BOOK REVIEWS

CONTRACTS TO MAKE WILLS. By Bertel M. Sparks. New York: New York University Press, 1956. Pp. 200. $5.00.

This book deals with a problem involving an interplay of concepts from many fields of the law (as usually delineated in curricula, textbooks and treatises) including Contracts, Wills, Remedies, Creditor's Rights, Trusts, Property, Domestic Relations, Equity and Damages. The work is primarily analytic in nature, bringing to bear a sound grasp of many fundamentals from these fields upon a host of problems. There is considerable confusion in the cases dealing with contracts to make wills, which the book should help dispel. Any lawyer about to draft such a contract or to engage in litigation involving such a contract would be well advised to consult *Contracts to Make Wills*. The wide range of basic and important doctrines whose operations are illustrated in the book also would make it valuable reading during a review or bar refresher.

The title is aptly descriptive of the contents. It deals with contracts under which a promisor agrees to devise or bequeath property to a promisee. Suggestive, but not exhaustive, of the aspects of such contracts covered by the author are: Historical development, including that of joint and mutual wills; Formation of such contracts (frequently complicated by being an informal family arrangement in which the parties have executed no written instrument and have not otherwise expressed themselves with precision); Statute of Frauds; Power and privileges of the promisor relative to the property after execution of contract; Remedies of the promisee prior to promisor's death; Relationship of the contract to probate of an inconsistent will; Remedies, both legal and equitable, of the promisee after the death of the promisor; Relative rights of the promisee and of creditors, legatees or a surviving spouse; and the Effect of statutes of limitations and nonclaim statutes.

Much of the confusion in the cases stems from a collision of the rules that a contract is irrevocable while a will is revocable. Although there is a verbal paradox in this juxtaposition, the validity of contracts to make wills was early recognized. The problem of coexistence between these legal concepts is squarely raised when there are two wills, an earlier one carrying out the contract and a later revoking will, inconsistent with

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the contract. Should the earlier will be probated, having become irrevocable by virtue of the contract? The author's answer and that of almost all courts is no. For this result the author gives two reasons, (1) a probate court is not the proper forum for issues as to validity of contracts or for granting relief for breach of contract and (2) to treat the will as irrevocable would be changing the revocable nature of a will. The first point seems well taken and is supported by authority.[1] The second point needs to be qualified, however. If a will executed pursuant to a contract is said to be revocable, that statement nevertheless means something quite different from the same statement about a will not pursuant to a contract. A will pursuant to and one not pursuant to a contract may both be ambulatory in the sense that a revoking will is admitted to probate. However, the dispositive scheme in the will pursuant to a contract is not ambulatory. To hold otherwise would deny the validity of contracts to make wills.

The author resolves this problem of revocability of the will by viewing the contract as controlling the transfer of property at death and the will as merely being the vehicle for accomplishing the transfer. This is sound. This "vehicle" being incidental to the end result, the inconsistent will can be admitted to probate, while appropriate relief on the contract is granted in a court of law or equity, rather than in the probate court. This treatment recognizes the contract as controlling over the inconsistent will and does not deny the validity of contracts to make wills.

Throughout his treatise the author draws a fundamental distinction between contracts to devise or bequeath specific property as contrasted to all or a fractional part of the property owned by the promisor at death. The former does not present the difficult question inherent in the latter, namely, whether the promisor may dispose of any property inter vivos thus eliminating part or all of the property which might otherwise constitute part of his probate estate. The courts have protected the reasonable expectations of promisees of all or a fractional part by imposing limitations upon the promisor's power of disposition. Gifts, particularly those large in value, have been held breaches. Transfers such as those with a life estate retained by the promisor-grantor or for annuities have been held to breach the contract, the courts frequently characterizing the transfers, although inter vivos, as "testamentary." The author deplores this loose usage of the term "testamentary," and proposes an overall test of whether the transfer by the promisor was reasonable.

1. ATKINSON, LAW OF WILLS 217 (2d ed. 1953); 4 PAGE, LAW OF WILLS §§ 1733 and 1743 (3d ed. 1941). *But cf.* Goddard, *Mutual Wills*, 17 MICH. L. REV. 677, 686 (1919).

The reviewer believes this is a workable test. However, it is suggested that one factor, mentioned by the author and dismissed as not of controlling importance, should be given emphasis as being sufficient to establish that a particular inter vivos transfer by a promisor is neither unreasonable nor a breach of contract. This factor is the presence of consideration passing to the promisor of approximately equal value to the property transferred. The crucial sentence in the paragraph in which the author deals with the role of consideration is this: "If the transferee [who has furnished consideration] has knowledge of the prior contract he cannot be a bona fide purchaser and will be in no better position than if he had taken as a mere donee."[2] This statement is supported by the citation of one case, *Van Duyne v. Vreeland*.[3]

The reviewer's analysis of this case differs from that of the author, it being the reviewer's opinion that *Van Duyne v. Vreeland* recognizes that the transferee is protected (if the contract does not pertain to specific property) to the extent of the value of the consideration he furnishes and that a transfer for adequate consideration is within the rights of the promisor. In that case the defendant had promised to leave all the property he owned at death to his adopted son. Being a widower he took a second wife and at about the same time had a falling out with the adopted son over trivialities, the court viewing the son as without blame. Within six months the father conveyed a farm worth $6,000 to his second wife's sister and husband. In return he received a bond in the amount of $6,000 conditioned upon the grantees supporting the defendant and his wife for their lives. The court's opinion in at least three places indicates the consideration received by the grantor was not equal in value to the property transferred: the sale was "an extraordinary one,"[4] "The bargain is a most improvident one . . . ,"[5] and "The consideration was an inadequate one."[6] Furthermore, as suggested by the nature of the transfer, it was apparently entered into by the grantor, to the knowledge of the grantee, deliberately to defeat the interest of the son. The court, however, stated and restated that the father could dispose of or exhaust his property during his life.[7] Presumably this would be in situations in which adequate consideration was received for the dispositions made. That the court recognized the consideration received by the transferor as of controlling importance is shown by the decree ordered. Brickell,

2. SPARKS, CONTRACTS TO MAKE WILLS 65 (1956).
3. 12 N.J. Eq. (1 Beasley) 142 (1858).
4. *Id.* at 153.
5. *Id.* at 156.
6. *Id.* at 155.
7. *Id.* at 153, 157, 159.

the transferee, was decreed to hold the property subject to the agreement between father and son and at the death of Vreeland (the father) an accounting would be had in which allowance would be made to Brickell "for his costs, expenses, and trouble for the support of Vreeland and his wife."[8] This express recognition of the role of consideration would mean that if this consideration were of equal value to all the benefits received by the transferee, the transferee would be fully protected.

Thus interpreted *Van Duyne v. Vreeland* gives a rational significance to the adequacy of the consideration received by a transferor who has contracted to will all or part of his property owned at death. Apart from a contract to devise or bequeath specific property, the promisee has no cause to object to a transfer for adequate consideration. The promisor's estate is not depeleted, and the promisee's rights can attach to the property received in the transfer. To hold that the promisor could not transfer property for full value would be tantamount to freezing the assets held by the promisor. This would seem to be an unwarranted implication going beyond the intention of the contracting parties. While the reasonable expectations of the promisee would preclude by implication the promisor's right to dissipate his estate by transfers for inadequate consideration, the promisee needs no protection from transfers for full value. In fact to allow the promisee to proceed both against the transferee and the assets in the estate of the promisor would be to unjustly enrich the promisee at the expense of the transferee.

Once transfers for adequate consideration are sanctioned (regardless of whether the transferee has notice of the prior contract) it should not be assumed that all transfers for inadequate consideration (or even for no consideration) are to that extent a breach of contract. As to those situations the author's proposed test of reasonableness would be an excellent guide in reaching a decision. For example, he cites and discusses cases[9] holding that there was no breach when a person made gifts to relatives or charity in amounts not constituting a substantial proportion of the promisor's wealth.

In the last chapter the author mentions some situations in which a contract to make a will can be used as an estate planning device. Its most common use, in which it serves a recurrent need, is for aged persons of modest means to insure themselves of support while still retaining their property until death. However, it would be easy to overemphasize the book as one on estate planning. The advertising copy on the dust jacket

8. *Id.* at 159.
9. *Op. cit. supra* note 2, at 59-61.

makes this error, and distorts the nature of the book which is essentially analytic of legal problems in contracts to make wills. It is not in the how-to-do vein of many estate planning texts, nor does it list and evaluate the respective merits of possible alternatives to contracts to make wills such as annuities, trusts, or inter vivos transfers in return for a promise of support for life (even perhaps with a security interest in the promisee). Much of the current literature on estate planning is concerned with tax aspects, which are not touched in the present book. This is regrettable for contracts to make wills raise difficult questions under the federal income and estate taxes as well as under state inheritance taxes.[10]

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GENERAL PRINCIPLES OF LAW. By Giorgio Del Vecchio. Translated by Felix Forte. Introduction by Roscoe Pound. Boston University Press, 1956. Pp. x, 111. $3.50.

There must first be a word of honor for the translator. This book is very largely his as well as the author's, because the translator has so brilliantly made the author's actual thought available to the English reader. This illustration occurs to me. In his own philosophy of law, Professor Del Vecchio has as a test the *sentimonto justicia,* but he means *sentimonto* in the Italian sense of sympathetic understanding, and not the English sense of concept. The Italian *sentimonto* is not a term of rigid analysis like our concept. It is a term of reverent understanding, that takes its content from the idea of sympathetic interpretation and generous loyalty, somewhat in the sense of the Spanish *simpatico.* In Spanish, a true friend, or even a fair-minded person of any kind, considers everything *simpatico.* Thus *simpatico* becomes not a generous extra favor of friendship, it becomes a minimum duty which puts you at fault if you

10. Some possible questions under the federal tax laws are: Is the receipt of the property by the promisee income or instead a bequest or devise under INT. REV. CODE of 1954, § 102?; If income, how are the expenses of performance by the promisee to be treated?; What will be the basis in the hands of the promise, cost or value at date of decedent's death?; and Is there a deductible claim under INT. REV. CODE of 1954, §2053(c), for the federal estate tax?

The Indiana Inheritance Tax includes transfers, "if made in payment of a claim against the estate of a deceased person arising from a contract or antenuptial agreement made by him and payable by its terms by will or contract at or after his death." IND. ANN. STAT. §7-2401 (1953). See Comment, *Applicability of Inheritance Taxation to Contracts to Devise or Bequeath,* 37 YALE L.J. 108 (1927).

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