succeed in hurdling the barrier presented by the West Virginia statutes.¹⁹ “. . . [S]uch contracts are viewed by courts with suspicion, are not favored and to be enforceable must be upon sufficient consideration, and be equitable, and clear and definite in terms.”²⁰

The amount and type of evidence necessary for the establishment of the contract has varied from time to time according to the decisions of the court. Perhaps the leading decision with reference to the questions is that of *Bryson v. McShane*,²¹ where A agreed to “*deed*” all of her property (emphasis added) to plaintiffs who were husband and wife, if plaintiffs would move onto A’s farm and care for her during the rest of her life. The period of care lasted for approximately five months during which A was improved in dress and cleanliness and during which period A, according to uncontradicted testimony of disinterested witnesses, repeatedly told those in the neighborhood that she had turned her property over to plaintiffs. Upon the accidental death of A, plaintiffs buried A as requested, redeemed the delinquent property, and paid physician’s fees and funeral expenses. The testimony of witnesses was uncontradicted as to the standard of care given A, and also as to A’s statements as to the plaintiffs having all her property. The court held, both as to land occupied by plaintiffs and that located in another area, that plaintiffs had established their right to such land in that, “specific performance of a contract will be enforced where adequate compensation cannot be had at law,” and that “persons who contract to perform peculiar services for peculiar compensation, having performed such services, are entitled to have the compensation contracted for and to enforce a different value on their services and compel them to accept a less compensation for them would be the perpetration of fraud and injustice against them. There are some services that are incapable of valuation in money: as to these the law permits individuals to make their own contracts.”

The court however, declared the circumstances in *Root v. Close*²² to be altogether different from those presented in *Bryson v. McShane*. Here the decedent was diseased and unkempt about his person, yet possessed a capacity for work, and was held not to have

¹⁹ See notes 3, 4, 5, 6, 7 *supra*.

²⁰ 72 W. Va. 747, 756, 79 S.E. 998 (1913).

²¹ See note 15 *supra*.

²² 83 W. Va. 600, 98 S.E. 733 (1919).

contracted to give to A an amount of cash, placed in the hands of A during decedent's life, or to have established a relationship which would entitle A to such money as compensation for the care, support, and maintenance of the decedent, and medical attention furnished him while in life and expenses of burial. The evidence relied upon by A was said by the court to lack, "the definiteness and capacity that ought to characterize evidence relied upon for such purposes." By dicta the court implies that such evidence can be supplied by the situation and conduct of the parties in addition to the surrounding facts and circumstances. In addition the court appears to rely upon a capacity for work on the part of the deceased and competency to care and utilize property owned by him to rebut the possibility of use of the reasoning of *Bryson v. McShane*.

By dicta in *Blagg v. Van Sickle*²³ where plaintiffs requested specific performance of a contract to convey property in consideration of personal services rendered to an aged and diseased²⁴ individual who had the capacity to care for his property to the extent of executing a written contract to *pass* property to plaintiffs at his death, such paper having subsequently been lost, and also to execute a deed concerning other property to the same parties; the court asserted that with clear and conclusive proof of the contract, without contradiction, and services performed of the character not readily compensated in damages, specific performance of the contract would have been decreed, "even though there be no writing evidencing it."

Again by dicta in *McElhinney v. Minor*²⁵ where the decedent verbally contracted in consideration for his support and maintenance for the remainder of his life to give a farm and personal property at death to A and B, and such consideration entailed nursing care as well as farm duties for a period of three years, the court indicated had specific performance been requested, A and B "might have had" by proper proceedings specific execution of their contract, and obtained title to the land and personal property.

*Atkins v. Sawyer*²⁶ wherein the court rendered a decision based upon a procedural point, contains the dictum that, "if the labor and services under such agreement has been such as to change the whole course of life or life work of the complainant on the faith of

²³ 90 W. Va. 351, 110 S.E. 116 (1922).

²⁴ *Loathsome kidney disease* is apparently endemic among those with a bent toward oral testamentary statements.

²⁵ 91 W. Va. 755, 114 S.E. 147 (1922).

²⁶ 95 W. Va. 403, 121 S.E. 283 (1924).

the contract to devise or convey, the case is one which is within the same rule as to part performance as where possession of the land has been taken and valuable improvements made."

Another instance of equitable enforcement of the contract is found in *Hurley v. Beattie*.²⁷ The court decreed specific performance of an oral contract to give land in consideration of maintenance of a home and care for the remainder of the life of A, who at the time of entry into the contractual relationship was "crippled from a broken hip, and so could not work, as well as rheumatism, kidney, and heart trouble." The court stated that if the services performed are of the type as to be incapable of being measured in dollars and cents and if the evidence established a contract, "the controlling question is one of fact." Here there was no claim that P had failed in the slightest way in performance and there was uncontradicted disinterested testimony as to statements of A with reference to the existence of such contract. A died intestate and as such the court decreed that his property be given to P in specific performance of the oral contract and that a gift to P of certain personal property prior to the death of A, "may be evidence of decedent's desire that she have his entire personal estate, rather than proof that it was intended in full payment for her services."

Several witnesses were introduced to show that A made general statements of his intention to give P his estate in *Hedrick v. Harper*.²⁸ In addition the witnesses reported that A stated in his conversation that his son had received his share of the estate and intended appellant to have the rest. Appellant's services in consideration of the promise consisted of management of personal and business affairs for A, as well as management of household and farm. The court held that as the declarations of the witnesses were indefinite and uncertain as to the contract, such evidence is insufficient to show that deceased carried out his intention, if any.

A recent decision of the West Virginia Court, *Lantz v. Reed's Ex'r*,²⁹ appears to reassert the position of the court with regard to the evidence problem in securing "quasi specific performance"³⁰ or oral contracts to devise. Plaintiffs were husband and wife. The wife, prior to her marriage, lived in decedent's home as a domestic

²⁷ 98 W. Va. 125, 126 S.E. 562 (1925).

²⁸ 135 W. Va. 47, 62 S.E.2d 265 (1950).

²⁹ 89 S.E.2d 612 (W. Va. 1955).

³⁰ Costigan, *supra* note 9.

for several years. After the death of the wife of A, P (wife) assumed the position of housekeeper and continued to serve A until her marriage, whereupon she moved to another city. One year later, after a discussion with plaintiffs, A purchased a house in the city where plaintiffs had established residence, and at the request of A, plaintiffs "moved into the dwelling and lived in it together as their home." Plaintiffs who were not related to A, were in possession of the house and personal property of A at the time of suit. Shortly before death, A had left plaintiffs and purchased a house in still another city and had gone there to live but returned to the house wherein plaintiffs resided shortly thereafter. According to numerous witnesses there was a contract between plaintiffs and A by the terms of which A was to bequeath certain personalty and devise certain realty to plaintiffs in return for their caring for him as long as he should live. At the time of the alleged contract A was, "an elderly man and who was afflicted with an ailment which affected his kidneys and bladder and required daily care and attention. . . ." The court disposed of the testimony of witnesses by holding such testimony to have different meaning and effect in that, "some of them refer to each plaintiff, others to both plaintiffs, and still others to both plaintiffs and their infant daughter." However particular reliance was placed upon a letter from plaintiffs to A written while A was hospitalized which contained the words, "get well and get home so we can finish paying you and get our deed." The court stated the words "indicate the existence of some arrangement or agreement by which plaintiffs were to purchase and pay for the property and obtain a deed for it instead of the alleged oral agreement upon which the plaintiffs rely. . . ."

Had the letter not been introduced it would be difficult to reconcile this decision with prior decisions. No case has been noted in West Virginia wherein the court has refused specific performance of an oral contract to devise or bequeath when there has been presented uncontested, disinterested testimony as to the existence of the oral contract and performance by P of same where services are, "rendered in the care of aged persons."³¹ A request for specific performance of a parole contract in West Virginia must satisfy the requirement of our court that, "the proof must be so clear cogent and convincing as to leave no doubt in the mind of the chancellor

³¹ 98 W. Va. 125, 126, 126 S.E. 562 (1925).

that the particular contract as averred was made, and its existence and conditions clearly shown."³²

Of interest, though not precisely in point as to evidentiary matters, is the decision of the court in *Tearney v. Marmion*³³ wherein by dicta the court stated that a request for compensation due to a written contract, though it could be parol, can be specifically enforced as against the real estate and personalty concerned in the contract in that the specific relief sought is not a determining factor of the pleading. "It is the duty of a court under a prayer for general relief to grant any appropriate relief warranted by the averments and the proof."

The court has stated a general rule with reference to oral contracts that are within the statute of frauds by way of dictum in *Callahan v. First Nat'l Bank*:³⁴ "The general rule may be stated to be that specific performance cannot be decreed on the grounds of part performance, unless the acts are such that legal damages would not be adequate relief; and the mere rendition of services, the value of which can be estimated in money, is not, ordinarily, such part performance as will take the case out of the statute of frauds. Also that rendition of services which will take the case out of the statute must be services which cannot be estimated by any pecuniary standard, and subject to the additional qualifications that the parties did not intend that they should be measured by such standard."

The United States Supreme Court in *Whitney v. Hay*,³⁵ with reference to specific performance as being barred by the statute of frauds has stated, "the decree does not charge . . . upon his parol contract . . . , but rests upon the equities arising out of the acts and conduct of the parties subsequent to the making of the original agreement."

The decisions of the Virginia court have been in accord with those of the West Virginia court until May 1, 1888, the date upon which the *Code of 1887* took effect.³⁶ Even subsequent to that date the Virginia court stated in *Hale v. Hale*,³⁷ "there is no doubt, notwithstanding a will is in its nature ambulatory until the testator's

³² Kennedy v. Burns, 84 W. Va. 701, 101 S.E. 156 (1919).

³³ 103 W. Va. 394, 137 S.E. 543 (1927).

³⁴ 126 W. Va. 907, 30 S.E.2d 735 (1944).

³⁵ 181 U.S. 77 (1901).

³⁶ Wohlford v. Wohlford, 121 Va. 699, 73 S.E. 629 (1917).

³⁷ 90 Va. 728, 730, 19 S.E. 739 (1894).

death, and cannot be made irrevocable, that a person may by a certain and definite contract bind himself to dispose of his estate by will in a particular way, and that such a contract in a proper case will be specifically enforced in equity: that is to say, the property will be held charged with a trust in the hands of the heir at law, devisee, personal representative, purchaser with notice of the agreement, as the case may be, and a conveyance or accounting directed in accordance with the agreement.”

The West Virginia court is committed to enforcement of parol contracts to devise or bequeath where such contract is clearly demonstrated and services rendered are not capable of pecuniary evaluation. It is submitted, however, that the court might well endeavor to describe the exact procedure entailed in granting the *specific performance* in that no West Virginia case mentions a constructive trust imposed upon personalty or realty held by heirs, administrators, or executors, yet specific performance of the deceased's contract would require the court to execute a will for the deceased.

H. G. U.