

Contracts to Make Wills (Book Review)

George F. Keenan

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vestment in the property is afforded. While this struggle is no longer at crest, it continues in various forms before commissions and courts.

The author is of the Brandeis-Holmes school, a stout defender of "prudent investment." The lack of any detailed consideration of what constitutes a "fair return" is a matter of regret. So, too, is the want of consideration of the "cost of money" in determining a fair rate of return. The author's views would be of interest and of value. It is to be hoped that at some later day he will add to the debt owing him by administrators and practitioners by setting forth his views on these subjects.

FRANK H. SOMMER.*



CONTRACTS TO MAKE WILLS. By Bertel M. Sparks. New York: New York University Press, 1956. Pp. 230. \$5.00.

This is a treatise on the legal relations arising out of contracts to devise or bequeath. The author has adequately stated these relations. In addition, he has underlined some of the confusion in this area originating in a failure to differentiate the legal incidents of a contract and those of a will. It is elementary that a contract, once made, creates mutual rights and obligations and cannot be revoked by the unilateral action of either party thereto. On the other hand, it is likewise elementary that a duly executed will does not create a legal interest in any of the beneficiaries named therein, and it may be revoked by the testator at any time. A testator is generally acknowledged to possess this power to revoke his will, even though such will was drawn in accordance with a contract theretofore made by him.

It has been stated in some leading judicial opinions that a contract to devise or bequeath may be revoked upon notice given by one party to the other, but that such a contract cannot be revoked after the death of either party thereto, apparently on the theory of estoppel. If the courts making these observations had the contract to devise or bequeath exclusively in mind, they are obviously inaccurate. A contract to devise or bequeath, like any other contract, cannot be revoked upon notice given by one party to the other; like other contracts, it can be terminated only upon the consent of both parties thereto. Furthermore, a contract of this kind is enforceable to some extent during the lifetime of both parties thereto, and upon the death of

* Deputy Attorney General, assigned to New Jersey Department of Public Utilities, Board of Public Utility Commissioners; Dean Emeritus of New York University School of Law.

either party, it is in all respects enforceable, without invoking the doctrine of estoppel.

If, on the other hand, the courts making these statements had a will exclusively in mind, they are again inaccurate. A will drawn pursuant to a contract may be revoked at any time by either party during the lifetime of both or by the survivor, and it is not necessary to give notice to anyone. Compliance with the local revocatory statute is all that is required.

The author traces this confusion to what is probably its source and makes appropriate recommendations with respect thereto.

It should be observed that a will drawn pursuant to a contract is not by that fact deprived of one of its chief attributes, namely, its revocability. The great weight of authority holds that if a will is drawn pursuant to a contract, the testator is not legally incapacitated from revoking that will and drawing another in violation of the contract. This is reinforced by statutes in some jurisdictions which provide for the admission to probate of the last will and testament of a decedent and no other.

A contract to devise or bequeath of course imposes some restrictions upon the promisor's use of that part of his property which is affected by the contract. These restrictions we should naturally expect to find clearly and specifically enumerated in the contract. Apparently, however, some of these contracts are drawn by laymen, or possibly by attorneys who may have been unaware of the necessity of making any provision with respect thereto. As a result, these contracts usually do not specify any restrictions upon the promisor's use of that part of his property affected by the contract. The courts then are confronted with the necessity of making a determination with respect to a matter which was probably not in the contemplation of the parties, or, if it was in their contemplation, they neglected to include in the contract any provisions with respect thereto. This, in most cases, is tantamount to determining what under the circumstances is equitable and just. The author suggests that the draftsmen of these contracts be more fully aware of the many difficulties involved, and of their commensurate obligations and responsibilities.

In some of the opinions concerned with the rights of the promisee against the promisor or his estate, the nature of the relationship between them has been considered. Presumably as an aid in ascertaining their mutual rights and obligations, the relationship between them has been likened to an express or constructive trust in which the promisor is the trustee, and the promisee is the beneficiary; and also to a life estate and remainder, the promisor being the life tenant, and the promisee the remainderman. The author properly suggests that the legal problems arising under a contract to devise or bequeath cannot be solved by likening it to more commonly used plans for the disposition of property. He correctly points out that it is merely a contract purporting to direct a certain disposition of part or all of

the testator's property, and likening it to other relationships subserves no useful purpose.

The marriage of the promisor in a contract to devise or bequeath may create a conflict of interest between the promisee and the spouse of the promisor in the disposition of which a variety of solutions has been purposed. If the contract precedes the marriage, as a matter of law, the rights of the promisee under the contract should be accorded priority even though the subject matter of the contract is the promisor's entire estate. However, in view of the fact that this would invariably work an injustice, there has been considerable modification. The author has thoroughly reviewed the various facets of this problem.

In New York, and some other jurisdictions, a contract either to devise or bequeath must comply with the Statute of Frauds.¹ Hence the contract or some note or memorandum thereof must be in writing and subscribed by the party to be charged. Attention is called to the fact that the contract or memorandum may be included in the will itself, provided it contains a recital of all the essential terms. Frequently in recent years that is precisely where the courts have found either the memorandum or contract.

These contracts, the author suggests, may be used as estate planning devices. Certainly there are some desirable objectives which can be achieved by no other effective or available device. It is evident, however, that there are but few of these. This observation is emphasized by the fact that in the chapter purporting to cover this matter exclusively,² there are but five pages devoted to it, the balance of the chapter being a summary of some of the material appearing in other chapters of the book.

These and many other equally significant subjects are handled in this excellent volume with scholarliness, and in a style that is both lucid and attractive. The work is a valuable contribution to the literature in this field.

GEORGE F. KEENAN.*

¹ N.Y. PERS. PROP. LAW § 31(7).

² Pp. 187-200.

* Executive Assistant to the Mayor of The City of New York; Professor of Law, St. Johns University School of Law.