The Statute of Frauds' Lifetime and Testamentary Provisions: Safeguarding Decedents' Estates

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NOTES

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INTRODUCTION

Anglo-American jurisprudence has long recognized the importance of ensuring that the intent of a decedent to devise or bequeath property be the result of careful deliberation and that his intention not be thwarted by spurious claims against his estate. This goal has been achieved by the universal requirement that distribution of an estate be either in accordance with a writing validly executed under the Statute of Wills, or pursuant to the laws of intestate succession.

Most jurisdictions, however, have failed to provide the safeguard of a writing requirement in those situations in which a testamentary transfer of money or property is to be accomplished by a contract to make a will, or by a contract not performable within a lifetime. In both cases, the obligation assumed requires performance after the


3. See First Gulf Beach Bank & Trust Co. v. Crubaugh, 330 So. 2d 205, 210 (Fla. Dist. Ct. App. 1976); Sherman v. Johnson, 159 Ohio St. 209, 222, 112 N.E.2d 326, 333 (1953); Frieders v. Estate of Frieders, 180 Wis. 430, 433-34, 193 N.W. 77, 78-79 (1923); T. Atkinson, supra note 1, § 62, at 292-94, § 63, at 296; G. Bogert, supra note 2, § 22, at 55; 1 Page, supra note 2, § 10.10, at 463; A. Scott, supra note 1, § 40, at 95-96; G. Thompson, supra note 1, § 28, at 58, § 114, at 182.

4. T. Atkinson, supra note 1, § 38, at 159; 2 Page, supra note 2, § 19.4, at 68-69; G. Thompson, supra note 1, § 2, at 1-2.
death of the promisor, often in derogation of a will. In fact, most jurisdictions will enforce such contracts, even those proven by parol evidence, although they circumvent the policy behind the Statute of Wills and pose a great potential for fraud and perjury. Eleven states have sought to close this loophole in the Statute of Wills by enacting specific Statute of Frauds’ provisions that require these contracts to be evidenced by a writing. This Note contends that the writing requirement imposed by such legislation is both necessary and beneficial. It is recommended that the legislatures in those jurisdic-


9. 1 Page, supra note 2, § 10.10, at 463-64; B. Sparks, supra note 1, at 26; see Ray, Dead Man’s Statutes, 24 Ohio St. L. J. 89, 90 (1963); Editorial Note, Effect of the New Ohio Statute of Frauds on a Prior Oral Contract to Make a Will, 16 U. Clin. L. Rev. 166, 166-67 (1942) [hereinafter cited as Ohio Statute of Frauds]; 7 U.C.L.A. L. Rev. 132, 133 (1960).

tions lacking a writing requirement ponder the important safeguards afforded an estate by such a statutory mandate, and consider enacting amendments to their Statutes of Frauds to regulate lifetime and testamentary contracts.

This Note also explores the exceptions to the requirements of the Statute of Frauds that have been developed by the judiciary over the years. Although designed to alleviate some of the hardships occasioned by rigid adherence to the Statute, these exceptions threaten to drastically reduce the effectiveness of the Statute's lifetime and testamentary provisions. This Note strongly suggests that courts carefully scrutinize any exception to the Statute of Frauds' writing requirement in light of the important policy considerations embodied in the lifetime and testamentary provisions.

I. Statutory Background

Contracts to make a testamentary disposition and contracts not performable within a lifetime have historically been viewed with suspicion. In these types of contracts, the promisor's obligation usually entails performance after his death, long after the making of the contract with the promisee. Claims arising out of the breach of


such contracts, therefore, are usually litigated without the testimony of one of the parties to the alleged agreement.\textsuperscript{14} A heightened potential for fraudulent allegations is thus presented when the claim is based primarily on the oral statements of the decedent.\textsuperscript{15} Courts confronted with a claim of an oral contract to make a will or an oral contract not performable within a lifetime have turned to the various statutory protections afforded an estate against fraudulent claims such as the Dead Man's Statute\textsuperscript{16} and the Statute of Wills.\textsuperscript{17}

Dead Man's Statutes were enacted in most states during the 19th

\textsuperscript{14} See Rubin v. Irving Trust Co., 305 N.Y. 285, 299, 113 N.E.2d 424, 428 (1953); Dreher v. Levy, 67 A.D.2d 438, 441, 415 N.Y.S.2d 658, 660 (1979); 3A Warren's Heaton, supra note 13, § 276, ¶ 2, at 48-150; 19 St. John's L. Rev. 152, 153 (1945); 7 U.C.L.A. L. Rev. 132, 133 (1960). The majority of cases within the lifetime and testamentary provisions are litigated for the first time after the death of one of the parties, because of the general rule that an action for breach of contract cannot be brought until the time when performance is due. J. Calamari & J. Perillo, The Law of Contracts § 12-2, at 456 (2d ed. 1977); see B. Sparks, supra note 1, at 85-86, 90. For example, if a promisor contracts to make a reciprocal will, the promisor's obligation would not be fulfilled unless the promisor died leaving the will in effect. 1 Page, supra note 2, § 10.2, at 437; B. Sparks, supra note 1, at 85-86. In a situation where the promisor intends to act or has acted so as to make his performance under the contract impossible, however, the promisee may bring an action for anticipatory breach of contract. J. Calamari & J. Perillo, supra, §§ 12-3, 12-4; B. Sparks, supra note 1, at 83-87, 90. For instance, if a party to a contract to make a will attempts to defeat the contract by selling the subject matter of the contract, the other party could bring an action to enjoin the sale. See A. Corbin, supra note 12, § 432, at 441; see, e.g., Remele v. Hamilton, 78 Ariz. 45, 275 P.2d 403 (1954) (injunction granted); Schondelmayer v. Schondelmayer, 320 Mich. 565, 31 N.W.2d 721 (1948) (same). In instances of repudiation, where both parties are alive to testify, the evidentiary problems associated with lifetime and testamentary contracts are considerably lessened. See infra notes 163-64 and accompanying text.

\textsuperscript{15} Notten v. Mensing, 3 Cal. 2d 469, 477, 45 P.2d 198, 202 (1935); In re Estate of Ditson, 177 Misc. 648, 650, 31 N.Y.S.2d 468, 471 (Sur. Ct. 1941); 1 Page, supra note 2, § 10.10, at 463-64; B. Sparks, supra note 1, at 26; see Ray, supra note 9, at 90; Ohio Statute of Frauds, supra note 9, at 166-67; 7 U.C.L.A. L. Rev. 132, 133 (1960).


century\(^{18}\) in response to the special evidentiary problems occasioned by claims against decedents' estates.\(^{19}\) In an effort to deter perjury, these statutes prohibit an interested party from testifying about transactions or communications with a decedent.\(^{20}\) The Dead Man's Statutes thus render a promisee incompetent to testify to the existence of a contract that is based on oral communications with the decedent-promisor.\(^{21}\)

Perhaps the most important legislative safeguard afforded an estate against false claims is the Statute of Wills.\(^{22}\) Enacted in every state, the Statute of Wills requires all testamentary dispositions of property to be accomplished by an unambiguous writing,\(^{23}\) signed by the testa-

18. See Ray, supra note 9, at 89-90.
19. B. Sparks, supra note 1, at 26; Ray, supra note 9, at 90; Ohio Statute of Frauds, supra note 9, at 166-67 & n.2. The Dead Man's Statute had its inception in an even older rule of evidence that rendered "all persons having a direct pecuniary or proprietary interest" in the results of the suit incompetent to testify. C. McCormick, McCormick on Evidence § 65, at 142 (E. Cleary 2d ed. 1972). In the middle to late nineteenth century, these rules were reformed. The incompetency of interested parties was generally abolished, but remained in instances of a civil suit between two parties, one of whom was deceased. Id. It was felt that without such a rule hardship and injustice would result, because no one could rebut the survivor's testimony as adequately as the decedent. Dead Man's Statutes were created to codify this common law rule. Id. at 142-43.
20. See Walling v. Couch, 292 Ala. 33, 35, 288 So. 2d 435, 436 (1973); Redwine v. Jackson, 254 Ala. 564, 569-70, 49 So. 2d 115, 120 (1950); Renz v. Drury, 57 Kan. 84, 87, 45 P. 71, 72 (1896). The premise behind the Dead Man's Statutes is that where the mouth of one party to a transaction is sealed by death, the lips of the surviving party shall be closed by law, so as not to leave the decedent's estate at a gross disadvantage. See Ray, supra note 9, at 90; Ohio Statute of Frauds, supra note 9, at 167 n.2. Only a witness who is so interested in the result of the suit as to directly gain or lose thereby is disqualified from testifying by these statutes. C. Lilly, An Introduction to the Law of Evidence, 66-67 (1978); C. McCormick, supra note 19, § 65, at 142.
21. 3A Warren's Heaton, supra note 13, § 276, ¶ 2, at 48-142 to -143, 48-154 to -155; C. McCormick, supra note 19, § 65, at 143; 2 J. Wigmore, Evidence §§ 488, 578 (Chadbourn rev. ed. 1979); see Eastwood v. Crane, 125 Iowa 707, 709, 101 N.W. 481, 482 (1904); Farrington v. Richardson, 153 Fla. 907, 910-12, 16 So. 2d 158, 160-62 (1944).
The formalities required by the Statute of Wills reflect the strong public policy that disposition of an estate accord with the deliberately expressed intentions of the testator. By requiring a writing, the Statute of Wills not only ensures that evidence of the testator’s intentions will be available to defeat fraudulent claims, but also assures the court that those intentions were reached with an element of deliberation.

Although the Dead Man's Statutes and the Statute of Wills afford some safeguards against claims that might defeat a testator's wishes, they are insufficient to protect an estate against fraudulent allegations of a contract with the decedent. First, Dead Man's Statutes do not prevent subornation of perjury. Persons not privy to the transaction

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27. Sherman v. Johnson, 159 Ohio St. 209, 221-22, 112 N.E.2d 326, 333 (1953); 2 Page, supra note 2, § 19.3, at 62-63; A. Scott, supra note 1, § 55.9, at 133; see Spinks v. Rice, 187 Va. 730, 744, 47 S.E.2d 424, 430 (1948); Fuller, supra note 1, at 803.

28. State of N.Y. Law Revision Comm’n, supra note 13, at 33, reprinted in 1957 Commission Report, supra note 13, at 47; see First Gulf Beach Bank & Trust Co. v. Grubaugh, 330 So. 2d 205, 210 (Fla. Dist. Ct. App. 1976); Sherman v. Johnson, 159 Ohio St. 209, 221-22, 112 N.E. 2d 326, 333 (1953); cf. Fuller, supra note 1, at 800, 803 (one who is compelled to furnish a memorial of his intention is usually induced to deliberate before writing).

29. See In re Estate of Ditson, 177 Misc. 648, 654, 31 N.Y.S.2d 468, 475 (Sur. Ct. 1941); B. Sparks, supra note 1, at 26, 38; supra note 18-28 and accompanying text.

such as a spouse or a sibling are not disqualified by these statutes\textsuperscript{31} and may falsely testify as to oral statements made by the decedent-promisor that tend to show the alleged contract.\textsuperscript{32} The Dead Man’s Statutes, therefore, cannot effectively deter the assertion of fraudulent contractual claims against decedents’ estates.\textsuperscript{33}

Second, the Statute of Wills does not preclude enforcement of contracts requiring a testamentary disposition of property.\textsuperscript{34} In fact, such contracts generally are enforceable,\textsuperscript{35} even if based on an oral agreement with the decedent,\textsuperscript{36} despite recognition that these contracts circumvent the Statute of Wills.\textsuperscript{37} In the absence of a statutory

\textsuperscript{31} 1 Page, \textit{supra} note 2, § 10.45, at 536; \textit{e.g.}, Evans v. Mason, 82 Ariz. 40, 47-48, 308 P.2d 245, 250 (1957) (promisee’s assignee not incompetent to testify); Brewer v. Mackey, 177 Ga. 813, 814, 171 S.E. 273, 273 (1933) (daughter not incompetent to testify); Hamar v. Isachsen, 58 A.D.2d 988, 989, 397 N.Y.S.2d 485, 486 (1977) (husband not incompetent to testify); \textit{In re} Estate of Manchester, 279 A.D. 254, 255, 110 N.Y.S.2d 107, 109 (1952) (wife not incompetent to testify); Tracy v. Danzinger, 253 A.D. 418, 422, 3 N.Y.S.2d 24, 27 (husband not incompetent to testify), aff’d, 279 N.Y. 679, 18 N.E.2d 311 (1938); Hungerford v. Snow, 129 A.D. 816, 818, 114 N.Y.S. 127, 128-29 (1909) (same).

\textsuperscript{32} 1 Page, \textit{supra} note 2, § 10.10, at 464; B. Sparks, \textit{supra} note 1, at 26, 38. When a lifetime or a testamentary contract is oral, circumstantial evidence often tends to show that a contract existed, especially when a witness close to the situation, such as a wife or child, testifies to that effect. After the promisor is dead, rebutting evidence may be difficult to find. \textit{Id.} at 26.

\textsuperscript{33} B. Sparks, \textit{supra} note 1, at 26, 38; \textit{see} Doby v. Williams, 53 N.J. Super. 548, 552-53, 148 A.2d 42, 45 (Super. Ct. Law Div. 1959); C. McCormick, \textit{supra} note 19, § 65, at 143-44.

\textsuperscript{34} Hale v. Wilmarth, 274 Mass. 186, 189, 174 N.E. 232, 234 (1931); 1 Page, \textit{supra} note 2, § 10.11, at 467; \textit{see} authorities cited \textit{infra} notes 35-36.


writing requirement, courts have required clear and convincing evidence of the alleged agreement.\textsuperscript{38} While this high standard of proof might provide some evidentiary safeguards against fraud,\textsuperscript{39} it does not diminish the number of claims asserted, because the case must go to the merits to establish the proof.\textsuperscript{40} Both parties might feel more satisfied that they had their day in court and argued fully. Nevertheless, the increased number of cases heard that would still be dismissed because of failure to provide conclusive evidence of an actual agreement would inflict a severe blow to judicial economy and force estates to defend spurious claims.\textsuperscript{41}

Furthermore, the other protections afforded by the Statute of Wills' writing requirement, such as deliberateness, are not addressed by merely imposing a higher evidentiary standard.\textsuperscript{42} Ignoring the im-

\textsuperscript{38} See Spinks v. Rice, 187 Va. 730, 743-44, 47 S.E.2d 424, 430 (1948) ("If the validity of this instrument be established, it would accomplish a clear evasion of the statute of wills.").

\textsuperscript{39} See Morton v. Yell, 239 Ark. 195, 197, 388 S.W.2d 88, 89 (1965). \textit{But see} B. Sparks, \textit{supra} note 1, at 24-26 (courts pay lip service to rule requiring a higher standard of proof).

\textsuperscript{40} See B. Sparks, \textit{supra} note 1, at 22-38 (discussing problems associated with the application of clear and convincing standard of proof). Enacting lifetime and testamentary provisions would check the flood of claims against estates that apparently were not checked by the high standard of proof generally required in the absence of these provisions. \textit{See} Bayreuther v. LaGuardia, 176 Misc. 547, 548, 25 N.Y.S.2d 620, 621-22 (Sup. Ct. 1941); State of N.Y. Law Revision Comm'n, \textit{Act}, Recommendation and Study relating to Section 31, Subdivision 8, of the New York Personal Property Law, 1946 Legislative Doc. No. 65(I), at 15 (1946), \textit{reprinted in} State of N.Y. Law Revision Comm'n, \textit{Report of the Law Revision Commission for 1946}, at 267, 281 (1946) [hereinafter cited as 1946 Comm'n Report]; 3 Brooklyn L. Rev. 150, 154 (1933); 19 St. John's L. Rev. 152, 152-53 (1945).


portance of deliberation in the context of a testamentary agreement is particularly troublesome, because "parties are probably less likely to accurately express themselves concerning contracts to devise or bequeath than upon any other kind of transaction." The belief that performance is in the distant future often prevents the parties from fully exploring and comprehending the obligations attendant to the agreement. Because contracts making a testamentary disposition of property are irrevocable and can defeat the intended disposition of a testator's will, careful deliberation is of paramount importance. This problem has been ameliorated, however, in those states that have enacted specific Statute of Frauds’ provisions to cover contracts making a testamentary disposition and contracts not performable within a lifetime.

43. B. Sparks, supra note 1, at 22; see G. Bogert & G. Bogert, The Law of Trusts and Trustees § 480, at 202-03 (rev. 2d ed. 1978).

44. See B. Sparks, supra note 1, at 32-34. People tend to think of death as an occurrence in the distant future. D. Coon, Introduction to Psychology 293 (2d ed. 1980). As a result, contracts requiring performance at or after death often are made without a full appreciation of the obligations assumed. See B. Sparks, supra note 1, at 32-34.

45. See infra note 56 and accompanying text.

46. See Rubin v. Irving Trust Co., 305 N.Y. 288, 299, 113 N.E.2d 424, 428 (1953); Frieders v. Estate of Frieders, 180 Wis. 430, 433-34, 193 N.W. 77, 78-79 (1923); 1 Page, supra note 2, § 10.3, at 441-43; B. Sparks, supra note 1, at 162. If a contract to make a will is enforceable, the promisee has rights similar to a creditor, because the claims are settled before disposition of the estate according to the will. See id.

47. See B. Sparks, supra note 1, at 200. A writing prevents "the making of ill-considered oral contracts to dispose of property after death." State of N.Y. Law Revision Comm’n, supra note 13, at 33, reprinted in 1957 Commission Report, supra note 13, at 47.

48. See In re Estate of Ditson, 177 Misc. 648, 654, 31 N.Y.S.2d 468, 475 (Sur. Ct. 1941); 1 Page, supra note 2, § 10.10, at 463; Ohio Statute of Frauds, supra note 9, at 166-67. Other jurisdictions have recognized the need for a writing requirement to cover lifetime and testamentary contracts as evidenced by their efforts to fit these contracts within other Statute of Frauds’ provisions. 1 Page, supra note 2, § 10.11, at 464-65; B. Sparks, supra note 1, at 41-44. For example, contracts to devise land are often decided under the provision governing transfers of an interest in land. T. Atkinson, supra note 1, § 48, at 213; 1 Page, supra note 2, § 10.11, at 465 & n.6; B. Sparks, supra note 1, at 41; e.g., Vickers v. Pegues, 247 Ala. 624, 626, 25 So. 2d 720, 722 (1946); Fitzpatrick v. Michael, 177 Md. 248, 253-55, 9 A.2d 639, 641 (1939); Humphrey v. Fason, 247 N.C. 127, 134, 100 S.E.2d 524, 530 (1957). Similarly, contracts to bequeath personally valued over a specified amount are sometimes interpreted within the sale of goods provision. 1 Page, supra note 2, § 10.11, at 467 & n.10; B. Sparks, supra note 1, at 41-42 & n.11. But see 1 G. Palmer, The Law of Restitution § 4.21, at 549 & n.4 (1978) (noting jurisdictions that do not extend sale of goods provisions to testamentary contracts). These provisions, however, are not created to protect decedents’ estates against fraudulent claims, but to control sales of land and goods. Where a contract cannot be completed before the end of a lifetime, and does not involve goods or land, such as a bequest of money, or a promise to support for life, there is no other Statute of Frauds’ provision to protect against
II. THE STATUTE OF FRAUDS: COMPLETING THE SPHERE OF PROTECTIONS

A. The Provisions

1. The Testamentary Provision

In those states with a testamentary provision, an agreement to devise or bequeath is considered a contract to make a will that must satisfy the writing requirement of the Statute of Frauds. Because only contracts to make a will fall within the Statute of Frauds' testamentary provision, courts in these states must determine the nature of the transaction in question. Fine distinctions must, therefore, be made between gifts causa mortis, wills, and contracts to make a will.

A gift causa mortis is an existing intent to donate coupled with the transfer of a property interest prior to the death of the donor. Here death acts to preclude revocation of the already transferred property interest. A will, by definition, is an ambulatory instrument, inoper-
ative and revocable until the death of the testator. A contract to make a will, on the other hand, is an irrevocable agreement, supported by consideration, that immediately transfers a contract right, but does not transfer a property interest until the death of the promisor.

Wills and contracts to make a will can often be confused in cases where a husband and wife make joint or reciprocal wills. Joint testaments may show evidence of a common understanding or intention, but an understanding does not necessarily indicate that the parties intended to form a contract. Two persons may validly agree to dispose of their estates in a particular manner by means of a joint or mutual will. Mere execution of a joint testament, without further evidence, however, does not establish a contractual obligation.


57. A joint will is a single testamentary instrument that contains the wills of two or more persons and disposes of property owned jointly, in common, or in severalty by them. In re Brown, 26 Misc. 2d 1011, 1019, 209 N.Y.S.2d 465, 474 (Sur. Ct. 1961); T. Atkinson, supra note 1, § 49, at 222-24.

58. Reciprocal wills, also called mutual wills, are created when two individuals execute "separate wills which are, in part at least, reciprocal or identical in their provisions as the result of some preconcerted plan." T. Atkinson, supra note 1, § 49, at 222.


dicial policy has been one of great reluctance to restrict the ambula-
tory nature of a will, absent clear and convincing evidence of an
intention to contract.61

2. The Lifetime Provision

The lifetime provision requires that a contract be in writing if the
agreement cannot be completed before the end of a lifetime.62 This
provision has been strictly construed to encompass only those agree-
ments that are, by their terms, incapable of full performance within a
lifetime.63 Generally, the endurance of the promisor's obligation is
deemed the deciding factor.64 If, by the terms of the contract, that
obligation ceases simultaneously with and not before the end of the
promisor's lifetime, the contract falls within the Statute of Frauds'
provision.65 For example, an assignment or a promise to assign a life
insurance policy has been held to fall within the lifetime provision
because, implicit in the agreement is the promise not only to name,

643 (1977), aff'd mem., 44 N.Y.2d 780, 377 N.E.2d 482, 406 N.Y.S.2d 38 (1978); see
B. Sparks, supra note 1, at 30-31.

N.Y.S.2d 477, 479 (1961); In re Estate of Bainer, 71 A.D.2d 728, 728, 419 N.Y.S.2d
228, 229 (1979); In re Estate of Rothwachs, 57 Misc. 2d 152, 155, 290 N.Y.S.2d 781,
785 (Sur. Ct. 1968); In re Estate of Aquilino, 53 Misc. 2d 811, 812, 280 N.Y.S.2d 85,
86-87 (Sur. Ct. 1967); B. Sparks, supra note 1, at 30. Where one of the parties to a
joint or reciprocal will executes a new will in violation of the previous one, the later
instrument is recognized as his last testament. T. Atkinson, supra note 1, § 48, at
217-18, § 49, at 224. If a contract to execute a joint testament is established,
however, the agreement will be enforceable against the beneficiaries of the subse-
quent will. Tutunjian v. Vetzigian, 299 N.Y. 315, 319, 87 N.E.2d 275, 277 (1949);
Glass v. Battista, 56 A.D.2d 806, 806, 392 N.Y.S.2d 654, 655 (1977), aff'd, 43 N.Y.2d

2 N.Y.2d 796, 140 N.E.2d 549, 159 N.Y.S.2d 698 (1957); In re Estate of Albin, 35
Misc. 2d 322, 325, 230 N.Y.S.2d 750, 753 (Sur. Ct. 1962); e.g., Gold v. Killeen, 44
Ariz. 291, 33 P.2d 595 (1934); Bayreuther v. Reinisch, 264 A.D. 138, 34 N.Y.S.2d
674 (1949), aff'd, 290 N.Y. 553, 47 N.E.2d 959 (1943).

107, 110-11, 190 P.2d 307, 309 (1948); In re Estate of Albin, 35 Misc. 2d 322, 325,

64. E.g., Rubenstein v. Kleven, 261 F.2d 921, 924 (1st Cir. 1958) (applying New
York law); Harris v. Home Indem. Co., 16 Misc. 2d 586, 587, 190 N.Y.S.2d 157, 158
(Sup. Ct. 1957), aff'd, 6 A.D.2d 861, 175 N.Y.S.2d 603 (1958); see In re Estate of
Albin, 35 Misc. 2d 322, 325, 230 N.Y.S.2d 750, 754 (Sur. Ct. 1962); Weber v. Billman,
165 Ohio St. 431, 435, 135 N.E.2d 866, 869 (1956); cf. Martocci v. Greater
N.Y. Brewery, 301 N.Y. 57, 92 N.E.2d 887 (1950) (similar analysis under one-year
provision of the Statute of Frauds).

1938), aff'd, 256 A.D. 908, 10 N.Y.S.2d 411 (1939).
but also not to change the beneficiary before the promisor's death.\textsuperscript{66} Other fact patterns include contracts for the sale of a business containing an agreement not to compete for life,\textsuperscript{67} agreements regarding the continuation of a partnership after a partner's death,\textsuperscript{68} and contracts for lifetime employment.\textsuperscript{69}

Contracts that may be terminated, but not completed, by the death of a party, however, are not covered by the lifetime provisions.\textsuperscript{70} For example, in a contract to support a child for a fixed term of years, the child could conceivably die within the term of the contract. Should the child die, the promisor's obligation would not be fully performed, but merely excused,\textsuperscript{71} and thus the contract would not fall within the lifetime provision. A corollary of this rule is that contracts imposing an indefinite obligation on a defendant, such as agreements for permanent employment, are not within the lifetime provision.\textsuperscript{72} Permanent indicates merely that the contract will continue indefinitely.


\textsuperscript{67} E.g., Dunbar Camps, Inc. v. Amster, 303 N.Y. 958, 106 N.E.2d 53 (1952); Weiss v. Weiss, 268 A.D. 1058, 52 N.Y.S.2d 557 (1945).


\textsuperscript{70} See J. Calamari & J. Perillo, supra note 14, § 19-20, at 707 & n.37, 708 & n.39.

\textsuperscript{71} See \textit{id.} § 19-20, at 707-08; 3 Brooklyn L. Rev. 150, 151 (1933).

performance could, however, be completed before the end of a lifetime.  

Jurisdictions having a lifetime provision differ on the question of whose lifetime should form the predicate for application of the statutory writing requirement. Arizona, 74 California 75 and Hawaii 76 require a writing only where the time for performance of the contract is measured by the life of the promisor. New York 77 and Alaska, 78 however, do not expressly address whose lifetime must determine the duration of the parties’ contractual obligations in order to invoke the Statute’s writing requirements. Courts in New York have broadly construed the Statute to encompass contracts measured by the lifetime of the promisor, 79 the promisee, 80 or a third person. 81

B. The Safeguards

An examination of the general functions of the Statute of Frauds demonstrates that the safeguards provided by its writing requirement are particularly beneficial whenever an individual seeks to make or enforce an agreement that takes effect at or after death. 82


82. State of N.Y. Law Revision Comm’n, supra note 40, at 15, reprinted in 1946 Commission Report, supra note 40, at 281; 1 Page, supra note 2, § 10.10, at 463-64; 3 Brooklyn L. Rev. 150, 153-54; see A. Scott, supra note 1, § 55.9, at 133. It would seem that there is less danger of perjured testimony where the transaction is inter vivos than where it is testamentary in character. See id. § 55.9, at 133.
1. Safeguards When Making the Agreement

One function of the Statute of Frauds' writing requirement "is to caution the promisor that he is entering into a binding relationship," thus preventing hastily spoken words from later being interpreted as a contract. Having to write out the agreement insures that the promisor recognizes his commitments and, at the same time, clarifies his intentions. Not all contracts, however, require such safeguards for the promisor. Rigid writing requirements have been imposed only for those transactions of importance to both society and the parties, or those situations where the parties' intentions could be misconstrued. In the former, such as contracts in consideration of marriage or for the transfer of real property, a writing requirement serves to impress on the promisor the significance and seriousness of his action. In the latter, such as promises to answer for the debt of another or to assign an insurance policy, it serves to ensure that the promisor has, in fact, assumed a binding obligation.

Because agreements within the lifetime or testamentary provisions usually involve serious, long-term commitments as well as the dispositions of estates, it is in the best interests of both society and the parties

84. Note, The Statute of Frauds and Comparative Legal History, 63 L. Q. Rev. 174, 178 (1947) [hereinafter cited as Legal History]; see B. Sparks, supra note 1, at 34; cf. Fuller, supra note 1, at 803-04 (writing requirement promotes deliberation and ensures testamentary intention).
85. Perillo, supra note 83, at 54; Fuller, supra note 1, at 804; Equitable Estoppel, supra note 11, at 170; Ohio Statute of Frauds, supra note 9, at 167.
86. See Knight v. Smith, 250 Ala. 113, 115, 33 So. 2d 242, 244 (1947); Fuller, supra note 1, at 803; Equitable Estoppel, supra note 11, at 170; Ohio Statute of Frauds, supra note 9, at 167.
87. A. Scott, supra note 1, § 40, at 96; Fuller, supra note 1, at 805-06.
89. L. Bogert & G. Bogert, supra note 43, § 480, at 203-06; Perillo, supra note 83, at 56-58; see 9D P. Rohan, supra note 16, ¶ 13-2.1[4], at 13-127 to -129.
91. Fuller, supra note 7, at 803-04; Perillo, supra note 83, at 54. See generally, 2 A. Corbin, supra note 90, § 347, at 399-400 (debt); R. Keeton, Basic Text on Insurance Law § 4.11(d), at 250-52 (1971) (assignment of insurance policies).
92. See supra notes 5, 12, 13 and accompanying text.
that such contracts not be premised on words spoken without deliberation.\textsuperscript{93} The imposition of a writing requirement allows the parties to reflect on the wisdom and risks attendant to their agreement.\textsuperscript{94} Furthermore, these types of contracts generally arise in the context of a family relationship,\textsuperscript{95} where it is easy to misinterpret words of gratuitous intention as a promise of binding obligation.\textsuperscript{96} In these situations, the conduct and expressions of the parties are necessarily ambiguous;\textsuperscript{97} they may be performed out of love and affection, or they may be rendered with expectation of compensation.\textsuperscript{98} Requiring the par-

ties to memorialize their agreement thus serves to distinguish legally enforceable transactions from unenforceable expressions of gratitude by clarifying the intentions of the parties.98

2. Safeguards When Enforcing Agreements

The primary purpose of the Statute of Frauds' writing requirement is, of course, the "prevention of frauds and perjuries."100 The logic behind the Statute is quite simple: "Witnesses are subornable, but forgery is a difficult art."101 By requiring objective, written evidence of a contract, the Statute of Frauds removes nearly all potential avenues for fraudulent claims.102 Moreover, the Statute protects both courts and parties from lengthy and expensive trials by reducing the amount of litigation premised solely on the often faulty memories of parties and witnesses to an alleged oral agreement.103

The protections afforded by the Statute of Frauds' evidentiary safeguards are especially important to lifetime and testamentary agreements.104 "Such contracts are easily fabricated and hard to disprove, because the sole contracting party on one side is [generally] dead when the question arises. They are the natural resort of unscrupulous

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98. State of N.Y. Law Revision Comm'n, supra note 41, at 23, reprinted in 1953 Commission Report, supra note 41, at 555; Fuller, supra note 1, at 805-06; see Frankenberger v. Schneller, 258 N.Y. 270, 273, 179 N.E. 492, 493 (1932). The writing requirement is similar to the delivery requirement relating to gifts; delivery of the gift is the formality that separates the legally enforceable gifts from gratuitous expressions or intentions. Fuller, supra note 1, at 805-06. In either case, recovery "cannot be based on disappointed expectations or even on expression of intention, in the form of a promise which was not carried out." Frankenberger v. Schneller, 258 N.Y. at 273, 179 N.E. at 493.


101. Perillo, supra note 83, at 68; see 1 A. Corbin, supra note 90, § 301, at 195 (Supp. 1980).

102. See L. Simpson, supra note 100, at 130; Costigan, supra note 100, at 5-6; Equitable Estoppel, supra note 11, at 170.


104. 1 Page, supra note 2, § 10.10, at 463-64; 3 Brooklyn L. Rev. 150, 153-54 (1933); see State of N.Y. Law Revision Comm'n, supra note 40, at 12-13, 15, reprinted in 1946 Commission Report, supra note 40, at 278-79, 281 (commenting on the inadequacy of oral testimony in claims based on contracts to make a will).
persons who wish to despoil the estates of decedents.” A writing requirement checks the flood of these “unfounded assertions,” many of which are pursued with the hope that the real beneficiaries will settle to avoid delays in distribution of the estate.

Even when a plaintiff asserts a claim in good faith, the claim is often “prompted by nothing more than a feeling that the decedent ought to have made a certain property disposition and that he therefore must have contracted to that effect.” A sense of moral obligation or frequent declarations by the decedent of his intentions, however, does not give rise to a contractual obligation. By requiring objective evidence of a contract, the Statute of Frauds prevents the misinterpretation of general statements or expressions of gratitude as words of promise.

Moreover, testimony submitted in support of an oral lifetime or testamentary contract is often unreliable due to the length of time between making the alleged agreement and bringing suit for its non-performance. Any recollection of the circumstances, words of the parties, or actual terms or promises, would be clouded by time. A court would be required to determine the existence of a contract based solely on the ambiguous words and actions of the parties and unclear


106. 3 Brooklyn L. Rev. 150, 154 (1933); see authorities cited supra notes 103-04.

107. 3 Brooklyn L. Rev. 150, 154 (1933); 19 St. John’s L. Rev. 152, 153 (1945); see Trout v. Ogilvie, 41 Cal. App. 167, 172-73, 182 P. 333, 335 (1919); Rubin v. Irving Trust Co., 305 N.Y. 288, 298-99, 113 N.E.2d 424, 427 (1953); B. Sparks, supra note 1, at 48.

108. B. Sparks, supra note 1, at 22. Statements or expressions of future intent without consideration and the concomitant assumption of a binding obligation carry no contractual obligations. Frankenberger v. Schneller, 258 N.Y. 270, 273, 179 N.E. 492, 493 (1932); 3A Warren’s Heaton, supra note 13, § 276, ¶ 2(j), at 48-158 to -159; see 7B Warren’s Heaton, supra note 13, § 100, ¶ 5; B. Sparks, supra note 1, at 22-23.


memories of witnesses. The Statute of Frauds' lifetime and testamentary provisions resolve this issue by delimiting the enforceable contract from the unenforceable in an area where such demarcation would otherwise be nebulous at best.

III. RELIEF FROM APPLICATION OF THE STATUTE

In a minority of jurisdictions, courts have held that noncompliance with the writing requirement of the Statute of Frauds renders a contract void and without any legal effect. The majority of states, however, provide that failure to produce written evidence of a contract makes the contract voidable. In these states, the contract remains valid unless affirmatively avoided by one of the parties. Because oral contracts that fall within the Statute of Frauds are void or voidable, the promisor who refuses to perform is technically doing no wrong; there is no breach of contract, merely the exercise of a legal right under the Statute. Allowing a promisor to escape his

113. A. Corbin, supra note 12, § 275, at 380-81; see Dueser v. Meyer, 129 A.D. 598, 599, 114 N.Y.S. 64, 65 (1908). See generally, Fuller, supra note 1, 800-06 (discussing need for formalities to fulfill evidentiary and cautionary functions).


117. J. Calamari & J. Perillo, supra note 14, § 19-35, at 724; see A. Corbin, supra note 12, § 279, at 387. "Unenforceable contracts are those which have some legal consequences but which may not be enforced in an action for damages or specific performance in the face of certain defenses such as the Statute of Frauds . . . ." J. Calamari & J. Perillo, supra note 14, § 1-11, at 18.

obligations by asserting the Statute as a defense, however, may lead to harsh results that would appear to promote fraud. In an effort to avoid hardship and injustice, courts have developed exceptions to the Statute of Frauds' writing requirement based on the doctrines of restitution, part performance and estoppel.

A. Restitution

Restitutionary remedies have long been employed in both law and equity as a means of preventing defendants from being unjustly enriched under an unenforceable contract. Courts have accomplished this result by allowing plaintiffs to pursue a remedy that is not based on the contract but is premised on a fictional contract for the benefits already rendered by the claimant. The aim of restitution, unlike damages for breach of contract, is the restoration of parties to the positions they occupied before the transaction. The recovery,

119. Knight v. Smith, 250 Ala. 113, 116, 33 So. 2d 242, 244-45 (1947) (Brown, J., dissenting); B. Sparks, supra note 1, at 45; see L. Simpson, supra note 100, § 79, at 157. “[T]he Statute of Frauds is intended to be a shield and not a sword, and . . . it should not become an instrument by which fraud is perpetrated.” Trollope v. Koerner, 106 Ariz. 10, 16, 470 P.2d 91, 97 (1970); accord T. . . . v. T. . . ., 216 Va. 867, 871-72, 224 S.E.2d 148, 151 (1976).

120. Trollope v. Koerner, 106 Ariz. 10, 16, 18-19, 470 P.2d 91, 97, 99-100 (1970); 2 G. Palmer, supra note 48, § 6.3, at 22. “It was never intended that the statute of frauds could be used to permit one party . . . to use the statute to escape . . . obligations.” L. Simpson, supra note 100, § 78, at 156.


122. 1 G. Palmer, supra note 48, § 1.1, at 2-3; e.g., Evans v. Mason, 82 Ariz. 40, 44-45, 308 P.2d 245, 248 (1957); Donovan v. Walsh, 238 Mass. 356, 362, 130 N.E. 841, 842 (1921); Weber v. Billman, 165 Ohio St. 431, 437-38, 135 N.E.2d 866, 871 (1956). The contract is not enforced; the courts imply a promise to pay for the goods or services unjustly gained by the defendant. 3 S. Williston, supra note 115, § 534, at 817. “[O]ne universally recognized remedy [for non-compliance with the Statute of Frauds] . . . is recovery of the value of the services in quasi contract.” 1 G. Palmer, supra note 48, § 4.21, at 549-50 (footnote omitted). Generally, there is a requirement that the plaintiff, in order to recover, must not be in default of the agreement. J. Calamari & J. Perillo, supra note 14, § 19.41, at 730. In a few jurisdictions, however, a defaulting plaintiff may recover in restitution. 2 G. Palmer, supra note 48, § 6.2, at 8-10.

123. J. Calamari & J. Perillo, supra note 14, § 15-1, at 570; Perillo, supra note 121, at 1220. The aim of restitution has not always been clearly defined. The traditional theory is that the goal of restitution is to force the defendant to disgorge any benefits unjustly received from the plaintiff. Id. Consequently, the award was restricted to the amount of the enrichment, and if defendant did not gain, the plaintiff recovered nothing. See id. at 1220-21. The other theory was to measure the
therefore, encompasses the reasonable value of the benefits already conferred by the plaintiff, not the value the plaintiff might have obtained had the contract been fully performed.  

A question to be resolved before allowing a restitutionary recovery is whether the claimant's services were performed gratuitously or in expectation of payment. In commercial settings, the presumption is that services are performed or goods are delivered for remuneration. A significant number of cases within the lifetime and testamentary provisions, however, involve services rendered for a close friend or relative pursuant to an informal agreement. Because fair market value of the plaintiff's services, even where the defendant actually received no benefit from those services. The theory behind such a recovery is that it would be "unconscionable for a person to bargain for the services of another and escape paying the value of services rendered by repudiating the agreement." 2 C. Palmer, supra note 48, § 6.3, at 19-20.

124. See J. Calamari & J. Perillo, supra note 14, § 19.45, at 733 (contrasting the difference in the amount of recovery between the reasonable value of the services and the amount recoverable in an action for damages for breach of contract). The plaintiff does not recover the loss of profit, or expectation interest bargained for in the contract. 2 G. Palmer, supra note 48, § 6.1, at 2-3. Reliance interests may be recoverable based on the theory that they are expenditures in carrying out performance, as opposed to simply preparing to perform, and, therefore, confer a benefit on the defendant in the same way that performance would. Id. § 6.3, at 20-23; Perillo, supra note 121, at 1221-22. See generally Comment, The Necessity of Confering a Benefit for Recovery in Quasi-Contract, 19 Hastings L.J. 1259 (1968).

125. E.g., Evans v. Mason, 82 Ariz. 40, 44-45, 308 P.2d 245, 248 (1957); Downey v. Union Trust Co., 312 Mass. 405, 411, 45 N.E.2d 373, 377 (1942); In re Adams, 1 A.D.2d 259, 261, 149 N.Y.S.2d 849, 852 (1956), aff'd mem., 2 N.Y.2d 796, 140 N.E.2d 549, 159 N.Y.S.2d 698 (1957); In re Estate of O'Connor, 236 N.Y.S.2d 972, 973 (Sur. Ct. 1963); see Dombrowski v. Somers, 41 N.Y.2d 858, 859, 362 N.E.2d 257, 258, 393 N.Y.S.2d 706, 707 (1977). Restitution is denied also where the plaintiff merely "volunteered" the services despite an expectation of remuneration. 1 G. Palmer, supra note 48, § 1.7, at 43-44. Plaintiff cannot recover if he is a volunteer and an "intermeddler" because "one should not intervene in the affairs of another without the other's request, and... such conduct will not be encouraged by awarding restitution." Id. § 1.7, at 43. The principle underlying the refusal to grant an award in such situations is that the defendant was not unjustly enriched, nor did the plaintiff unjustly lose. See id. § 1.7, at 43-44.


127. See State of N.Y. Law Revision Comm'n, supra note 13, at 31, reprinted in 1957 Commission Report, supra note 13, at 45; G. Bogert & G. Bogert, supra note 43, § 480, at 202-03; B. Sparks, supra note 1, at 139; Sparks, Problems in the Formation of Contracts to Devise or Bequeath, 40 Cornell L.Q. 60, 80 (1954);
services performed in a close relationship are often bestowed out of love and affection, courts presume that the parties did not intend a contractual obligation. Generally, courts require a claimant to rebut this presumption by strong evidence of a contract. If it is established that the services were performed for compensation, the amount of recovery must then be calculated. When the plaintiff has given money to the defendant, or rendered services that have an easily ascertainable market value, that value is the basis of the recovery. In those instances the value set by the contract is the best determinant and, recognizing this, most courts allow admission of the contract price as evidence of the value of the services.


129. See B. Sparks, supra note 1, at 23-25; see, e.g., Long v. Rumsey, 12 Cal. 2d 334, 343, 347, 84 P.2d 146, 150, 152 (1938); Weber v. Billman, 165 Ohio St. 431, 435, 135 N.E.2d 866, 869 (1956).

130. Evans v. Mason, 82 Ariz. 40, 44-45, 308 P.2d 245, 248 (1957); see 1 G. Palmer, supra note 48, § 4.21, at 550; B. Sparks, supra note 1, at 139; Perillo, supra note 121, at 1216.


132. B. Sparks, supra note 1, at 141; 3 S. Williston, supra note 115, § 536, at 835; see, e.g., Ledingham v. Bayless, 218 Md. 108, 114-15, 145 A.2d 434, 439 (1958); Green v. Richmond, 369 Mass. 47, 49-50, 337 N.E.2d 691, 694 (1975); Snyder v. Warde, 151 Ohio St. 426, 437, 86 N.E.2d 489, 493-94 (1949). But see Downey v. Union Trust Co., 312 Mass. 405, 417-18, 45 N.E.2d 373, 380 (1942) (although services, consisting of visiting testator and corresponding and writing with testator, were "uneusual" and "uncommon in ordinary experience," their value "was to be determined by no other standard than that of fair market value").

133. 2 G. Palmer, supra note 48, § 6.3, at 26; B. Sparks, supra note 1, at 140-41; e.g., Turner v. White, 329 Mass. 549, 555, 109 N.E.2d 155, 158 (1952); Hastoufis v. Gargas, 398 N.E.2d 745, 751 (Mass. App. Ct. 1980); see Farrington v. Richardson, 153 Fla. 907, 915, 16 So. 2d 158, 162 (1944); J. Calamari & J. Perillo, supra note
Courts of equity have also developed restitutionary remedies that allow a plaintiff to recover specific property from a defendant who fails to perform a contract that violates the Statute of Frauds. The specific restitutionary remedy most commonly utilized is the constructive trust.

Generally, the constructive trust decree involves a fictional transfer of title whereby the defendant is deemed to hold legal title in trust for the plaintiff. This fiction becomes unnecessary when a court orders specific restitution of property still in the hands of the defendant. Instead, the court simply orders cancellation of the deed or redelivery of the property. If the defendant has sold or used the property, however, the constructive trust doctrine allows the court to treat the plaintiff as having an equitable right to any proceeds or property generated thereby.

To obtain a constructive trust, the plaintiff must not only establish the elements necessary for restitution at law, but must also demonstrate that his legal remedies would be inadequate to prevent injustice. The circumstances under which a court will grant a construc-

14, § 19-45, at 733. Where courts allow admission of the contract price as evidence of the reasonable value of the services, and that amount is awarded as the value of the plaintiff's services, it has been contended that, in effect, specific enforcement of the contract has been granted. D. Dobbs, supra note 115, § 13.2, at 951; see J. Calamari & J. Perillo, supra note 14, § 19-45, at 733.


136. See Dietz v. Dietz, 244 Minn. 330, 334, 70 N.W.2d 281, 286 (1955); Oursler v. Armstrong, 10 N.Y.2d 385, 392, 179 N.E.2d 489, 492, 233 N.Y.S.2d 477, 481 (1961); Restatement of Restitution § 180 (1939); G. Bogert, supra note 2, § 77, at 288; 1 G. Palmer, supra note 48, § 1.3, at 11-13. The fiction was created because of the debate over whether equity could vest title in the plaintiff by the terms of an equitable decree. 1 G. Palmer, supra note 48, § 1.3, at 13-14.

137. See G. Bogert, supra note 2, § 83, at 301-03; 1 G. Palmer, supra note 48, § 1.3, at 13-14. When both parties are alive, it is possible to return them to the status quo, which is the aim of restitution. If one party has died, however, and there has been an agreement to devise or bequeath, it is impossible to put the parties back in the status quo. In these cases, a constructive trust may be used as a means of enforcing the agreement. A. Scott, supra note 1, § 55.1, at 128.


tive trust, however, are not entirely clear. Typically, courts have been reluctant to grant such a remedy in a commercial setting, even if the property sought to be recovered is land. The promisee's willingness to part with the property indicates that it is of no unique value to him, and thus, a money recovery for the value of the land is deemed adequate.

The remedy has been allowed, however, where the transaction involves conveyance of real property in return for an oral promise of lifetime support. In these cases, the agreement generally is not a commercial transaction. Most often, the promisor is an elderly individual who transfers the deed to his residence in exchange for an oral promise of support from a relative or trusted companion. When the promise of support is subsequently breached, the promisor will be awarded specific restitution of the residence. Because the promisor continues to live on the land with the companion, it is clear that the property retains its unique value to the promisor and a money judgment would be inadequate. The presence of a confidential or fiduciary relationship, coupled with the inherently unique value of a residence, appears to be the basis for the award.

Restitutionary recovery, either at law or in equity, does not undercut the policies underlying the Statute of Frauds, because the remedy

141. J. Calamari & J. Perillo, supra note 14, § 19-46, at 734-35. Calamari and Perillo state that a constructive trust generally is imposed where (1) there is a fiduciary or confidential relationship; (2) the transaction involved fraud, duress, undue influence or mistake; or (3) the conveyance was only for the purpose of security. Id.; see D. Dobbs, supra note 115, § 13.2, at 959-60. See generally 1 G. Palmer, supra note 48, § 1.3 (analyzing theories and applications of constructive trust).


144. 1 G. Palmer, supra note 48, § 4.20, at 537-39. "Conveyances of property by aged and infirm people in consideration of promised support and maintenance are peculiar in their character and incidents, and with them the courts deal on principles not applicable to ordinary conveyances." Russell v. Carver, 208 Ala. 219, 219, 94 So. 128, 128 (1922).


147. See supra note 141.
does not enforce the contract.\textsuperscript{148} A recovery in restitution merely requires proof that actual benefits were rendered in expectation of payment, and proof of their value.\textsuperscript{149} "Such services are generally matters known to many persons and subject to adequate verification, so that there is ample protection to the estate."\textsuperscript{150} Restitution works only to prevent the hardships and injustices that can result from rigid application of the Statute of Frauds' lifetime and testamentary provisions.\textsuperscript{151}

B. Part Performance

The equitable doctrine of part performance originated as the first court-created exception to the Statute of Frauds, and has long been accepted by most jurisdictions as a means of enforcing oral contracts for the sale of land.\textsuperscript{152} Perhaps because the doctrine has been established for so long, the elements of part performance have become somewhat settled.\textsuperscript{153} First, the conduct claimed to constitute part performance must involve full or at least substantial performance of the plaintiff's part of the alleged oral agreement.\textsuperscript{154} Second, the


\textsuperscript{149} See In re Adams, 1 A.D.2d 259, 262, 149 N.Y.S.2d 849, 853 (1956), aff'd mem., 2 N.Y.2d 796, 140 N.E.2d 549, 159 N.Y.S.2d 698 (1957); G. Palmer, supra note 48, § 6.12, at 92; supra notes 125-33 and accompanying text.


\textsuperscript{151} 2 G. Palmer, supra note 48, § 6.7, at 63; see J. Calamari & J. Perillo, supra note 14, § 15-2, at 571.


\textsuperscript{153} Busque v. Marcou, 147 Me. 289, 293-95, 86 A.2d 873, 876 (1952); Equitable Estoppel, supra note 11, at 172.

\textsuperscript{154} See T. . . . v. T. . . ., 216 Va. 867, 871, 872-73, 224 S.E.2d 148, 151, 152 (1976); D. Dobbs, supra note 115, § 13.2, at 961; L. Simpson, supra note 100, § 79, at 157-58. The doctrine of part performance, however, has been applied in the context of oral land sale contracts where the promisee performs acts in reliance on the oral agreement, rather than pursuant to its terms and conditions. 2 A. Corbin, supra note 90, § 426; Equitable Estoppel, supra note 11, at 173 n.19. The part performance asserted must be performance "on the part of one seeking to charge the other party under the contract, not part performance on the part of the one whom it is sought to charge." Busque v. Marcou, 147 Me. 289, 295-97, 86 A.2d 873, 877 (1952).
conduct must be "unequivocally referable" to the agreement; the actions must be explainable only by the existence of a contract.\textsuperscript{155} Third, the agreement must be proven by clear and convincing evidence,\textsuperscript{156} and the terms of the agreement must be shown to be definite and unambiguous.\textsuperscript{157} Finally, because part performance is an equitable doctrine, plaintiff must demonstrate that a restitutionary remedy at law would be inadequate.\textsuperscript{158}

The doctrine of part performance has been applied infrequently to contracts within the lifetime and testamentary provisions, primarily because the acts claimed as part performance in these situations are rarely "unequivocally referable" to the existence of a contract.\textsuperscript{159} In most cases, the close personal relationship between the parties offers a non-contractual explanation for the conduct of the claimant, thereby defeating any claim of part performance.

Some jurisdictions do not recognize the doctrine of part performance as a means of enforcing any contract that falls within the lifetime or testamentary provisions.\textsuperscript{160} Courts in these jurisdictions have reasoned that, in the absence of effective rebuttal by the promisor or written evidence of the alleged agreement, the potential for

\begin{itemize}
\item 155. Kimmel v. Roberts, 179 Neb. 8, 12, 136 N.W.2d 208, 210-11 (1965); T . . . v. T . . . , 216 Va. 867, 872-73, 224 S.E.2d 148, 152 (1976). "The acts . . . [must] directly point to that contract as the only reasonable explanation for their performance." L. Simpson, infra note 100, § 79 at 159. "What is done must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done." Burns v. McCormick, 233 N.Y. 230, 232, 135 N.E. 273, 273 (1922).
\item 159. A. Corbin, supra note 12, § 435, at 442. "The rendition of such services are explainable on a number of different grounds, such as love and affection, a supposed moral duty, hope of a legacy or other financial award." L. Simpson, supra note 100, § 79, at 159; e.g., Kimmel v. Roberts, 179 Neb. 8, 11-12, 136 N.W.2d 208, 210 (1965); Bayreuther v. Reinisch, 264 A.D. 138, 141, 34 N.Y.S.2d 674, 677 (1942), aff'd mem., 290 N.Y. 553, 47 N.E.2d 959 (1943).
\end{itemize}
fraud and perjury is simply too great. Clearly, any other result would effectively nullify the testamentary and lifetime provisions.

When the claim is not against a decedent's estate, however, the chances of perjured proof are materially reduced because the promisor is available to rebut the claims. Examples of such situations are instances of repudiation, or lifetime contracts when the lifetime is not that of the promisor. In such cases, the strict requirements of the part performance doctrine coupled with the availability of both parties provide an adequate evidentiary substitute for the Statute's writing requirement. Although the cautionary function of the Statute is undercut, enforcement may be justified on "the grounds that part

161. E.g., Knight v. Smith, 250 Ala. 113, 114-15, 33 So. 2d 242, 243-44 (1947); First Gulf Beach Bank & Trust Co. v. Grubaugh, 330 So. 2d 205, 210 (Fla. Dist. Ct. App. 1976); In re Estate of Ditson, 177 Misc. 648, 653-54, 31 N.Y.S.2d 468, 474-75 (Sur. Ct. 1949); see Burns v. McCormick, 233 N.Y. 230, 233, 135 N.E. 273, 274 (1922). One argument is that in almost every claim of an oral contract against a decedent's estate the basis of the charge is that the plaintiff has performed one side of the contract. If part performance were grounds for relief from the Statute, then every case meant to be covered would fall within the exception. State of N.Y. Law Revision Comm'n, supra note 13, at 34, reprinted in 1957 Commission Report, supra note 13, at 48. The Statute would be obviated, leaving its purposes unfulfilled. Id. Of course, rigid interpretation of the Statute does lead to some harsh results. See Knight v. Smith, 250 Ala. at 115, 33 So. 2d at 244 (Brown, J., dissenting). In one case, however, it was argued that the Statute of Frauds should be even more stringent: The party seeking relief under an unenforceable oral contract with a decedent should be forced to return any consideration claimed to have been given by the decedent. In re Estate of Douglas, 170 Misc. 155, 156, 9 N.Y.S.2d 631, 632 (Sur. Ct. 1938), aff'd mem., 256 A.D.2d 1070, 12 N.Y.S.2d 359 (1939). Although the court did not require return of the consideration, it did indicate that complete enforcement of the Statute would require return of any consideration allegedly received from a promisor, because a promisee to a lifetime or testamentary contract is usually in a position to seize property of the deceased and claim it was delivery on account. Id. at 157, 9 N.Y.S.2d at 633.


164. State of N.Y. Law Revision Comm'n, supra note 13, at 47-49, reprinted in 1957 Commission Report, supra note 13, at 33-34; Equitable Estoppel, supra note 11, at 172-73. One explanation for the doctrine is that the acts constituting performance, if unequivocally referable to the contract, provide sufficient evidence of the contract to substitute for the necessity of a writing. H. McLintock, McLintock on Equity 140 (2d ed. 1948). This evidentiary protection can only be ensured, however, if courts do not liberally construe actions as "unequivocally referable" to the contract. See Equitable Estoppel, supra note 11, at 181-82.
performance in reliance upon the promise may result in a virtual fraud if the promise is not specifically enforced." To effectuate the policies of the lifetime and testamentary provisions, however, the doctrine should be allowed only in those extreme cases where the balance of interests clearly favors the plaintiff.

C. Estoppel

Historically, the doctrine of estoppel precluded a party from denying the truth of his own representations. From this original concept, two different types of estoppel have evolved: equitable estoppel and promissory estoppel. Equitable estoppel bars an individual from asserting rights based on a denial of the truth of his own representations of past or present facts upon which another justifiably relied to his detriment. For example, if a party represents that a written memorandum of an agreement exists, when in fact it does not, and in reliance on that representation the promisee fails to insist upon a writing, the promisor will be estopped from asserting that the agreement is unenforceable under the Statute of Frauds.

Promissory estoppel, on the other hand, estops a promisor from asserting a legal right premised on the denial of a promise as to future conduct upon which a promisee justifiably and detrimentally relied. As used to defeat a Statute of Frauds' defense, promissory

165. J. Calamari & J. Perillo, supra note 14, § 19-15, at 697 n.77; accord Restatement (Second) of Contracts § 197 (1981). The rationale advanced to justify the doctrine of part performance is that "to allow the defendant to rely on the statute, after plaintiff has acted on the faith of the oral contract so that he would be irreparably injured, would be to permit the statute to be made an instrument of fraud." H. McLintock, supra note 164, § 58, at 141. The emphasis on detrimental reliance brings the doctrine very close to the doctrine of equitable estoppel. *Equitable Estoppel*, supra note 11, at 173; *see infra* pt. III(C).


169. Waugh v. Lennard, 69 Ariz. 214, 223-24, 211 P.2d 806, 812-13 (1949); J. Calamari & J. Perillo, supra note 14, § 6-1, at 202 & n.2, 203. In the past, promissory estoppel has been used as a substitute for consideration. *Id.* § 11-34, at 445; *Promis-
estoppel was originally applied only when a promisor made a subsidiary promise to reduce the agreement to writing. If the promisee detrimentally relied on the subsidiary promise, the promisor would be estopped from asserting a Statute of Frauds' defense and the underlying agreement would be enforced.

Virtually all jurisdictions allow the doctrine of equitable estoppel to bar a Statute of Frauds' defense. The justification is that the Statute was enacted to prevent fraud, and courts will not allow a defendant to use the Statute to promote fraud. Without equitable estoppel, virtual fraud could result if a defendant, by his own conduct, could misrepresent past or present facts, and thus gain from inducing another to detrimentally rely upon that misrepresentation. Courts have been more reluctant to apply promissory estoppel to defeat the Statute of Frauds, despite the fiction that the Statute's policies are not undercut, because it is the subsidiary promise, not the original unenforceable promise, that the defendant is estopped from denying.

sory Estoppel supra note 11, at 122. The Second Restatement of Contracts states, however, that the doctrine of promissory estoppel should not be used as a means of displacing the Statute of Frauds writing requirement as readily as it is used to substitute for consideration. Restatement (Second) of Contracts § 139 comment b, illustration 2 (1981).


175. Note, Promissory Estoppel and The Statute of Frauds in California, 66 Cal. L. Rev. 1219, 1229 (1978) [hereinafter cited as The Statute of Frauds in California]; Promissory Estoppel, supra note 11, at 116-17. A large loophole was created because promissory estoppel allowed enforcement of the principal oral promise that was barred by the Statute of Frauds, by proving a subsidiary oral promise. Id.; see, e.g., Alaska Airlines v. Stephenson, 217 F.2d 295, 298 (9th Cir. 1954) (applying Alaska law); Aubrey v. Workman, 384 S.W. 2d 389, 393-94 (Tex. Civ. App. 1964). Where the Statute bars enforcement of a promise because it is oral, the addition of a second oral promise should not be sufficient to take the original out of the Statute. See Promissory Estoppel, supra note 11, at 117; cf. Paramount Pictures Corp. v. Holden,
The modern tendency in an increasing number of jurisdictions has been to broaden the application of promissory estoppel. The modern tendency in an increasing number of jurisdictions has been to broaden the application of promissory estoppel. Under this approach, the plaintiff need only show an "unconscionable injury," coupled with detrimental reliance upon a promise proven by clear and convincing evidence. Application of this more liberal doctrine, however, frustrates the policies of the Statute of Frauds. The "unconscionable injury" standard is too indefinite. It is defined only by a nebulous concept of fairness and, therefore, is subject to a liberal interpretation. Courts could easily lose sight of the policies and safeguards of the Statute of Frauds by focusing solely on their own

166 F. Supp. 684, 691 (S. D. Cal. 1958) (applying California law) ("[W]e know of no principle of estoppel which would change an oral contract into a written one, even if equitable considerations should call for the enforcement of such contracts.").


177. Monarco v. Lo Greco, 35 Cal. 2d 621, 623-24, 626, 220 P.2d 737, 739-40 (1950) (en banc). In Monarco, the California court held that estoppel would be granted in instances where "unconscionable injury" or "unjust enrichment" would result. Id. at 625, 220 P.2d at 740. Those elements are present when either one party would suffer unconscionable injury or the other party would be unjustly enriched if the contract were not enforced. In re Estate of Baglione, 65 Cal. 2d 192, 197-98, 417 P.2d 683, 687-88, 53 Cal. Rptr. 139, 143-44 (1966) (en banc); Day v. Greene, 59 Cal. 2d 404, 410, 380 P.2d 385, 388-89, 29 Cal. Rptr. 785, 788-89 (1963) (en banc). The majority of jurisdictions employing the modern formulation of estoppel use only the "unconscionable injury" standard as the threshold criteria, and the "unjust enrichment" standard has apparently been relegated to its traditional role in restitution. Promissory Estoppel, supra note 11, at 119-20; see D. Dobbs, supra note 115, § 13.2, at 963-65.


179. See Equitable Estoppel, supra note 11, at 176-77; cf. Restatement (Second) of Contracts § 139 comment b (1981) (avoidance of injustice is a very flexible standard). A clear example is found in Goldstein v. McNeil, 122 Cal. App. 2d 608, 612, 265 P.2d 113, 115 (1954). Plaintiff shipped a load of used cars pursuant to an oral contract which defendant repudiated. The court found that refusal to enforce the contract would result in an "unconscionable injury" because plaintiff "missed the very high market existing around the time of the contract and was caught in a sharp slump." Id. at 612, 265 P.2d at 115.
moral sense of “doing justice.” In fact, courts employing a broad promissory estoppel theory “clearly have done so with the intention of restricting the Statute’s operation [solely] to those cases in which its application would not produce an ‘unfair’ result.”

Certainly a statute enacted to prevent fraud should not be allowed to promulgate fraud. In instances where a party has perpetrated actual fraud, or induced detrimental reliance through factual misrepresentation, estoppel is arguably justified. It should be recognized, however, that although equitable estoppel protects against fraudulent use of the Statute, it does not provide adequate evidentiary safeguards against fraudulent allegations of a contract. This is especially true when the claim is against a decedent’s estate, and thus based on oral proof that is highly susceptible to perjury. Due to the heightened potential for fraud, courts should be extremely reluctant to apply the estoppel doctrine in cases that are within the lifetime and testamentary provisions. If the doctrine is utilized, perhaps courts should require the additional evidentiary protections afforded by the doctrine of part performance, such as proof of performance that is “unequivocally referable” to the contract.

Furthermore, courts should carefully balance the important public safeguards of the Statute against the alleged fraud that might be perpetrated by applying the Statute of Frauds. “If the only ‘fraud’ is that the defendant is relying on the statute, that is no fraud at all, but the exercise of a legal right given by the Statute.”

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181. *Equitable Estoppel*, supra note 11, at 175.

182. See supra notes 119, 173 and accompanying text.


184. *Statute of Frauds in California*, supra note 175, at 1220-21; see Restatement (Second) of Contracts § 139 comment c & reporter’s note (1981); *Equitable Estoppel*, supra note 11, at 181-82.

185. See *Equitable Estoppel*, supra note 11, at 181-82.

186. See Rubin v. Irving Trust Co., 305 N.Y. 288, 300, 113 N.E.2d 424, 428 (1953) (“It is clear that the enforcement of such oral contracts . . . is completely inconsistent with and imperils the policy of this State . . . .”); Restatement (Second) of Contracts § 139 comment b & reporter’s note, comment c (1981) (courts should determine whether detrimental reliance of promisee outweighs policy and purpose behind the applicable Statute of Frauds’ provision); *Equitable Estoppel*, supra note 11, at 179-80 (same).

legislatures enacted the Statute of Frauds' provisions, it was obvious that there might be "harsh results," but the policy protections afforded by the Statute were believed to outweigh the equitable considerations. Moreover, enforcement of the Statute of Frauds does not leave a plaintiff without a remedy; he may recover his losses through restitution, or assert that the contract is enforceable under the doctrine of part performance.888

Conclusion

Protecting estates from fraudulent claims and enforcing valid contracts are both commendable goals. These goals collide, however, when an oral contract to make a testamentary disposition is asserted in derogation of a decedent's will. The clash between the decedent's intentions and a claimant's rights can be prevented by demanding that all contracts requiring performance after death be evidenced by a writing. The disposition of a decedent's property, left to the care and protection of the probate system, should not be disturbed by allegations of contrary oral intention. In addition, the judiciary should not be forced to entertain spurious or fraudulent litigation by self-serving claimants.

A writing requirement for lifetime and testamentary contracts can lead to harsh results. Courts can ease the impact of the statutory requirements, however, through application of the doctrines of restitution, part performance and estoppel. Nevertheless, these doctrines should be applied sparingly. Courts should not yield to the temptation to expand these exceptions to the point of defeating the important purposes of the Statute of Frauds.

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188. Bouret, supra note 180, at 68; see Snyder v. Warde, 151 Ohio St. 426, 445, 86 N.E.2d 489, 497-98 (1949). Although the plaintiff does not gain from the agreement, this is "a result which is invited and risked when the agreement is not reduced to writing in the manner prescribed by law." Ozier v. Haines, 411 Ill. 160, 164-65, 103 N.E.2d 485, 488 (1952); accord Equitable Estoppel, supra note 11, at 180; see Rubin v. Irving Trust Co., 305 N.Y. 288, 302, 113 N.E.2d 424, 429 (1953); A. Scott, supra note 1, § 40, at 97, § 55.9, at 133.
189. Snyder v. Warde, 151 Ohio St. 426, 445, 86 N.E.2d 489, 497-98 (1949); Restatement (Second) of Contracts § 139(2)(a) comment c & illustration 4 (1981); see supra pt. III (A).
190. Equitable Estoppel, supra note 11, at 181-82; supra pt. III (B).