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SPECIFIC PERFORMANCE-ORAL PROMISE TO DEVISE IN CONSIDERATION OF PERSONAL SERVICES

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SPECIFIC PERFORMANCE—ORAL PROMISE TO DEVISE IN CONSIDERATION OF PERSONAL SERVICES—Decedent orally agreed that if plaintiff would render services as housekeeper, practical nurse and general business associate, he would devise and bequeath one-half of his estate to her. Decedent died without having made a will, and plaintiff sought specific performance[1] of the agreement. *Held,* performance of these services did not take the oral contract out of the operation of the statute of frauds because the services were capable of measurement in money, and recovery on a quantum meruit basis was adequate. *Snyder v. Warde,* 151 Ohio St. 426, 86 N.E. (2d) 489 (1949).

A contract to make a will almost uniformly is held to be within the operation

[1] Technically plaintiff's action is not one for specific performance, but rather an equitable action to impose a constructive trust upon one-half of the realty and personalty comprising decedent's estate.

of the statute of frauds.[2] If the contract is oral, plaintiff's remedy is an action in quantum meruit for the reasonable value of the services performed. In certain instances courts of equity are liberal in allowing performance by the promisee to take the contract out of the operation of the statute, if the agreement itself has been proved with the required degree of certainty.[3] A majority of jurisdictions deem the quantum meruit remedy inadequate and grant equitable relief when the services rendered are so unique that they cannot readily be reduced to a money judgment.[4] Courts justify this result by saying that otherwise there would be a "fraud" upon the plaintiff. Even where the reasonable value of the services can be ascertained, a refusal to impose a constructive trust results in a "fraud" in that the plaintiff is deprived of the benefit of his bargain. The fundamental question in each situation is whether the benefit to this particular plaintiff in granting relief upon the contract outweighs the public interest, expressed in the statute, in security of land titles. Although the cases do not expressly recognize two separate categories, it is apparent that in this area a constructive trust is imposed in two types of situations. In one the plaintiff undergoes a real hardship in order to serve the deceased, which hardship cannot be compensated by money;[5] whereas in the other the services themselves are of unique value to the deceased because of a peculiar filial or domestic relationship which exists between the plaintiff and the deceased.[6] There is more justification for equitable relief in cases of the former type because the plaintiff cannot be put back in statu quo by a money judgment. In the latter type the unique value of the services to the deceased results from no particular effort on the part of the plaintiff, and compensation for the uniqueness would seem somewhat of a boon even if it could be adequately measured. With regard to the second type of situation the decisions indicate that where the plaintiff is a close relative of the deceased, a constructive trust almost automatically is imposed; while if the plaintiff is not a relative, courts are more reluctant to impose such a trust, even though there may be substantially the same love and devotion between the parties. In the principal case there was

[2] For a discussion of the application of particular provisions of the statute of frauds, see Schnebly, "Contracts to Make Testamentary Dispositions as Affected by the Statute of Frauds," 24 MICH. L. REV. 749 (1926).

[3] This procedure is sometimes said to be justified because the statute was designed to control the inexperienced jury and not the chancellor, and because the performance itself is some evidence of the contract.

[4] Huse v. Moore, 261 Mich. 288, 246 N.W. 123 (1933); 69 A.L.R. 14 (1930); 106 A.L.R. 742 (1937). At least two jurisdictions do not allow the performance of unique services alone as a defense to the statute. Hooks v. Bridgewater, 111 Tex. 122, 229 S.W. 1114 (1921); Martin v. Estate of Martin, 108 Wis. 284, 84 N.W. 439 (1900). Several states require only full performance without qualification. Fleming v. Dillon, 370 Ill. 325, 18 N.E. (2d) 910 (1938). Minnesota seems to require a domestic relationship. Olsen v. Dixon, 165 Minn. 124, 205 N.W. 955 (1925). Courts holding to the uniqueness doctrine sometimes differ as to what services are not pecuniarily compensable. Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 129 S.W. (2d) 905 (1939).

[5] Smith v. Nyburg, 136 Kan. 572, 16 P. (2d) 493 (1932) (foregoing marriage to care for parents); Lothrop v. Marble, 12 S.D. 511, 81 N.W. 885 (1900) (nursing helpless invalid who suffers from particularly unpleasant disease); Puddy v. Sharpe, 248 Mich. 147, 226 N.W. 853 (1929) (leaving home in England to come to United States to care for granduncle).

[6] Cannon v. Cannon, 158 Va. 12, 163 S.E. 405 (1932).

more than a mere master-servant relationship as the plaintiff was considered a member of the family and the plaintiff's children were treated by the deceased much as if they were his own. The court rejected the argument that this personal relationship made the services unique.[7] If equitable relief ever is to be granted in cases of the second type, it should be recognized that a person other than a relative may at times offer a much closer relationship than relatives themselves. The plaintiff's services in the principal case probably are no easier to value than they would be if plaintiff were deceased's daughter. No doubt the court was influenced by an Ohio statute, similar to the statute of frauds, which dealt specifically with agreements to make a will.[8]

C. J. Rice

[7] The court said at page 437, "We know of no rule by which it is necessary for an employer and employee to dislike or hate each other and not to be kindly and generous toward each other in order for the services of the employee to be monetarily compensable by the employer."

[8] Ohio Gen. Code (Page, 1938) §10504-3a.