ORAL CONTRACTS TO MAKE A WILL AND THE UNIFORM PROBATE CODE: BOON OR BOONDOGGLE?

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A verbal contract isn’t worth the paper it’s written on.*

Whether one is a movie mogul or a practicing lawyer, the problem with oral contracts has long been recognized. Such problems have been prevalent in the estate and estate planning area. The best laid estate plans may come to naught when a despised relative shows up after death claiming to have had a contract with the deceased to receive all of the deceased’s estate.1

I. INTRODUCTION

If a man can’t forge his own will, whose will can he forge?**

Contracts to make a will occur in a variety of factual situations. Very often they involve the elderly. As people grow older, their reliance on others normally increases because of their inability to care for themselves. This is especially true of those who have lost spouses and who, as a result, come to rely on relatives for normal needs such as housing and food. The furnishing of these services by a friend or relative may be motivated by a variety of reasons, including friendship, good samaritanism or, unfortunately, greed.

In many instances, no mention is ever made of compensation to the providers. In such a situation, after the death of the one receiving the services, the providers may claim there was an oral contract to make a will, under the terms of which they were to be left certain property in exchange for their providing care for the deceased.2

Such a “contract” may have been the last thing on the mind of

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1. While joint and mutual wills are a part of this area of the law, a complete history and discussion of them is really beyond the scope of this article, except to the extent they are discussed in the section regarding section 2-701 of the Uniform Probate Code, discussed below. For a view that advocates joint wills in certain situations, see Hunt, Joint Wills May Provide a Solution to Drafting Problems for Clients Concerned with Remarriage, 12 EST. PLAN. 88, 89-93 (1985).

** Ruddigore II, W.S. Gilbert (1887).

the deceased, who may have otherwise adequately taken care of the providers during the deceased’s lifetime. Under these circumstances, any lawyer attempting to advise clients on estate planning or general financial affairs must be aware of the problems encountered in oral contracts to make a will. This is especially true if elderly clients are living with relatives or friends who are providing services or materials for the lawyer’s client. The most carefully drafted will may be of little use if the lawyer failed to recognize the possibility of a person arriving after death who claims the entire estate by reason of an oral contract in exchange for services rendered to the deceased.

Such alleged contracts are normally oral, with little or no written confirmation. This Article will discuss the various rules for enforcing such a contract, both before and after the Uniform Probate Code.

II. PRE-UNIFORM PROBATE CODE RULES

One precedent creates another. They soon accumulate and constitute law. What yesterday was fact, today is doctrine.*

Since it is extremely easy for the disinherited to claim that the deceased had an oral contract to leave the disinherited a major portion of the deceased’s estate, the courts have been presented on many occasions with the interpretation of oral contracts to make a will. Most such claims occur after the death of the testator, although there is some question as to what remedies are available during the lifetime of the testator to remedy a breach; for example, when the testator tells the other party of a change in the testator’s will, thus violating the agreement. Is specific performance a proper remedy during the testator’s lifetime?3 The problem with specific

* The Letters of Junius (1769-1771).
3. See Clark v. Clark, 288 N.W. 2d 1, 11 (Minn. 1979); Owens v. Church, 675 S.W. 2d 178, 185 (Tenn. Ct. App. 1984). Nebraska law appears to embrace the right to specific performance, although the court’s holdings seem somewhat inconsistent. See Teske v. Dittberner, 65 Neb. 167, 172, 9 N.W. 181, 182-83 (1902), rev’d, 70 Neb. 544, 557-58, 98 N.W. 57, 62 (1903). For a general discussion of the problems of damages and remedies in such cases, see B. Sparks, Contracts to Make Wills 70-100 (1958); 79 Am. JUR. 2d Wills §§349, 381 (1975); Annotation, Remedies During Promisor’s Lifetime on Contracts to Convey or Will Property at Death in Consideration of Support or Services, 7 A.L.R. 2d 1166, 1167-97 (1949). Under prior law some remedies available include a suit for specific property, Teske, 65 Neb. at 168, 91 N.W. at 181, or a suit for specific performance of all or a part of the estate property, In re Peterson, 76 Neb. 652, 653, 107 N.W. 993, 993 (1906), aff’d, 76 Neb. 661, 666, 111 N.W. 361 (1907). Cf. In re Estate of Thompson, 330 Pa. Super. 360, —, 481 A.2d 655, 656-57 (1984) (holding that the proper remedy is an action for breach of contract); Annotation, Liability in Damages for Interference With Expected Inheritance or Gift, 22 A.L.R. 4th 1229, 1229-54 (1983) (discussing liability in damages for interference with inheritance). The one thing apparently not allowed is “probate” of the contract. B. Sparks, supra, at 196.
performance is that if the consideration for the will is that the plain-
tiff was to care for the testator during the latter's lifetime, then the
testator probably would not want the plaintiff's caretaking. For ex-
ample, in a Tennessee decision, the feelings of the testator were
made clear when the court quoted her sentiments:

"Honey, I wanted to get it out of them dadburned sons of
bitches Vaughns' hands. . . . I wanted to get it out of their
hands so bad I couldn't hardly stand it. Honey, I'd throw it
in the river if I couldn't get it nowhere else. I'd throw it in
the river."4

The burden is generally very high on the person claiming such a
contract. An oral contract to make a will is a specific violation of the
Statute of Frauds.5

Most states' statutes of fraud are patterned on sections four and
seventeen of the English Statute of Frauds of 1676.6 The primary
purpose of the Statute of Fruads is to prevent fraud and perjury,7
and the statute has long been applied to oral contracts to devise both
real estate and personal property.5

4. Owens v. Church, 675 S.W.2d 178, 184 (Tenn. Ct. App. 1984) (quoting deposi-
tion of the defendant).
5. For example, Nebraska's Statute of Frauds is found in chapter 36 of the Ne-
braska Revised Statutes, with section 36-103 containing the most specific prohibition:

No estate or interest in land, other than leases for a term of one year from the
making thereof, nor any trust or power over or concerning lands, or in any
manner relating thereto, shall hereafter be created, granted, assigned, surren-
dered, or declared, unless by operation of law, or by deed of conveyance in
writing, subscribed by the party creating, granting, assigning, surrendering or
declaring the same.

NEB. REV. STAT. § 36-103 (Reissue 1985). In addition, section 36-202 of the Nebraska
Revised Statutes prohibits oral agreements which are not to be performed within one
year from their making, and section 2-201 of the Nebraska Uniform Commercial Code
prohibits the enforcement of an oral contract for the sale of goods in excess of $499,
with certain exceptions for merchants, special goods, and estoppel. See id. § 36-202; id.
2-201 (Reissue 1980).
6. 29 Car. II, ch. 3, §§ 4, 17 (1676). The statute provided:

[N]o action shall be brought . . . to charge any person upon any agreement
made upon consideration of marriage . . . or upon any contract for sale of
lands, tenements, or hereditaments, or any interest in or concerning them . . .
or upon any agreement that is not to be performed within the space of one
year from the making thereof . . . No contract for the sale of any goods,
wares and merchandizes, for the price of ten pounds sterling for upwards,
shall be allowed to be good, except the buyer shall accept part of the goods so
sold, and actually receive the same, or give something in earnest to bind the
bargain, or in part of payment, or that some note or memorandum in writing
of the said bargain be made and signed.
8. Overlander v. Ware, 102 Neb. 216, 217, 166 N.W. 611, 612 (1918). This appears
to be the first Nebraska case specifically stating such contracts were prohibited by the
Statute of Frauds. Id. For a historical review of the Statute of Frauds and its applica-
tion to contracts to make wills, see Bouret, Oral Will Contracts and the Statute of
41, 43-52 (1980).
While some courts have debated which specific statutes prohibit such contracts for the devise of personal property—whether it be that such contracts cannot be performed within one year or that they are in excess of the amount required by statute, some form of the Statute of Frauds prohibits the contract. To circumvent this problem, proponents of such contracts usually try to show partial performance, discussed below.

Other statutory problems for such contracts were found in the Wills Act, or Statute of Wills, and the Dead Man's Statute. Both

9. Gray hairs will note that subsection 1-201(7) of the Uniform Probate Code ("UPC") now makes us all "devise," whether it be real or personal property, while prior law devised real estate and bequeathed personal property. Seams a pity to rid our usually colorless legal language of a word that rolls so easily off the tongue. UNIFORM PROBATE CODE § 1-201(7) (West 6th ed. 1985) [hereinafter "UPC"].


11. See Maloney v. Maloney, 258 Ky. 567, —, 80 S.W.2d 611, 613 (1935).

12. B. SPARKS, supra note 3, at 40-42.

13. See infra notes 27-30 and accompanying text.

14. See UPC, supra note 9, at § 2-502; NEB. REV. STAT. § 30-2327 (Reissue 1985). Except for holographic wills, separate writings or wills that are valid where executed, section 2-502 of the UPC and section 30-2327 of the Nebraska Revised Statutes require that a will be in writing and "signed" by the testator, with two witnesses. UPC, supra note 9, at § 2-502; NEB. REV. STAT. § 30-2327 (Reissue 1985). Holographic wills are permitted under section 2-503 of the UPC, section 30-2328 of the Nebraska Revised Statutes. UPC, supra note 9, at § 2-503; NEB. REV. STAT. § 30-2328 (Reissue 1985). Before the UPC's enactment, the Nebraska Statute of Wills was section 30-204, again requiring a writing and two witnesses. NEB. REV. STAT. § 30-204 (Reissue 1964) (repealed by L.B. 354, § 316(5), 83d Leg., 2d Sess., 1974 Neb. Laws 264).

15. See NEB. REV. STAT. § 25-1202 (Reissue 1964) (repealed by L.B. 279, § 75, 8th Leg. 1st Sess., 1975 Neb. Laws 557). Section 25-1202, Nebraska's former Dead Man's Statute, provided:

No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation.

Id. This section, as part of the Nebraska Rules of Evidence, was repealed in 1975, apparently because the Dead Man's prohibition cut off some just claims. See NEB. REV. STAT. §§ 27-101 to -1103 (Reissue 1985); J. WEINSTEIN, WEINSTEIN'S EVIDENCE 601-20 (1982). Now such evidence is discretionary:

The death of the person who might have been in the best position to refute a party's testimony is now primarily considered by the judge in deciding, pursuant to Rule 403, whether to exclude the relevant testimony of this competent witness because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." If the court decides that the testimony is admissible, then the death of other parties to the transaction is considered by the jury in evaluating credibility. In any event, we no longer engage in the presumption that the
statutes are designed to either preserve the sanctity of contracts or prevent perjury, but neither are of any real use in the field of contracts to make a will. The Statute of Wills only sets forth the requirements of a will;16 the statute does not prevent the enforcement of a contract to dispose of property at death.17 In addition, the philosophy of the Dead Man's Statute has given way in light of the New Federal Rules of Evidence.18 However, even when in force, the Dead Man's Statute did not effectively provide safeguards, since it did not prevent friends or relatives of the proponents who didn't have "a direct legal interest" from falsely testifying about the contract.19

Because of these many problems, most state supreme courts have set forth specific rules that the claimant must follow in order to prevail:

1. **Burden of Proof.** The burdens of pleading and of proof in establishing a claim under such an oral contract are on the party alleging the contract. These burdens are high ones:

   We are in full agreement with the following statement found in Annotation, 69 A.L.R. 16: "It is very proper that the assertion of such a contract, especially when it is claimed to be entirely in parol, should be regarded by the court with grave suspicion, and the establishment thereof required by evidence which clearly indicates the minds of the parties met upon the terms of the contract sought to be established."20

2. **Evidence.** The evidence proving such a contract must be "clear, satisfactory and unequivocal."21

3. **Declarations of the Deceased.** If the only evidence of such an

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16. See supra note 14 and accompanying text.
18. See supra note 15 and accompanying text.
19. See B. SPARKS, supra note 3, at 26; Note, supra note 17, at 244-45.
20. Rudolph v. Hartung, 202 Neb. 678, 683, 277 N.W.2d 60, 63 (1979). See also In Re Estate of Layton, 212 Neb. 518, 525, 530, 323 N.W.2d 817, 820-21, 823 (1982) (holding that the appellee failed to satisfy the burden of proof as to the existence of an oral contract to make a will); Yates v. Grosh, 213 Neb. 164, 167-68, 328 N.W.2d 200, 202-03 (1982) (holding that the plaintiff's evidence did not meet the standard of clear, satisfactory, and unequivocal proof).
21. Overlander v. Ware, 102 Neb. 216, 217, 166 N.W. 611, 612 (1918).
oral contract consists of the declarations of the deceased person, these declarations do not amount to direct proof of the facts claimed to have been admitted by those declarations. "Such evidence, when not supported by other evidence, is generally entitled to very little weight.' 22 As stated by an Illinois court: "[Such] testimony must be subject to the closest scrutiny on several grounds." 23 In addition, if the sole evidence of the terms of the contract comes from the persons to be benefited by the contract, such claims are not favored by the courts. 24

4. Terms of the Contract. The oral contract must be clear and certain in its terms as well as fair and reasonable in order to be enforced in equity. 25 Perhaps the burden on the person propounding the contract was best stated as follows:

While contracts to make wills are enforceable they are not favored by the courts. The requirements with reference to certainty, burden of proof, special restrictions as to the time at which such contract takes effect, or as to the amount of damages which may be recovered in case of breach, makes such a contract very difficult to prove and to enforce. 26

5. Partial Performance. As discussed above, 27 an oral contract to make a will is barred by the Statute of Frauds because it is not in writing, even though proved by clear and satisfactory evidence, unless there has been partial performance. 28

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27. See supra notes 5-12 and accompanying text.

This "partial performance" must refer exclusively to the alleged contract, and it must be something that the parties claiming the contract would not have done unless there had been such an agreement:

The thing done, constituting performance, must be such as is referrable solely to the contract sought to be enforced, and not such as might be referrable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to fraud upon him.29

The persons claiming such a contract generally try to avoid the Statute of Frauds by showing that they did in fact take care of the deceased during the deceased's lifetime, performed extraordinary services for the deceased, or did specifically what the deceased had asked them to do as consideration and part performance for the contract. However, the action taken by the claimant must be referrable only to the agreement, and must be something that the claimant would not have done except for the agreement. For example, in a recent Nebraska Supreme Court case, the party alleging the oral agreement to make a will had worked for the deceased as a clerk in his store. The claimant's testimony was that he was not paid in full for all of the work that he did and that the deceased had promised to leave his estate to the employee in exchange for the extra services. In response to this, the Nebraska Supreme Court stated:

There is not evidence in the record, other than the appellee's bare assertions, to indicate that the appellee was being undercompensated for the work he was doing. Consequently, the appellee has by his own admission made it impossible to distinguish between his performance rendered under his employment contract and his performance rendered under the alleged agreement at issue herein. We are unable to draw such a distinction and therefore must conclude that the appellee has failed to prove that his performance following the making of the alleged agreement was "not such as might have been referrable to some other or different contract."30

6. Consideration for the Contract. The claimant must show that there was consideration for the contract: "It is the rule that contracts for testamentary or similar disposition of property must, like

29. Overlander v. Ware, 102 Neb. 216, 218, 166 N.W. 611, 612 (1918).
30. Layton, 212 Neb. at 530, 323 N.W.2d at 823 (citations omitted). The "partial performance" required can sometimes be amusing. In D'Ambrosio v. Rizzo, 12 Mass. App. Ct. 926, 425 N.E.2d 369 (1981), the plaintiff stated a cause of action because his parents named him after the deceased, in reliance on the deceased's promise that he would leave the plaintiff the deceased's house when he died. Id. at —, 425 N.E.2d at 370.
other contracts, be supported by a sufficient valid consideration." 31

This consideration may be difficult to show, especially if the estate can show that the actions by the claimant, alleged to be consideration, were really gifts to the deceased because of the close family relationship. 32

7. Quasi-Contract Theory. If the claimant cannot meet these severe burdens set out by the courts, the claimant may try to prove entitlement to payment for the services rendered to the deceased under a quasi-contract or "quantum meruit" theory. 33 Such theories have been allowed in cases involving estate claims, 34 but the burden is high on the claimant. 35

Since the value of the services rendered is the measure of damages, 36 and this usually does not nearly equal the share of the estate the proponent of the contract would usually claim, most plaintiffs would prefer not being forced to use the quasi-contract theory. 37 In addition, when the providers of the services are relatives, it is presumed that they rendered the services gratuitously 38 — another hurdle in an already difficult hurdles race.

III. SECTION 2-701 OF THE UNIFORM PROBATE CODE

All sensible people are selfish, and nature is tugging at every contract to make the terms of it fair.*

Perhaps recognizing the difficulty with contracts to make a will, the drafters of the Uniform Probate Code ("UPC; "Code") enacted section 2-701, which severely limits the use of contracts:

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this Act, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an ex-

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34. See In re Estate of Baker, 144 Neb. 797, 801, 14 N.W.2d 585, 588 (1944).
35. See In re Estate of Haddix, 211 Neb. 814, 816, 320 N.W.2d 745, 747 (1982); In re Estate of Nissen, 173 Neb. 735, 738, 114 N.W.2d 764, 766 (1962); In re Estate of Olson, 167 Neb. 799, 802, 95 N.W.2d 128, 132 (1959); In re Estate of Huber, 81 Wis. 2d 55, 259 N.W.2d 714, 716 (1977).
36. B. SPARKS, supra note 3, at 139.
37. See Schrebyl, supra note 28, at 784. The Statute of Frauds may also be an additional hurdle under a quasi-contract theory. Id.
38. In re Estate of May, 279 Mich. 53, — 217 N.W. 549, 550 (1937); In re Estate of Anderson, 199 Minn. 598, 590-91, 273 N.W. 89, 91 (1937); Haddix, 211 Neb. at 816, 320 N.W.2d at 747; In re Estate of Bouma, 205 Neb. 209, 211, 292 N.W.2d 37, 38 (1980).
* Ralph Waldo Emerson (1803-1882).
press reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.39

This section was recently interpreted by the Nebraska Supreme Court to hold that such an oral contract is “executed” at such time as the parties become bound to each other for the performance of the terms of the agreement.40 Therefore, in Nebraska, if any alleged contract was “executed” before January 1, 1977, then section 2-701 does not apply.41 If, however, the parties became “bound to each other for the performance of the terms of the agreement” after January 1, 1977, section 2-701 should be a viable defense.42

Obviously, as time passes, the chances of using section 2-701 to defeat such claims increases. However, lawyers should still find fertile ground for litigation by trying to interpret various portions of the statute. For example:

1. How much of the oral contract must be in the deceased’s will in order to constitute “material provisions” under subsection (1)? Will the courts require that the rather rigid requirements of section 2-701 must be met in all instances, even when it causes inequity? For example, a New Jersey court has interpreted section 2-701 as the sole end to the problem, even though the facts indicated there was an oral agreement and that it had been specifically violated:


41. See supra note 39.

42. See supra notes 39, 40 and accompanying text.
Were we free to ignore the clear statutory language and the obvious intent of [Section 2-701] we would find that plaintiffs had presented clear and convincing evidence of a contract to make a will or devise and not to revoke the agreement. Under . . . equitable principles . . . we would impose a constructive trust. . . . Obviously, however, the Legislature has by the enactment here considered precluded such a determination.43

2. What will constitute an “express reference” to the contract under subsection (2)?44

3. What will be allowed as “extrinsic evidence” to prove the contract under subsection (2)? Must that “extrinsic evidence” be “clear, satisfactory and unequivocal” as required by prior case law?45 If part of this “extrinsic evidence” is contained in oral statements made by the deceased, are those statements nonetheless not “direct proof” of the facts claimed, and therefore entitled to very little weight, as was true under prior case law?46 At least one court has interpreted section 2-701 to mean that no extrinsic evidence is permitted unless a writing is first produced that is signed by the deceased and evidences the essential terms of the contract.47 In that particular case, the documents found were not valid wills.48 An “express reference in a will to a contract” appears to be required under section 2-701(2) before extrinsic evidence can be introduced.49

4. What will constitute a “writing” signed by the deceased under subsection (3)?50

44. UPC, supra note 9, at § 2-701(2).
45. See supra note 18 and accompanying text. This question was recognized by the leading author on the subject:
It is important to emphasize that wherever statutes are enacted requiring that contracts to make wills be reduced to writing such statutes should be regarded as supplemental to, not a substitute for, the rule that these contracts must be proved by clear and convincing evidence. If this rule is forgotten the statutory requirement will be insufficient to give adequate protection in courts of equity with a highly developed sensitivity for finding grounds upon which they can base relief against the application of a statute.

B. SPARKS, supra note 3, at 48-49. For a case applying the “clear and convincing evidence rule after enactment of the UPC, see Simmons v. Ewing, 96 Idaho 380, —, 529 P.2d 776, 779 (1974). The Arizona Court of Appeals has held that the proof under section 2-701 of the UPC is even more restrictive than the “clear and convincing evidence” requirement. In re Estate of Moore, 137 Ariz. 176, —, 669 P.2d 609, 611 (1983).
46. See supra notes 22-24 and accompanying text.
48. Id. at —, 698 P.2d at 453.
49. See UPC, supra note 9, at § 2-701.
50. See id. An Arizona case appears to require that the “writing” required by section 2-701 “must state the terms and conditions of all the promises constituting the contract and any deficiency in this regard cannot be supplied by parol evidence.” In re Estate of Moore, 137 Ariz. 176, —, 669 P.2d 609, 612 (1983). In that case, the Arizona
5. In what manner must this "writing" be "signed" by the deceased? Must it be in the same manner required for holographic wills?51

6. What must be in the "writing" required by subsection (3)? Again, will the requirements of holographic wills be used?52 Will the courts look to the requirements of the Statute of Frauds as an analogy?53

Court of Appeals held that a letter signed by a husband and wife to their son which definitely showed an agreement to execute mutual wills did not satisfy the "writing" requirement of section 2-701 because it did not show an agreement to execute irrevocable mutual wills. Id.

51. The UPC recognizes holographic wills in section 2-503. UPC, supra note 9, at § 2-503. Under that section, in order for a holographic will to be valid, there must be a "signature" by the testator. Id. Courts have held that it does not matter where such a signature appears, if it can be gathered from an inspection of the whole instrument that it was intended as a last will. See In re McNair's Estate, 72 S.D. 604, —, 38 N.W.2d 449, 455 (1949). Some very unusual items have been held to constitute a signature, including only a first name, an abbreviation, initials, an affectionate name, and the words "father" or "mother." See Cartwright v. Cartwright, 158 Ark. 278, —, 250 S.W. 11, 13 (1923); In re Estate of Button, 209 Cal. 325, 329, 287 P. 964, 966 (1930); In re Will of Southerland, 188 N.C. 325, —, 124 S.E. 632, 633 (1924); In re Estate of Kimmel, 278 Pa. 435, 437, 123 A. 405, 406 (1924); In re Estate of Briggs, 148 W. Va. 294, —, 134 S.E.2d 737, 741 (1964).

52. See supra notes 50-51 and accompanying text. Under section 2-503 of the UPC, only the "material provisions" of the holographic will must be stated. UPC, supra note 9, at § 2-503. The UPC does not provide a definition of "material provisions," but some states require that a holographic will must be entirely in the testator's handwriting. The commentary on the UPC published by the Editor-in-Chief of the Joint Editorial Board for the Uniform Probate Code makes the following comment on this requirement:

Present statutes authorizing holographic wills usually require that the will be "entirely" in testator's handwriting; hence, a stamped date would prevent a handwritten document from being probated as a holograph under the old type of statute. The test under the Code is much more liberal. It is perfectly possible that a printed will form filled in by the testator in his own handwriting and signed by him might be valid if the court finds that the handwritten portion constitutes the material provisions of a will and that the printed words are not material.

1 UNIFORM PROBATE CODE PRACTICE MANUAL 136 (1977). Under most prior law, an instrument written on a stationer's will form by filling in the blanks was usually not a valid holographic will. See In re Bower, 11 Cal. 2d 180, —, 78 P.2d 1012, 1014 (1938). For a recent Nebraska case discussing section 2-503, see In re Estate of Casselman, 219 Neb. 516, 520, 364 N.W.2d 27, 30 (1985). In the case of Cumings v. Curtiss, 219 Neb. 106, 361 N.W.2d 508 (1985), the Nebraska Supreme Court implied that a stationery form might not be a holographic will, but the court did not discuss section 2-503, nor was the validity of the will an issue in the case. Id. at 109, 361 N.W.2d at 510.

53. See supra notes 5-12 and accompanying text. The Arizona Court of Appeals has held that UPC section 2-701 is a "mini-statute of frauds" and therefore in interpreting that section it has applied the rules concerning the general contract statute of frauds. See In re Estate of Moore, 137 Ariz. 176, —, 669 P.2d 609, 612 (1983). However, the Montana Supreme Court found that if the specific requirements of section 2-701 are not met, the fact that the contract has been partially performed makes no difference. Orlando v. Prewett, 705 P.2d 593, 598 (Mont. 1985). Section 36-105 of the Nebraska Revised Statutes voids any contract to lease for longer than ten years, or for the sale of any lands, unless the contract or "some note or memorandum thereof" is in
7. Will the courts imply a requirement that the "writing" must be "delivered" to complete the transaction?\textsuperscript{54}

8. The doctrine of estoppel may apply to prevent the personal representative from relying on the UPC provisions.\textsuperscript{55} For example, the California Supreme Court has used estoppel to enforce such agreements in spite of the Statute of Frauds.\textsuperscript{56} Nebraska also recognizes such estoppel to defeat a Statute of Frauds' defense,\textsuperscript{57} but has not applied it to oral contracts to make a will.

9. What if an oral agreement to make a will was "executed" in a non-Code state, after January 1, 1977, and is valid under that state's law? Is it valid as to the Code state's assets, even though it is not valid under section 2-701?\textsuperscript{58}

10. Will the pre-code rules governing specific preformance of such contracts still apply under section 2-701?\textsuperscript{59} Assuming that the plaintiff can prove a valid contract, there does not appear to be any

writing. \textsc{Neb. Rev. Stat.} \S 36-105 (Reissue 1985). This has been interpreted by the Nebraska Supreme Court to mean that the essential terms or elements must be in writing. \textit{See} Reifenrath v. Hansen, 190 Neb. 58, 62, 206 N.W.2d 42, 44 (1973); Kubicek v. Kubicek, 186 Neb. 802, 806, 186 N.W.2d 923, 926 (1971).

\textit{See In re} Estate of Brackenridge, 245 S.W. 786, 789 (Tex. Civ. App.) (stating that normally the delivery of a will, unlike a deed, is not essential to its execution or validity), \textit{rev'd on other grounds}, 114 Tex. 418, 287 S.W. 244, 270 S.W. 1001 (1922) (overruling the motion for rehearing). \textit{Compare} Fredmore v. Brill's Estate, 183 Wis. 282, 197 N.W. 802, 805 (1924) (holding that a written contract to devise in consideration for services rendered was void by reason of nondelivery of the agreements) with Russel v. Close's Estate, 83 Neb. 232, 235, 119 N.W. 515, 516 (1909) (upholding a written contract to devise even though it was not delivered, stating that "failure to prove delivery would not destroy its evidential value as proof of the agreement which it purports to set forth.").

\textit{See} 73 \textsc{Am. Jur. 2d} Statute of Frauds \S 567, at 205-06 (1974); 28 \textsc{Am. Jur. 2d} Estoppel and Waiver \S 48, at 656-57 (1966) (stating that promisesory estoppel "may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice.").


\textit{Farmland Serv. Coop., Inc. v. Klein}, 196 Neb. 538, 544, 244 N.W.2d 86, 90 (1976) (regarding an oral agreement to sell corn); \textit{Atlas Corp. v. Magdanz}, 130 Neb. 519, 525, 265 N.W. 743, 746 (1936) (regarding a promisesory note).

\textit{See} \textit{Silianoff v. Silianoff}, 399 So. 2d 462, 464 (Fla. Dist. Ct. App. 1981) (holding that under UPC section 2-701 it is irrelevant where the oral agreement is made that "it is a nullity, insofar as Florida assets of the decedent are concerned.").

\textit{See supra} notes 3-4 and accompanying text. \textit{See also} \textit{Thompson v. Thompson}, 495 A.2d 678, 681 (R.I. 1985) (holding that a mutual agreement to dispose of property by will may be enforced prior to the death of the surviving promisor where that promisor has repudiated the contract).
new requirement of section 2-701 that would not allow specific performance in the same instances allowed by pre-Code law. A related issue is when the statute of limitations starts to run—from the date of an alleged breach or from the promisor's date of death?

11. What significance is to be given the section's refusal to grant a contract "presumption" to joint or mutual wills? Does this mean the mere execution of a "joint" or "mutual" will is some evidence of a contract under section 2-701, even though it is not a presumption? The majority of case law provides that there is no presumption of a contract from the mere execution of a joint or mutual will. This same case law should be of some assistance in showing that the execution of joint or mutual wills evidences some intent to create a contract, even though more evidence is needed to win. Obviously, the execution of a joint will pursuant to a proven agreement should still be valid.

Even under Section 2-701, the lawyer wishing to avoid such contracts should be able to rely on the following defenses, which were available under prior law:

1. Specific performance of such an oral agreement to make a will cannot be enforced if there has been "a substantial failure of performance" by the one seeking to enforce the agreement. In other words, the claimant must perform all of the vital precedent covenants of any alleged agreement in order to be able to enforce such a contract. For example, the claimant may not have taken

60. See UPC, supra note 9, at § 2-701.
62. See UPC, supra note 9, at § 2-701.
64. See Lazetich v. Miller, 671 P.2d 15, 19 (Mont. 1983). In that case, the court stated that the wording of the deceased will "which stated that her husband had executed his will on the same date and which contained the same provision regarding disposition of the stock. While not sufficient in itself to show an agreement not to revoke, [it was] strong confirmatory proof that such an agreement was made." Id. The court concluded that such evidence, in addition to testimony by the drafting attorney, was sufficiently credible to support enforcement of the agreement. Id. Cf. Somogy v. Marosites, 389 So. 2d 244, 246 (Fla. Dist. Ct. App. 1980) (stating that evidence of the oral agreement must be "clear and convincing").
67. See supra note 66 and accompanying text.
care of the deceased as required, or may not have otherwise fully performed the agreement.

2. One of the parties to the alleged agreement may have "abandoned" the agreement by taking certain acts inconsistent with the existence of such a contract in which the other party then acquiesced:

"The right of a party to the specific performance of his contract may be lost by his abandonment thereof, by his acquiescence in the breach of the other party, by laches, or by conduct inconsistent with the right to relief which amounts to a waiver or an estoppel."68

3. Was there consideration for the contract? Even under section 2-701, there must be consideration for the contract to make a will, or to refrain from altering a will.69 A contract to make a will is still a contract and the essential elements of a contract such as offer, acceptance, and consideration should still apply.70 Nothing in section 2-701 states that one need not prove the essential formal elements of the contract.71

IV. BEATING SWORDS INTO PLOWSHARES

_They shall beat their swords into plowshares, and their spears into pruning-hooks._*

While probate lawyers have in the past feared contracts to make wills as being swords that are used to disrupt an estate, contracts to make a will can provide flexibility in estate planning and divorce work.

1. Divorces. In settling a divorce case, the parties may desire to insure that the property they have accumulated during their marriage will pass to the children of that marriage. One of the ways to insure such a result is to execute a contract to make a will by each party, under the terms of which each agrees to make an irrevocable will, giving to the children of the marriage either certain assets or all of the estate of the deceased that exists at the time of death. Such a contract can be very flexible to meet the needs of the parties, primarily because section 2-701 of the UPC now sets forth specifically what is required to make such a contract valid.72

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68. Sopeich v. Tangeman, 153 Neb. 506, 512, 45 N.W.2d 478, 482 (1951) (quoting 58 C.J.S. Specific Performance § 65, at 909 (1944)).
70. Sparks, Problems in the Formation of Contracts to Devise or Bequeath, 40 CORNELL L. REV. 60, 60 (1954).
71. See UPC, supra note 9, at § 2-701.
72. See UPC, supra note 9, at § 2-701. For a thorough discussion of the use of
Nevertheless, there are a number of tax considerations that need to be addressed when attempting to use such a contract in a divorce.\footnote{3}

a. Gift Tax: Between Spouses. Prior to the passage of the Deficit Reduction Act of 1984, a transfer between former spouses in settlement of marital or property rights was exempt from gift tax if pursuant to a written agreement entered into by the spouses during the two years immediately preceding the divorce. However, section 2516 of the Code has been amended by the 1984 Act to permit such a transfer free of gift tax under a written agreement executed during a three-year period that starts two years before the divorce and ends one year after the divorce.\footnote{4} This is not a deduction; rather, the transfer is considered as having been made for full and adequate consideration in money or money’s worth.\footnote{5}

Between Third Parties. If the agreement requires the divorcing spouses to give certain property to the children of that divorce upon the death of either spouse, has a taxable transfer occurred, resulting in a gift tax at the time of the divorce? There are a number of rules that would cause some concern, including the facts that a transfer among family members receives close review,\footnote{6} and that there must be “money consideration” to the donor in order to exempt the transfer from gift taxation.\footnote{7}

However, even though the agreement is presently binding and enforceable, the question basically is whether the transfer received by the children is susceptible of valuation at the time it becomes enforceable.\footnote{8} Under Revenue Ruling 69-346, the effective date of a gift under an agreement where a wife agrees to transfer her community interest in her husband’s estate to a testamentary trust for her benefit when his estate was settled, was the date of her husband’s death:

\footnotesize{\begin{itemize}
  \item At the urging of the author’s malpractice carrier, the following disclaimer applies: “This is not an exhaustive list of various tax consequences but is intended to highlight some of the possible tax problems.” \footnote{73}
  \item I.R.C. § 2516 (1982 & Supp. 1985). \footnote{74}
  \item Id. See Madden & Heick, Unexpected Estate Planning Benefits Available under New Law for Divorcing Taxpayers, 12 EST. PLAN. 144, 144 (1985). \footnote{75}
  \item Fehrs v. United States, 620 F.2d 255, 260 (Cl. Ct. 1980). \footnote{76}
  \item Commissioner v. Wemyss, 324 U.S. 303, 306-07 (1945). \footnote{77}
  \item Rev. Rul. 69-346, 1961-1 C.B. 227. \footnote{78}
\end{itemize}}
In the above-described circumstances, the agreement between the taxpayer and her husband was enforceable at the time entered into. However, it was not determinable at that time whether the taxpayer had made a gift and, if so, of what value. Accordingly, it is held that the taxpayer in the instant case is not considered to have made a taxable gift until the death of her husband, at which time the amount of the gift first became susceptible of valuation. Therefore, no taxable transfer occurs unless the value of the gift can be determined on the basis of accepted actuarial principles at the time the agreement is entered into. Under an agreement to leave whatever property is left at the date of death of the spouse to the children of the marriage, the value of the gift cannot be determined at the time of the divorce, since the amount of the property to be transferred is not known until the death of the second spouse.

Authority for this position can also be found in the cases involving joint and mutual wills, in which the tax court has held that under a joint will and a mutual will containing a survivorship clause, sufficient dominion and control is not relinquished at the time of the execution of the will so as to create a taxable transfer. The gift tax consequences of such a transfer obviously must be addressed in the divorce situation, but there should be adequate ammunition for the taxpayer in favor of the argument that such agreements are not a gift tax transfer. Further support for this position could possibly be found under the Tax Reform Act of 1984. Under that act, as mentioned above, a transfer pursuant to a written agreement made during a three-year period, starting two years prior to the divorce and ending one year afterward, is free of gift tax as between the spouses. The transfer does not have to occur during this period but rather it may be made later so long as it is “pursuant” to an agreement entered into during the three-year period. While this does not relate directly to the question of the gift tax consequences to the spouses themselves, the new act does view the husband and wife as a single economic unit, permitting flexibility and reliance by the

79. Id.
80. Benage, supra note 72, ¶ 22,551, at 22,336.
81. See Hambleton v. Commissioner, 60 T.C. 558, 565 (1973) (holding that a contractual promise to transfer an indefinite amount of property at one's death is not a present gift); Brown v. Commissioner, 52 T.C. 50, 60 (1969) (holding that a joint and mutual will at the time of death of the first testator passes no present interest in the property of the survivor).
82. See supra note 75 and accompanying text.
83. See supra note 75 and accompanying text.
84. See supra note 77 and accompanying text.
b. Estate Tax. Under prior law, if the divorcing parties had an agreement that one spouse was to receive certain assets from the estate of the first spouse to die, there was some question whether that transfer was a valid claim against the estate of the deceased spouse under section 2053 of the Internal Revenue Code. However, under the Tax Reform Act of 1984, transfers made pursuant to a written agreement between the divorcing parties are now deemed to have been made for "an adequate and full consideration in money or money's worth" and therefore qualify as an estate tax deduction for claims against the estate under Section 2053: "Such transfers are now not only exempt from gift tax, but are also deductible for estate tax purposes if made by the transferor spouse's estate because he or she died before the transfers had been completed."

A separate question not clearly addressed under the Tax Reform Act is whether a distribution to the children of the marriage from the estate of the last to die also qualifies as a claim under Section 2053. If the transfer from the estate of the last to die is "a transfer of property and satisfaction of marital property rights," should it then be considered as made "for an adequate and full consideration in money or moneys [sic] worth," therefore satisfying the requirements of section 2516, which would also entitle it to be deducted as a claim under section 2053? If this theory is followed by the courts, the transfer at death is made pursuant to a written property settlement agreement entered into within the period of time specified in section 2516, and therefore the value of the property transferred to the children should be deductible from the gross estate of the decedent.

c. Estate Planning. The use of contracts to make wills may also be of use in those estates where the parties desire to prevent the surviving spouse from disinheriting the children of the marriage, even though no divorce is contemplated. This was often the reason for joint and mutual wills, although their use is generally discouraged. Of course, the need to be accurate and complete in such an agree-
ment is always extremely important. Under section 2-701 of the UPC, such contracts should now be able to be drafted with more precision, so long as the requirements of that section are met. States without the UPC lose this definiteness in making such contracts, and lawyers in those states would still need to worry about the rules of pre-Code law discussed above.

One additional area for possible use of such contracts is for the "live-in" arrangements. Two people living together, unmarried, may have the same desire to bind each other's devise of property as a married couple would. While such a contract may be problematic in some states if used upon separation of the couple, rather than death, section 2-701 certainly does not limit itself to married couples, so long as the necessary requirements of the section are met. Of course, there is always the possibility that the courts could refuse to enforce the agreement on the "public policy" grounds used in some of the separation cases. In other words, to enforce such a contract would only encourage people to live together without marriage, which is against public policy. Another argument against the contract could be that the sole consideration is payment for sexual services, which is not only against public policy, but is a violation of statutes outlawing prostitution. The answer to this argument is to separate the "sexual" consideration and uphold the "untainted" portions of the agreement.

Clients Concerned With Remarriage, 12 EST. PLAN. 88, 93 (1985) (stating that joint wills should be a tool of last resort).

91. See Ikegami v. Ikegami, 1 Haw. App. 505, —, 620 P.2d 768, 769 (1980) (stating that there was not clearly an agreement to make a will, but that the dispute was whether the agreement restricted the deceased's disposition of the property during his lifetime). For similar drafting problems in Nebraska, McKinnon v. Baker, 220 Neb. 314, 316, 370 N.W.2d 492, 493 (1985) (stating that there was an alleged ambiguity in the will).

92. See UPC, supra note 9, at § 2-701.

93. See supra notes 3-38 and accompanying text; Benage, supra note 72 § 22,551, at 22,336-38.


95. UPC, supra note 9, at § 2-701.


97. See supra note 96 and accompanying text. See also Note, Property Rights of Non-Marital Partners in Meretricious Cohabitation, 13 NEW ENG. L. REV. 453, 457 (1978) (stating that cohabitation either has been or is illegal in a number of states).

98. Abano & Schiller, supra note 94, at —.

Two of the major tax problems that relate to such contracts in the estate planning area are: first, whether the transfers under such an agreement to a surviving spouse qualify as a marital deduction under section 2056 of the Internal Revenue Code, and second, whether payments from the second deceased spouse's estate to the children qualify as claims against the estate and are therefore deductible for federal estate tax purposes under section 2053 of the Internal Revenue Code.

1. Marital Deduction. The provisions of an antenuptial agreement or other contract to make a will between a husband and wife would normally require the surviving spouse to dispose of certain property received from the spouse who dies first in a particular manner upon the death of the second spouse. Prior to the enactment of the Economic Recovery Tax Act of 1981 ("ERTA"), property passing from the first spouse to die under such a contractual will arrangement normally did not qualify for the marital deduction. The usual reason for this was that the surviving spouse was essentially denied control over the property and therefore had a "terminable interest," which was not deductible.

However, after the enactment of the ERTA, such contracts may create interests which can qualify for the marital deduction, if drafted correctly, using the qualified terminable interest property concept ("QTIP"). This concept is generally described as a qualified arrangement, under the terms of which the surviving or donee spouse is given a life interest that was previously characterized as a non-deductible terminable interest for transfer tax purposes, but which now can qualify for the marital deduction if properly elected.

Bd., 138 Cal. App. 3d 323, —, 187 Cal. Rptr. 869, 873 (1983) (stating that "[m]erely because two persons of the same sex occupy a single residential structure does not dictate either the . . . sexual influences or dependency within the meaning of the [state labor] code.").

100. See I.R.C. § 2056 (1982 & Supp. 1985). Section 2056 basically deducts from the value of the gross estate an amount equal to the value of any interest and property which passes or has passed from the decedent to the surviving spouse, essentially making the deduction an "unlimited" one. Id.


102. This discussion will assume that the parties have qualified the arrangement as a valid contract under section 2-701 of the UPC, whether the arrangement is by a written contract or in the form of a joint and mutual will. A will is joint when two or more persons execute the same instrument as their own wills. Wills are mutual when two or more persons execute instruments with reciprocal terms; that is to say, the two wills are identical except for changes to reflect which of the two partners is executing each of the wills. See B. SPARKS, supra note 3, at 26-27.


104. Estate of Opal, 450 F.2d at 1089; Estate of Elson, 28 T.C. at 446.

by the first deceased spouse's personal representative.\textsuperscript{106} If the requirements of section 2056(b)(7) are met, so that the property does qualify as QTIP property, it would appear that there is no reason why the fact that the property was transferred pursuant to a valid contract to make a will should prevent it from qualifying for the marital deduction, just as any other QTIP property would.\textsuperscript{107} This opinion appears to be reinforced by the proposed regulations issued by the Department of the Treasury in May of 1984.

If the contract does not qualify for QTIP protection, then whether the property qualifies for the marital deduction will depend on whether the surviving spouse's right to the assets is a "terminable" one. Some courts have held that such interests are terminable and therefore do not qualify for the marital deduction.\textsuperscript{108} However, if the contract leaves the surviving spouse free to make any kind of disposition except one by a different will, other courts have held the interest is not terminable and therefore should receive the marital deduction.\textsuperscript{109}

So far only probate property has been discussed. Is there a difference if the surviving spouse receives non-probate property, such as joint tenancy assets or life insurance proceeds, which the surviving spouse must dispose of pursuant to the contract? Under these circumstances the estate tax marital deduction has been allowed with respect to the non-probate property.\textsuperscript{110}

If the property passes to the surviving spouse pursuant to the

\begin{itemize}
\item \textsuperscript{106} Id. This article is not intended to be an in depth discussion of QTIP property or any problems that are associated with the election. For a general background on this section of the code, see Beattie, \textit{Defining the Role of Qualified Terminable Interest Property in Effective Estate Planning}, 12 TAX'N FOR LAW. 32, 32 (1983); Schulman, \textit{How and When to Use the New Marital Deduction Qualified Terminable Interest Trust}, 10 TAX'N FOR LAW. 196, 196 (1982); Strauss, \textit{Qualified Terminable Interest Property Offers New Opportunities But Many Problems are Unresolved}, 9 EST. PLAN. 74, 74 (1982).
\item \textsuperscript{107} See Dobris, \textit{Do Contractual Will Arrangements Qualify for Qualified Terminable Interest Treatment Under ERTA?}, 19 REAL PROP., PROB. AND TR. J. 625, 627 (1984) (discussing why such a contract to make a will does qualify as terminable interest property under ERTA).
\item \textsuperscript{108} Estate of Opal, 450 F.2d at 1085; Estate of Siegel, 67 T.C. 662, 671-72 (1977). A related issue is whether a gift tax is imposed on the transfer to the ultimate remaindermen under the contract when the first spouse dies. For a case that held that there was such a gift, see Pyle v. United States, 581 F.Supp. 252, 254 (C.D. Ill. 1984), rev'd., 766 F.2d 1141, 1147 (7th Cir. 1985). Other cases have also interpreted the effect of such a contract as to permit the survivor to use the assets in such a manner that no gift tax results. See Hambleton v. Commissioner, 60 T.C. 558, 568 (1973); Brown v. Commissioner, 52 T.C. 50, 68 (1969). For a general discussion of this issue, see Thomas, \textit{The Tax Consequences of Antenuptial Agreements}, 32 PRAC. LAW. 13 (1986).
\item \textsuperscript{110} See United States v. Ford, 377 F.3d 93, 99 (8th Cir. 1967); Estate of Awtry v.
contract, free and clear of any restrictions, it should also qualify for the marital deduction, even though it is in fulfillment of the agreement.\textsuperscript{111}

A somewhat related tax question to keep in mind is what is included in the surviving spouse's estate, for tax purposes. If the property was qualified as QTIP in the first spouse's estate, then the full value of the property will be in the surviving spouse's gross estate.\textsuperscript{112} If QTIP is not involved, but the surviving spouse has only received a life interest in the property passing under the will, then the property should not be in the survivor's gross estate, unless the survivor has a power to consume the property that would make it a general power of appointment.\textsuperscript{113}

2. \textit{Section 2053 Deduction}. Does the payment to the surviving spouse from the deceased's estate qualify for a deduction under section 2053 of the UPC? That section requires that the deduction is allowed only to the extent that the claim was a bona fide contract and for an adequate and full consideration in money or money's worth. Perhaps the cases from the divorce area mentioned above are useful here,\textsuperscript{114} but such a deduction has been allowed by the tax court where two unmarried persons living together had an agreement for payments to the survivor.\textsuperscript{115} The tax court has also allowed such a deduction under an antenuptial agreement.\textsuperscript{116}

V. CONCLUSION

\begin{quote}
\textit{He saw a lawyer killing a viper} \\
\textit{on a dunghill hard by his own stable;} \\
\textit{and the Devil smiled, for it put him in mind} \\
of Cain and his brother, Abel.*
\end{quote}

The estate planning lawyer who wants to avoid possible lawsuits over alleged oral contracts to make a will should be on the watch for situations that may give rise to a claim based on an oral contract, such as where the client lives with others or is greatly dependent on

\textsuperscript{*}Samuel T. Coleridge, The Devil's Thoughts.

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friends or relatives. The lawyer who is prepared can take additional steps while the client is alive to prevent the lawsuit, including interviewing the providers, drafting written agreements or statements from the testator as to the true facts or having the testator specifically disclaim such a contract in the testator's will or trust instrument.

In spite of the high burden of proof, to the proponent of the will such contracts are dangerous because the proponents of the oral contract usually have a sympathetic argument. They usually did provide services for the deceased, for which they may not have been fully compensated. This does not make the proponent's case easier—just more dangerous in front of a sympathetic judge.

Certainty in the law is to be favored—it allows a lawyer to predict with accuracy what will happen to clients. Oral contracts to make wills have traditionally been viewed as one of the least certain areas, primarily because of the sympathy factor for the proponents. It is hoped that the new UPC provision will limit the dangerous aspects of such contracts. But the innovative lawyer should try to use these same contracts in a constructive manner, whether it be in divorce planning or estate planning. In either event, recognizing the dangers—and attributes—of contracts to make wills enables the estate planning lawyer to more ably represent clients. A contract to make a will "is a device born out of a social need for which there appears no other satisfactory answer and its skillful use is a responsibility of the legal profession."117

117. B. SPARKS, supra note 3, at 200.