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# Oral Will Contracts and the Statute of Frauds in California, 1896-1980: A Summary and Evaluation

MARC P. BOURET\*

*There is no longer any certainty that one can successfully argue that purely oral mutual promises to bequeath property are unenforceable due to the Statute of Frauds. The author traces the trends in the oral will contract area during the past eighty years. He then analyzes various exceptions to the Statute of Frauds which have developed to allow oral will contracts to be enforced during the lifetime of the promisor, or more frequently after his or her death.*

This article evaluates and summarizes the California position on oral will contracts during the last eighty years.<sup>1</sup> The proliferation of decisions during this period has served to create a seam-

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1. This article is confined to the California position on this subject, except for historical discussions of sister states and English law. The breadth of material written on this subject in California is sparse at best, but its controversy in the general field of contracts has been widely discussed. See generally B. SPARKS, *CONTRACTS TO MAKE WILLS* (1956); 4 W. PAGE, *A TREATISE ON THE LAW OF WILLS*, §§ 1707-62 (1941); 1 W. BOWE & D. PARKER, *PAGE ON THE LAW OF WILLS*, § 10.1-10.50 (1961).

less web of case law interpretations. The principal focus<sup>2</sup> will be on the statutes and their judicially imposed exceptions which circumvent the Statute of Frauds in oral agreements to make a will or to devise property.<sup>3</sup>

In California, agreements to leave property by will have often consisted of a testator's promise to devise property if he receives personal or lifetime services in return or other consideration.<sup>4</sup> The plethora of cases involve situations that occur when a decedent fails to do what he promised, and therefore, the contract must be judicially enforced.<sup>5</sup> The contracts involved in such cases are of questionable validity when confronted with the California Statute of Frauds.<sup>6</sup>

California courts uphold the validity of oral will contracts upon the satisfaction of two elements. First, a contract must be evident to insure adequate consideration and definitive terms.<sup>7</sup> Second, a memorandum of the alleged oral agreement is required,<sup>8</sup> or a part performance,<sup>9</sup> sufficient unconscionable injury,<sup>10</sup> and detrimental reliance can substitute for the memorandum.<sup>11</sup> California courts

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2. This topic necessarily encompasses the subject popularly known as reciprocal, joint or mutual wills, but concentrates particularly on the facts that arise upon an oral promise made by one person to leave property in a certain manner and the reliance on that promise by a second party. Joint wills involve the situation where a like instrument is adopted as the will of two persons and is signed by both parties. Such a will may be probated at the respective deaths of each of the persons. G. THOMPSON, *LAW OF WILLS* § 34 (2d ed. 1936); 1 A. MARSHALL, *CALIFORNIA PROBATE PROCEDURE* § 610 (4th ed. 1979). Mutual or reciprocal wills have identical provisions and are commonly found where separate wills are made by two persons that have identical provisions. See G. THOMPSON, *LAW OF WILLS* § 34 (3d ed. 1947).

3. *Zellner v. Wassman*, 184 Cal. 80, 84, 87, 193 P. 84, 86, 87 (1920).

4. See *Kassianov v. Raissis*, 200 Cal. App. 2d 573, 576, 19 Cal. Rptr. 614, 616 (1962) (an oral agreement was made to care for a person for that person's life and to bury him).

5. At times, the opposite result is reached and no contract is formed. See *Wood v. Wrigley*, 119 Cal. App. 2d 90, 97, 258 P.2d 1049, 1054 (1953).

6. CAL. CIV. CODE § 1624(6) (West 1973); *Palmer v. Phillips*, 123 Cal. App. 2d 291, 295, 266 P.2d 850, 853 (1954).

7. *Smith v. Smith*, 126 Cal. App. 2d 194, 196-97, 272 P.2d 118, 120 (1954) (action on oral agreement to leave property to plaintiff in consideration of services to be rendered and in quantum meruit; suit instituted against the executor of the estate of one of the promisors).

8. The lack of a memorandum is not fatal if other facts sufficiently establish the contract. *Drvol v. Bant*, 183 Cal. App. 2d 351, 357, 7 Cal. Rptr. 1, 6 (1960).

9. *Rundell v. McDonald*, 62 Cal. App. 721, 724-25, 217 P. 1082, 1084 (1923).

10. See e.g., *Jirschik v. Farmers & Mercn. Nat'l Bank*, 107 Cal. App. 405, 406-07, 237 P.2d 49, 50 (1951) (recovery for unconscionable injury was denied because of an estoppel defense; plaintiff was employed and paid by decedent at a lower rate than she could have made elsewhere; she stayed at decedent's house upon a promise to receive property by will).

11. *Porporato v. Devincenzi*, 261 Cal. App. 2d 670, 674, 678, 68 Cal. Rptr. 210, 213, 214-15 (1968) (action for quasi-specific contract to enforce the oral agreement of a father-in-law to leave property to Porporato in exchange for her personal services).

utilizing this approach during the last eighty years have obliterated the effectiveness of the Statute of Frauds which would prevent a binding agreement from being concluded before execution of formal written agreements.<sup>12</sup> Today the scale of equity has shifted to allow enforcement of more oral contracts than at any other time.<sup>13</sup>

The purpose of this article is to sort out the debris and myths left after almost a century of opinions in this area by evaluating a few key decisions. The discussion will commence with a treatment of the historical development in California of oral will contracts in light of the Statute of Frauds.<sup>14</sup> Analysis will be directed toward court decisions which circumvent the Statute of Frauds by using the theories of equitable estoppel,<sup>15</sup> part performance<sup>16</sup> and detrimental reliance.<sup>17</sup> As a result of these judicially crafted exceptions, the statute has been literally shotgunned with loopholes.

#### I. LEGISLATIVE BACKDROP TO THE PAROL WILL CONTRACT

The original statute was born over three centuries ago under a variety of policy reasons. In 1676, the English Parliament enacted the Statute of Frauds.<sup>18</sup> The statute emphasized the necessity of written evidence of an agreement. The purpose of the statute was

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Porporato, in reliance on the agreement, returned to San Francisco, where they were living and raised the grandchildren).

12. See generally Sparks, *Legal Effects of Contracts to Devise or Bequeath Prior to the Death of the Promisor*, 1, 53 MICH. L. REV. 1 (1954); Comment, *Equitable Estoppel and the Statute of Frauds in California*, 53 CALIF. L. REV. 590 (1965); Note, *Part Performance, Estoppel and the California Statute of Frauds*, 3 STAN. L. REV. 281 (1951); Note, *Separation Agreements to Make Mutual Wills for the Benefit of Third Parties*, 18 HASTINGS L.J. 423 (1967).

13. This trend will be discussed; see notes 172-82, 213-16, 218-20, *infra* and accompanying text.

14. One commentator has questioned the validity of the exact year in which the Statute of Frauds was enacted, and the identity of the author. Note, *The Date and Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329 (1912). However, for the purposes of this comment, the date 1676 shall be assumed correct. W. BURBY, REAL PROPERTY 287 (3d ed. 1965).

15. See generally, Note, *S/F: The Doctrine of Equitable Estoppel and the Statute of Frauds*, 66 MICH. L. REV. 170 (1967); Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U. PA. L. REV. 440 (1931).

16. See note 12 *supra*.

17. Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORDHAM L. REV. 114 (1975).

18. See C. BROWNE, STATUTE OF FRAUDS 1-23 (1880); 1 H. REED, LAW OF THE STATUTE OF FRAUDS 1-25 (1884). The law was known as a statute for the prevention of frauds and perjuries, 29 CAR. 2, c. 16 (1676).

to prevent the establishment of dishonest contract claims.<sup>19</sup> During the three centuries since Parliament's enactment of the Statute of Frauds, the courts have strained to find methods to avoid the harshness of the requirement of a writing.<sup>20</sup> In California, this judicial inclination to chomp at the statutory bit has been manifested by the application of numerous exceptions to the codified rule.<sup>21</sup> Some courts have enforced the policy of the statute and have reflected concern for the potential danger of easing the general requirement for a writing.<sup>22</sup> On the other hand, some courts have applied exceptions that encroach upon the statute.<sup>23</sup>

California's first Statute of Frauds was enacted on April 19, 1850.<sup>24</sup> The original Act required a writing for leasing property for longer than one year or for the sale of land.<sup>25</sup> All agreements had to be in writing and had to be capable of performance within one year.<sup>26</sup> This first statute did not deal with oral agreements to devise or bequeath property and left the matter open. The California Supreme Court had occasion to confront the issue forty-six years later.<sup>27</sup>

The modern California version of the Statute of Frauds was enacted in 1872 as section 1624 of the California Civil Code.<sup>28</sup> The statute has been amended at various times since its enactment, but not until 1905, did the legislature make the statute applicable to will contracts.<sup>29</sup> Presently, the statute provides in relevant part:

The following contracts are invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:

. . . .

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19. 3 W. JAEGER, WILLISTON ON CONTRACTS § 448 (3d ed. 1960).

20. See generally, Note, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273, 273-74 (1916).

21. See generally, 35 CAL. JUR. 3D, STATUTE OF FRAUDS, of, §§ 89-118 (Supp. 1979). See note 180 *infra*.

22. See e.g., Kessler v. Lauretz, 39 Cal. App. 3d 441, 449, 114 Cal. Rptr. 42, 44 (1974); State v. Haslett Co., 45 Cal. App. 3d 252, 256, 119 Cal. Rptr. 78, 80 (1975).

23. Pearsall v. Henry, 153 Cal. 314, 318, 95 P. 159, 160 (1908); Taylor v. Odell, 50 Cal. App. 2d 115, 125, 122 P.2d 919, 924 (1942).

24. 1850 Cal. Stats. 226 codified in CAL. CIV. CODE §§ 3152-3154, 3156-3158, 3163 (Hittel's 1865). See also 1 M. THROOP, VALIDITY OF VERBAL AGREEMENTS 36-37 (1870).

25. 1850 Cal. Stats. 266, 267 (codified in CAL. CIV. CODE § 3152).

26. *Id.* at 267.

27. *Schaadt v. Mutual Life Ins. Co.*, 2 Cal. App. 715, 84 P. 249 (1906). The first reported decision of the California Courts of Appeal to address the issue that is the subject of this article is *Schaadt*. On November 8, 1904, the courts of appeal were created.

28. 1873-74 Cal. Amend. Code 241.

29. *Id.*; 1877-78 Cal. Amend. Code 86; 1905 Cal. Stats. 610; 1931 Cal. Stats. 2260; 1937 Cal. Stats. 695; 1963 Cal. Stats. 1843; 1967 Cal. Stats. 953. The code was made applicable to will contracts pursuant to 1905 Cal. Stats. 610.

(6) An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will.<sup>30</sup>

Subsection 6 requires that an agreement to devise or bequeath must be in writing or supported by some note or memorandum signed by the party to be held to such an agreement. Clearly, oral agreements to devise property *per se*, violate the Statute of Frauds and the California courts have so held.<sup>31</sup> Oral agreements of the type regulated by this subsection can arise in a variety of circumstances. A common fact pattern concerns an oral agreement to leave property in return for furnishing services for an individual's natural life.<sup>32</sup> Since there is no time fixed for payment, the contract falls within the purview of subsection 6 and must meet its terms.<sup>33</sup> Another frequent factual pattern involves an oral agreement not to revoke a will, whether or not it be joint or mutual,<sup>34</sup> or to execute a will to accomplish a promised result.<sup>35</sup>

The merger of contracts and wills under subsection 6 is both interesting and confusing.<sup>36</sup> A will, by definition, must be revokable during the lifetime of the testator; therefore, the instrument theoretically is not a will if the testator cannot revoke it.<sup>37</sup> The mere

30. *Id.*

31. See e.g., *Rotea v. Izuel*, 14 Cal. 2d 605, 612, 95 P.2d 927, 931 (1939); *Murdock v. Swanson*, 85 Cal. App. 2d 380, 385-86, 193 P.2d 81, 83-84 (1948).

32. *Manford v. Coats*, 6 Cal. App. 2d 743, 745-46, 45 P.2d 395, 395-96 (1935).

33. Any fair and reasonable interpretation that indicates the contract cannot possibly be performed within one year is unenforceable under the statute. *Dougherty v. Rosenberg*, 62 Cal. 32, 33 (1882); CAL. CIV. CODE § 1624(6) (West 1973).

34. See note 2 *supra*.

35. *Beard v. Melvin*, 60 Cal. App. 2d 421, 423, 140 P.2d 720, 723 (1943) (an agreement orally made wherein defendant would make provision in her will for plaintiff because plaintiff refrained from presenting a claim in a prior estate proceeding).

36. A nuncupative will is a special statutory exception to the general requirement of a writing found in CAL. CIV. CODE § 1624(6). In contrast to the establishment of the validity of an oral will contract through exceptions to the Statute of Frauds (see notes 147-71 *infra* and accompanying text), a nuncupative will in California is oral and is limited in amount to \$1,000 of personal property. In addition, the testator must be in expectation of immediate death from injury received the same day, or in actual shipboard or field duty. CAL. PROB. CODE §§ 54-55. See P. CALLAHAN, *HOW TO MAKE A WILL* 41 (1975). The nuncupative will must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator, at the time, to witness the words of disposition. CAL. PROB. CODE § 54. The oral will contracts discussed in this comment were substantially over the \$1,000 limit, involve both real and personal property and do not involve actual servicepersons or shipboard mates.

37. Revocation can be formally accomplished by an instrument executed with the same formalities as a valid will or by burning, tearing, cancelling and other clear methods of destruction. CAL. PROB. CODE § 74. An implied revocation occurs when wholly inconsistent provisions are found in a subsequent will. *Id.* § 72; It

execution of a will in California in accordance with an oral will contract without express reference to that oral agreement has been held to be insufficient to satisfy the writing requirement of the Statute of Frauds as to the contract.<sup>38</sup>

The will—contract dichotomy does not present a consistent means of property transfer because the right to devise property demands freedom of choice, including the power to revoke at any time.<sup>39</sup> However, where a particular will is bound by contract so that the testator promises not to revoke a will or to make a will in a certain manner, different competing interests come into play and the courts will not hesitate to enforce a remedy for a breach.<sup>40</sup>

### A. Early Development of Oral Agreement Decisions

Since the first Statute of Frauds was drafted and enacted in England,<sup>41</sup> the California judiciary drew heavily on English authority in developing its approach. In *Walpole v. Orford*,<sup>42</sup> the chancery court was presented with a situation where two parties executed mutual wills pursuant to an agreement; one party died, whereupon the surviving party changed his disposition. Lord Chancellor Loughborough recognized the right of parties to enter into agreements to devise property mutually pursuant to the authority of *Dufour v. Pereira*,<sup>43</sup> a case written by Lord Camden twenty-eight years earlier. *Dufour* held that an agreement to make mutual wills was binding and that since the survivor enjoyed the benefits of her husband's disposition she must dispose of her property similarly.<sup>44</sup>

Despite this earlier case, the court in *Walpole* found that even though the parties meant to impose the agreement on each other, there was no certainty that the parties wished it to amount to a legal obligation. The court found lacking the requisites necessary to enforce such agreement, namely: (1) certainty and definiteness

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may be partially revoked for surviving spouses or issue of a subsequent marriage. *Id.* §§ 70-71. See generally, Estate of Rolls, 193 Cal. 594, 226 P. 608 (1924).

38. *Shive v. Barrow*, 88 Cal. App. 2d 838, 848-49, 199 P.2d 693, 696 (1948) (party agreed to advance various sums of money "as needed" for the improvement of realty in consideration of receiving the property in fee upon the death of the life tenants).

39. J. BRITAIN, INHERITANCE AND THE INEQUALITY OF MATERIAL WEALTH 1-3 (1978); J. Ritchie, N. Alford, & R. Effland, DECEDENTS' ESTATES AND TRUSTS 2-4 (3d ed. 1967).

40. M. BIGELOW, LAW OF WILLS 110-12 (1898).

41. See note 18 *supra* and accompanying text.

42. 30 Eng. Rep. 1076 (Ch. 1797).

43. 21 Eng. Rep. 332 (Ch. 1769), cited in *Walpole v. Orford*, 30 Eng. Rep. 1076, 1083 (Ch. 1797).

44. *Id.*

of terms, (2) equality and fairness, and (3) proof in a manner required by law.<sup>45</sup> The English courts also touched on this issue in three other English cases: *Fortescue v. Hennah*,<sup>46</sup> *Logan v. Weinhold*,<sup>47</sup> and *Goilmere v. Battison*.<sup>48</sup> In *Fortescue*, a father had covenanted during his life to transfer his property to his eldest daughter and her first husband. The court held that his attempt to make a testamentary gift short of immediate absolute gifts during his lifetime was illegal because it would "furnish perpetual opportunity for subterfuge and scheme to defeat and disappoint these covenants, which ought to be most honourably observed."<sup>49</sup> In *Logan*, the testator defied his own promise to provide a disposition of property in consideration for the intended marriage of his niece, and the court specifically enforced the promise.<sup>50</sup> The *Goilmere* case contains an unclear opinion, but seems to decide that in 1682, a person had a right to enter into an agreement while living to dispose of property at death. In all of these cases, the courts found it uncomfortable to ignore the strong moral inequity in allowing persons to promise some act or omission during their lifetime and to promptly reverse that contractual seal with wholly contradictory testamentary dispositions.<sup>51</sup> The strength of our Anglo-Saxon legal heritage led California courts, and courts in many other states, to draw heavily from the holdings of the English cases such as *Walpole*, *Dufour*, *Fortescue*, *Logan*, and *Goilmere*.<sup>52</sup>

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45. 30 Eng. Rep. at 1085. The court almost seemed to wax from one extreme to another on the issue of whether or not the parties wished the agreement to be legally binding. The court first stated, "I must say, they meant to impose on each other a legal and binding obligation; that that was their intention, and they meant to do so." 30 Eng. Rep. at 1084. Yet later in the opinion the court says, "Here it is uncertain whether they meant it to amount to a legal obligation." *Id.* at 1085.

46. 34 Eng. Rep. 443 (Ch. 1812).

47. 5 Eng. Rep. 674 (Ch. 1833), *appealed*, 6 Eng. Rep. 1046 (1833).

48. 1 Vern. 48 (1682). This case was cited by *Walpole* and relied upon substantially, 30 Eng. Rep. at 1081 (Ch. 1797). In addition, the court in *Goilmere* found that the agreement, made by the wife for another party, was to be performed against the husband despite the fact he was a devisee of the will. The case is almost incomprehensible as to its rule, but establishes the right of a person to enter into an agreement while living to dispose of property at death.

49. 34 Eng. Rep. 443, 445 (Ch. 1812).

50. 5 Eng. Rep. 674 (Ch. 1833).

51. See note 48 *supra*.

52. See e.g., *Brinton v. VanCott*, 8 Utah 480, 483-85, 33 P. 218 (1893); *Parsell v. Stryker*, 41 N.Y. 480, 483, 487 (1869); *Johnson v. Hubbell*, 10 N.J. Eq. 332, 336-37 (1855); *VanDyne v. Vreeland*, 11 N.J. Eq. 370, 381 (1857); *Faxton v. Faxton*, 28 Mich. 159, 161 (1873). Counsel in *Goilmere* also argued these early cases vigorously in



## B. Oral Will Contracts and the California Supreme Court

1. *The court's first impressions, 1896-1934.* In the early case of *Owens v. McNally*,<sup>53</sup> a case where the decedent had agreed to leave his estate to a niece who came to care for him, the California Supreme Court defined the scope of the important right to enforce an oral promise to leave property to another in reward for particular services, provided there is a contract with the promises. The common law on the subject, derived initially from England<sup>54</sup> and through various eastern states, was adopted by the California courts and prevailed for the next century. The *Owens* court observed with curiosity the multitude of cases in other jurisdictions and noted that nearly fifty years of judicial history in California had not produced a single case on the subject; thus, the oral will contract question was being "presented to this court for the first time."<sup>55</sup> Nevertheless, the court had no trouble in following the common law cases<sup>56</sup> and stating its approval of the general rule that an oral contract to make a will can be specifically enforced.<sup>57</sup> The contract also withstood the defendant's claim that the agreement lacked certainty and was harsh and oppressive.<sup>58</sup>

To express its intuition that something was amiss, however, the court refused to enforce this oral agreement on public policy grounds, because the deceased had married and his wife had entered into the marriage contract ignorant of the oral will agreement, and because the wife had an expectation of surviving the spouse's right of intestate succession. The court further found that they would not enforce the contract even if it had been in writing.<sup>59</sup>

The *Owens* case predated the 1905 statutory amendment discussed earlier that ostensibly barred contracts from taking effect after death because of the lack of a writing.<sup>60</sup> If the existing oral agreements predated the 1905 amendments, they did not fall within the statute.<sup>61</sup> However, later cases soon began to comment

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their trail briefs. See e.g., *Gupton v. Gupton*, 47 Mo. 37, 37-41 (1870); *Kofka v. Rusicky*, 41 Neb. 328, 329, 59 N.W. 788 (1894).

53. 113 Cal. 444, 45 P. 710 (1896).

54. The court cited with approval the cases of *Dufour*, *Walpole*, *Fortescue*, *Logan*, and *Goilmere* as supporting the general rule that a "man may make a valid agreement binding himself to dispose of his property in a particular way by last will and testament, and a court of equity will enforce such an agreement specifically." *Id.* at 448.

55. 113 Cal. at 448, 45 P. at 711.

56. *Id.* at 447-48, 45 P. at 711.

57. *Id.* at 450, 45 P. at 712.

58. *Id.* at 451-52, 45 P. at 712. See note 32 *supra*.

59. *Id.* at 453-54, 45 P. at 713.

60. See text accompanying notes 28-29, *supra*.

61. *Wolfson v. Smyer*, 178 Cal. 775, 782, 175 P. 10, 12 (1918).

on the recently amended statute in an effort to shed light on the trend of opinion. In *Rogers v. Schlotterback*,<sup>62</sup> decided some eight years after *Owens*, the court noted the amendment but since the statute was enacted after the date of the contract, the court refused to apply it. It is probable that the persuasive force of the legislature's declaration of policy was not sufficiently controlling when compared to the clear and unequivocal rule of *Owens*.<sup>63</sup> Two years later in *Monsen v. Monsen*,<sup>64</sup> the court finally addressed the 1905 amendment, recognizing the manifest danger of fraud, injustice, and perjury in the enforcement of oral agreements.<sup>65</sup> However, even though the California courts were belatedly recognizing the rule mandated by the legislature, the pre-1905 cases involving oral agreements had already laid to rest the anxieties the courts had about oral will contracts that had prompted the legislature to amend the Statute of Frauds to require a writing in such cases.

The pre-1905 solution was quite simple. The law did not require a contract that takes effect after the death of a party to be in writing<sup>66</sup> so long as sufficient evidence was present to prove a definite, certain, clear, just, and equitable oral contract.<sup>67</sup> In practice, this probably required as stringent a test of evidence as that currently used by the California courts. According to Justice Sloss in *Monsen*:

Beyond all this, the evidence relied on, even if it could be regarded as tending to show [with] sufficient precision the making of any contract, fails utterly to support the precise contract alleged and found. . . . The only agreement alleged and found, and the one which the court undertakes to enforce, is one to give the plaintiff a child's share of the estate. . . .<sup>68</sup>

Examination of this class of cases indicates that there were sufficient safeguards to prevent most available kinds of fraud and dishonesty. The courts provided these safeguards: before an oral will contract could be enforced, the court (1) would be more strict in examining the nature and circumstances of such agreements,

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62. 167 Cal. 35, 138 P. 728 (1914).

63. *Id.* at 45, 138 P. at 732-33. See note 57 *supra* and accompanying text.

64. 174 Cal. 97, 162 P. 90 (1916).

65. *Id.* at 98, 162 P. 90.

66. See *Rogers v. Schlotterback*, 167 Cal. 35, 45, 138 P. 728 (1914); *Baumann v. Kusian*, 164 Cal. 582, 586, 129 P. 986, 987 (1913); *Bell v. Wyman*, 147 Cal. 514, 515, 82 P. 39, 41 (1905); *Estate of Healy*, 137 Cal. 474, 478, 70 P. 455, 456 (1902); *Russell v. Agar*, 121 Cal. 396, 398, 53 P. 926, 927 (1898).

67. *Monsen v. Monsen*, 174 Cal. 97, 98-99, 162 P. 90, 91 (1916).

68. 174 Cal. at 103-04, 162 P. at 92-93.

and (2) would require satisfactory evidence of the fairness and justness of the transaction.<sup>69</sup>

The first anomaly about the 1905 amendments to the Statute of Frauds is not that post-1905 oral will contracts must be in writing, but that so many numerous exceptions are applied to the statute as to negate any beneficial effect.<sup>70</sup> In addition, after 1905 a multitude of cases demonstrated that this statutory requirement was not effective. It can be argued, however, that pre-1905 decisions employed exceedingly effective legal tests to scrutinize the facts and evidence.<sup>71</sup> Almost forty years later the California Supreme Court issued an opinion that would influence nearly every subsequent decision to reach the courts of California in this area.

2. *The shift in direction: Notten v. Mensing, 1935-1950.* In *Notten v. Mensing*,<sup>72</sup> a childless couple made an oral agreement that bound each of them to leave all their property to the other on the condition that the survivor would leave it equally to the heirs of both. Upon his death the husband left his property entirely to his spouse as was spelled out in their agreement. The wife accepted this disposition. Ten years later, however, in breach of the agreement, she left all her property to her own chosen heirs. The will only entitled the husband's relatives to insignificant amounts.<sup>73</sup>

The court initially found that there had been in existence mutual and reciprocal wills that were practically identical, executed on the same day, witnessed by the same person, and made with the provisions for collateral heirs to have carbon-copy assets. The court also noted, however, that wills, being ambulatory in nature, may be revoked even if there was an agreement not to revoke.<sup>74</sup> In other words, the fact that the effect of the agreement was embodied in mutual wills, but not the oral contract itself, did not serve to make the arrangement irrevocable. The court found that the 1921 oral agreements of the parties regarding their testamentary dispositions fell squarely within the Statute of Frauds.<sup>75</sup> The

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69. *Wolfsen v. Smyer*, 178 Cal. 775, 783, 175 P. 10, 12 (1918).

70. See notes 139-64 *infra* and accompanying text.

71. *Stewart v. Smith*, 6 Cal. App. 152, 156, 91 P. 667, 670 (1907); *Schaadt v. Mutual Life Insurance Co.*, 2 Cal. App. 715, 717, 84 P. 249, 250 (1906); *Guradianship of Hayden*, 1 Cal. App. 75, 77, 81 P. 668, 669-70 (1905). CAL. CIV. CODE § 1624 (West 1973) was not the only code section to require a writing. Section 1973 of the California Code of Civil Procedure contained identical provisions, except that it also provided that "[e]vidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents." 1937 Cal. Stats. 694. The Law Revision Commission in 1965 found section 1973 to be irrelevant.

72. 3 Cal. 2d 469, 45 P. 2d 198 (1935).

73. *Id.* at 471-72, 45 P.2d at 199-200.

74. *Id.* at 473, 45 P.2d at 200; see note 37 *supra*.

75. *Id.* at 473-74, 45 P.2d at 200.

parties then addressed these issues.

The beneficiaries of the oral agreement staked their claim on the doctrine of quasi-specific performance.<sup>76</sup> This doctrine in effect circumvents the revocability of the wills dilemma. Under the doctrine, where there is an agreement not to revoke, and the agreement is fair and reasonable with consideration present, the court will equitably enforce a quasi-specific performance of the agreement. This is done by designating the parties who are to receive the estate as constructive trustees. The intended beneficiaries under the revoked mutual wills are protected in accordance with enforceable contractual terms.<sup>77</sup>

Initially the court noted that the remedy of quasi-specific performance requires for its utilization an enforceable agreement.<sup>78</sup> This led to recitation by the court of the usual general rules for such an agreement to be enforceable; it must be evidenced by a writing sufficient to satisfy the requirements of the Statute of Frauds;<sup>79</sup> mere execution of a will is not sufficient part performance to take the agreement out of the statute;<sup>80</sup> and mere execution of mutual wills where a surviving party obtains benefits under the other's will, fails to constitute part performance sufficient to take the agreement out of the statute.<sup>81</sup> But notwithstanding these clear rules, the court held that a court of equity would hold that the defendant's were estopped from pleading Statute of Frauds because of the constructive fraud worked on the decedent by the survivor who makes a mutual oral will contract with the decedent, takes the benefits of a will, and then revokes the mutual oral agreement.<sup>82</sup> The supreme court therefore held that the plaintiff had stated a cause of action and sent the case back for trial.<sup>83</sup>

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76. *Id.* at 473, 45 P.2d at 200. See generally 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, CONTRACTS § 254 (8th ed. 1973).

77. *Wolf v. Donahue*, 206 Cal. 213, 220, 273 P. 547, 550 (1921) (the court upheld specific performance of a contract to make a disposition of property by will in exchange for the care and services to an ill man for the remainder of his life).

78. 3 Cal. 2d at 473, 45 P. 2d at 200.

79. *Id.*

80. *Id.* at 473-74, 45 P.2d at 200.

81. *Id.*

82. *Id.*

83. Ultimately, the plaintiffs failed to make a case on two grounds. First, they failed to prove at trial the existence of even an oral agreement. *Notten v. Mensing*, 20 Cal. App. 2d 694, 697-98, 67 P. 734, 737-38 (1937). Second, even if an oral agreement had existed, the court concluded that it could not be specifically enforced by a court of equity because of inadequacy of consideration: the benefits received by

Courts attempting to solidify *Notten* varied over the next fifteen years.<sup>84</sup> The results in cases factually similar to *Notten* would hinge on other issues<sup>85</sup> such as the statute of limitations,<sup>86</sup> res judicata in the probate court,<sup>87</sup> jurisdiction,<sup>88</sup> or indefiniteness.<sup>89</sup> These issues tended to act as a screen to the real issue of constructive fraud, and they would frequently have to be countered by a plaintiff who wished to receive his rights under an oral agreement. The arguments by the plaintiffs would involve a presentation of the exceptions to the requirement of a writing.

3. *Modern decisional law—a focus toward the contracting parties, 1950-1980.* Beginning in the 1950's, however, the California Supreme Court described the *Notten* case as controlling in the celebrated case of *Monarco v. LoGreco*,<sup>90</sup> decided by Justice Traynor. *Notten* stressed the change of position and reliance aspects of the agreement.<sup>91</sup> In *Monarco*, the court lucidly set forth the doctrine that "in reality it is not the representation that the contract will be put in writing . . . but the promise that a contract will be performed that a party relies upon when he changes his position because of it."<sup>92</sup> The court then turned from what the

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the decedent were about one thousandth of the amount the plaintiffs were trying to obtain. *Id.* at 698, 67 P. at 738.

84. 3 Cal. 2d at 473. *See* Shive v. Barrow, 88 Cal. App. 2d 838, 848, 199 P.2d 693, 699 (1948); DeMattos v. McGovern, 25 Cal. App. 2d 429, 432, 77 P.2d 522, 523 (1938). *See generally*: Costigan, *Constructive Trusts Based on Promises Made to Secure Bequests, Devises or Intestate Succession*, 28 HARV. L. REV. 237 (1951); Note, *Contracts: Oral Agreement to Leave Property By Will*, 20 CALIF. L. REV. 654 (1931); Schnebly, *Contracts to Make Testamentary Dispositions as Affected by the Statute of Frauds*, 24 MICH. L. REV. 749 (1926).

85. 3 Cal. 2d at 474. *Baker v. Bouchard*, 122 Cal. App. 708, 710, 10 P.2d 468, 469 (1932); *Forbes v. Los Angeles*, 101 Cal. App. 781, 788-90, 282 P. 528, 531 (1929); *Zellner v. Wassman*, 184 Cal. 80, 85-87, 193 P. 84, 86-87 (1920).

86. *Luckwicki v. Guerin*, 57 Cal. 2d 127, 133-34, 367 P.2d 415, 419-20, 17 Cal. Rptr. 823, 827-28 (1961) (plaintiff was the daughter of decedent Guerin; the defendant was Guerin's wife who brought an action against the executor of Guerin's estate to establish a constructive trust upon one-half of the property in the estate based upon an oral contract in which they agreed to make reciprocal wills).

87. *Bennett v. Forrest*, 24 Cal. 2d 485, 494, 150 P.2d 416, 420-21 (1944) (Traynor, J., concurring) (plaintiff who was the sister of decedent, brought an action to establish a constructive trust on property to be distributed to a prior spouse who, upon dissolution of marriage, had entered into a settlement agreement).

88. *Alocco v. Fouche*, 190 Cal. App. 2d 244, 250-52, 11 Cal. Rptr. 818, 823 (1961) (a gift of real property from mother to daughter was obtained by daughter by undue influence and in violation of a contract contained in a joint and mutual will).

89. *Harris v. Larter*, 36 Cal. App. 2d 586, 594, 97 P.2d 1035, 1038 (1940) (husband promised to leave to his wife his interest in any property held jointly by them; the wife could use the property as necessary, and upon her death, she was to devise it equally between their respective relatives; the agreement was held too indefinite and uncertain to be enforced specifically).

90. 35 Cal. 2d 621, 627, 220 P.2d 737, 741-42 (1950).

91. 3 Cal. 2d 469, 477, 45 P.2d 198, 202 (1935).

92. 35 Cal. 2d 621, 626, 220 P.2d 737, 741 (1950).

person who promised to perform said and instead looked to who had accepted the benefits of an oral contract and his subsequent unjust enrichment.<sup>93</sup>

In *Monarco*, an oral proposal to a child was made by his parents that if he stayed home and worked they would keep their property and deed the majority of it to him. In performance of this agreement he remained at home and gave up all other opportunities.<sup>94</sup> In California, the court held that the purpose of estopping the defendant from asserting a lack of writing is to prevent unconscionable injury where one party has agreed to change position in reliance on an agreement or where unjust enrichment would result.<sup>95</sup> Justice Traynor then bemoaned the inadequacy of a legal remedy in the facts presented,<sup>96</sup> and also commented on the inappropriateness of the quasi-contractual remedy of reasonable value of services performed to satisfy the surviving contracting party.<sup>97</sup>

The *Monarco* decision thus makes the need for deciding on the proper cause of action of utmost importance<sup>98</sup> because a degree of unjust enrichment clearly is to be found in every case. Furthermore, the existence of a Statute of Frauds that governs dispositions to take effect at death seems to take on an ever decreasing importance. While its protective purpose of preventing fraud and abuse seems to be an obstacle of no immediate consequence, it has been seriously dealt with in California in oral situations since the 1920's.

## II. FORMATION OF WILL CONTRACTS IN CALIFORNIA

Meeting the prerequisites for a valid oral agreement is of paramount importance to the enforceability of an oral will contract and it is often underestimated. The courts have not completely forgotten the lessons of an era when there was no Statute of

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93. *Id.*

94. *Id.* at 622, 220 P.2d at 739.

95. *Id.* at 623-24, 220 P.2d at 739-40.

96. *Id.* at 626; 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 3 (8th ed. 1974).

97. 35 Cal. 2d at 626, 220 P.2d at 741. This, in essence, represented a slight change from the *Notten* enunciation of the rule. In *Notten*, the court said that had the contract been in writing then it might be susceptible to quasi-specific performance. 3 Cal. 2d at 473, 45 P.2d at 200. In *Monarco* the court did not cite *Notten* on this proposition, nor did it mention the requirement of a writing as a valid distinction.

98. See notes 199-203 *infra* and accompanying text.

Frauds to prevent fraud and perjury.<sup>99</sup> Many states found an impetus in the dangers of freely enforcing oral contracts for the establishment of a writing requirement for contracts to make testaments,<sup>100</sup> and also further protected against the threat of fraud by requiring clear proof of oral contracts.

California first evidenced this concern in *Rolls v. Allen*.<sup>101</sup> In *Rolls* an equitable action was commenced for specific performance to enforce provisions of joint and mutual wills, which a widow had ignored after inheriting the estate of her spouse. The court found that the mutual wills were not executed pursuant to a contract; therefore the widow had a right to distribute the property left by her spouse without complying with the mutual will.<sup>102</sup> The *Rolls* court developed a test requiring the parties attempting to prove an agreement to do so with "indisputable" evidence. The evidentiary tests for oral will contracts are the central stepping stones to proving agreements that have been characterized as "easy to fabricate and hard to disprove."<sup>103</sup>

#### A. Evidentiary Requirements in California

The plaintiff has the burden to prove any purported oral will contract.<sup>104</sup> The relative weight to be accorded the testimony and other circumstantial evidence is a matter of trial court determination.<sup>105</sup> Since *Rolls*, the court has formulated the new test as found in *Notten v. Mensing*.<sup>106</sup> That court emphasized the necessity of showing "clearly" a valid contract.<sup>107</sup> Stated in more modern terms, California requires 'clear and convincing evidence' of the oral contract.<sup>108</sup>

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99. See 1 PAGE, A TREATISE ON THE LAW OF WILLS § 10.10 (1941).

100. See e.g., ALASKA STAT., § 09.25.010(2) (1973); HAW. REV. STAT. § 656-1 (7) (Supp. 1978); ILL. ANN. STAT. ch. 59, § 9 (Smith-Hurd 1972); N.Y. EST., POWERS & TRUSTS LAW § 13-2.1(2) (McKinney 1967); TEX. BUS. & COM. CODE ANN tit. 3, § 26.01(1) (Vernon 1968).

101. 204 Cal. 604, 269 P. 450 (1928).

102. *Id.*, at 608-09, 269 P. at 452.

103. *Hunter v. Allen*, 174 Ore. 261, 147 P.2d 213 (1944), 1 PAGE, *supra* note 1, § 10.43 n.12.

104. *Sparks v. Lauritzen*, 248 Cal. App. 2d 269, 272, 56 Cal. Rptr. 370, 373 (1967) (action to impose a constructive trust upon all of the assets of an estate; an oral will agreement was made in return for a promise to make the decedent a member of the family; the agreement was found lacking in consideration).

105. *Brewer v. Simpson*, 53 Cal. 2d 567, 587-88, 2 Cal. Rptr. 609, 616, 349 P.2d 289, 296 (1960) (case involved an enforceable oral agreement regarding the making of mutual wills and the use and distribution of property upon the death of either; the survivor of the agreement breached after remarriage by leaving property in contravention to the agreement).

106. 3 Cal. 2d at 469, 45 P.2d 198 (1935) and text accompanying notes 72-83 *supra*.

107. *Id.* at 475, 45 P.2d at 201.

108. *Crail v. Blakely*, 8 Cal. 3d 744, 749, 505 P.2d 1027, 106 Cal. Rptr. 181 (1973)

The recent case of *Cameron v. Crocker Citizens National Bank*,<sup>109</sup> illustrates the substantive impact of the burden of proving an agreement by clear and convincing evidence. Many defendants assert that this burden is not capable of being met with sufficient clarity and conviction to establish anything even remotely similar to a contract. In *Cameron*, a long courtship and subsequent short marriage resulted in a divorce settlement agreement limiting alimony payments to \$1,000 per month for five years. Plaintiff returned from Europe and lived in California until her ex-husband's death, when she testified that her return to California was prompted by Cameron's oral promise that he would provide for her while alive and leave her a child's portion of his Los Angeles property. His will was never found and plaintiff asserted her services entitled her to the promised share of decedent's property.

The court found the strong showing of proof to be necessitated by "the manifest danger of fraud, perjury and injustice that may inhere in a recognition of the right to alter, by parol testimony, the course of the disposition of the property of a decedent."<sup>110</sup>

In *Cameron*, the deceased testator was told, "You know, Dad, you should make provisions for Cozy, Ernie and Jean."<sup>111</sup> The court expressed its skepticism as to the probative value of this conversation. The court dismissed as "far-fetched" the notion that such a statement indicated that the testator had executed a will to fulfill a contractual obligation, since the speaker was ignorant of the alleged oral agreement at the time the statement was made and could not have been reminding her father of any legal obligation.<sup>112</sup> The court finally upheld the trial courts determination that plaintiff had failed by clear and convincing evidence to prove the existence of an oral contract on the part of decedent to provide for her by will.<sup>113</sup>

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(complaint by children of deceased parents to enforce an oral agreement and mutually executed wills; the agreement was found enforceable because unjust enrichment would result if the Statute of Frauds was applied); *Notten v. Mensing*, 3 Cal. 2d 469, 477, 45 P.2d 198, 202 (1935).

109. 19 Cal. App. 3d 940, 97 Cal. Rptr. 269 (1971).

110. 19 Cal. App. 3d at 944, 97 Cal. Rptr. at 271, citing *Monsen v. Monsen*, 174 Cal. 97, 98, 162 P. 90 (1916).

111. *Cameron v. Crocker-Citizens Nat'l Bank*, 19 Cal. App. 3d 940, 945-97, 97 Cal. Rptr. 269, 272-73 (1971).

112. *Id.* at 945, n.7, 97 Cal. Rptr. at 272, n.7.

113. In *Cameron* the plaintiff was apparently aware that the deceased had said he would provide for her by will. *Id.* at 945-46, 97 Cal. Rptr. at 213.



The reason for this higher standard, as opposed to a fair preponderance of the evidence, is probably the serious consequences of finding an oral will agreement. Such an agreement may prevent the modification of a person's estate plan to current circumstances, such as remarriage, lapse, or change in size of the estate. A strict application of the evidentiary test has the effect of preventing undue burden by inappropriate dispositions, to which even the deceased spouse may have objected.<sup>114</sup>

In some cases, the line between a contract supported by clear and convincing evidence and a bare promise, is relatively certain.<sup>115</sup> If, however, the agreement is of sufficient substance to be at least a collateral agreement,<sup>116</sup> then a breach of contract still occurs when a party who makes a disposition of property by will later makes a different one from that agreed.<sup>117</sup> Other case law points out, that the time of the breach is when the testator fails at death to comply, as promisor, with his or her given promise to allocate in a certain manner.<sup>118</sup> At the death of the party who has breached, a cause of action for damages for quasi-specific performance is clearly available,<sup>119</sup> and the court will find a legal ob-

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114. *Lamberg v. Callahan*, 456 F.2d 1213, 1218 (1972) *citing* *Rolls v. Allen*, 204 Cal. 604, 269 P. 450 (1928).

115. *See Fallon v. American Trust Co.*, 176 Cal. App. 2d 381, 385, 1 Cal. Rptr. 386, 389 (1959). In *Fallon*, a well reasoned opinion of Justice Tobriner stated:

The policy of protection of an alleged obligor against parol claims, embodied in the Statute of Frauds, becomes particularly pertinent in the attempted enforcement of such a claim after the death of the alleged promisor. Here, to escape the ban of the statute the decisions require more than a bare promise; the easy concoction of a claimed oral agreement offers too likely a method to obtain property in violation of the decedent's intent.

176 Cal. App. 2d at 385, 1 Cal. Rptr. at 387, 389.

116. *Rolls v. Allen*, 204 Cal. 604, 269 P. 450 (1928); *Notten v. Mensing*, 20 Cal. App. 2d 694, 697 (1937).

117. *Goldstein v. Hoffman*, 213 Cal. App. 2d 803, 812, 29 Cal. Rptr. 334, 339-40 (1963) (breach of an agreement to make a disposition of property in a will; the agreement was enforced through summary judgment for specific performance; the court disposed of the property pursuant to the last will, but as *modified* by the agreement; respondent used a constructive trust theory and thereby negated any condition precedent; the constructive trust is required in order to present a claim in probate for a money judgement). *See also* notes 198 *infra* and accompanying text. *See also* *Brown v. Superior Court*, 34 Cal. 2d 559, 564, 212 P. 2d 878 (1949), *citing* *Osborn v. Hoyt*, 181 Cal. 336, 184 P. 854 (1919) and *Rogers v. Schlottback*, 167 Cal. 35, 48, 138 P. 728, 734 (1914) (intervivos conveyances can give an immediate cause of action to the promise before the death of the promisor).

118. *Luckwicki v. Guerin*, 57 Cal. 2d 127, 133-34, 367 P.2d 415, 419-20, 17 Cal. Rptr. 823, 827-28 (1961); *see* note 86 *supra* for facts of the case, *Brewer v. Simpson*, 53 Cal. 2d 567, 593, 349 P.2d 289, 304; 2 Cal. Rptr. 609, 624 (1960) *see* note 105 *supra* for facts of the case.

119. *Brown v. Superior Court*, 34 Cal. 2d 559, 563-64, 212 P.2d 878, 881 (1949) (breach of written contract to make mutual wills wherein it was alleged by plaintiff that the survivor ignored the beneficiaries of the decedent by transferring as-

ligation forbearing its revocation.<sup>120</sup> The courts find, absent an *express* agreement not to revoke, that a promised testamentary disposition necessarily includes an *implied* promise not to breach the oral contract by revoking the will and failing to dispose as agreed. The court implies this by superimposing an implied covenant of good faith and fair dealing on both promisors and promisees. Good faith can include an obligation on the survivor not to make unreasonable use of the property subject to agreement during his lifetime.<sup>121</sup>

It should be once again emphasized that there must be a preliminary finding of the agreement's existence by clear and convincing evidence. One case of importance that illustrates this

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sets to her new spouse without consideration and with intent to circumvent the beneficiaries).

120. *Thompson v. Boyd*, 217 Cal. App. 2d 365, 380, 32 Cal. Rptr. 513, 518 (1963). This case is an excellent example of the effects of a lack of such a contract. *Brewer v. Simpson*, 53 Cal. 2d 567, 593, 349 P.2d 289, 304, 2 Cal. Rptr. 609, 624 (1960) (lifetime obligation of beneficiary to maintain corpus through reasonable use). See *Stone*, *infra* note 219, at 230-40. *Brown v. Superior Court*, 34 Cal. 2d 559, 563-64, 212 P.2d 878, 881 (1949).

121. As stated in *Beard v. Melvin*, 60 Cal. App. 2d 421, 140 P.2d 720 (1943):

The question of when the statute of limitations begins to run in cases where services have been rendered to a decedent under an oral contract to compensate by will [citations omitted] has apparently been one causing considerable difference of opinion in the courts of this state. In most of these cases the services were rendered up to the time of the death of the promisor, and in such cases it has been held that the statute of limitations did not begin to run until the termination of the services, or, as it was sometimes stated, until the promise to compensate by will has failed of fulfillment. When the death of the promisor and the termination of the services coincided the effect was the same whichever was said to start the running of the statute. But in *Long v. Rumsey*, *supra*, the last services rendered by the plaintiff to decedent terminated some sixteen years before the latter's death, wherefore it became necessary to decide whether the termination of the services or the death of the decedent was to be the starting point. In its first opinion in the case (77 P.2d 1064), the Supreme Court adopted the opinion of the District Court of Appeal and held that the date of the death of the promisor governed.

It is the settled law of this state that when continuous personal services are performed under an express agreement for compensation upon termination thereof, which agreement is unenforceable because not in writing [citation omitted], the reasonable value of the services may be recovered and that the statute of limitations does not commence to run until the termination of the services, which, in such cases, is usually upon the death of the promisor. [citations omitted]

We conclude from the foregoing that if, under the allegations of plaintiff's complaint herein, any cause of action on an implied or quasi contract arose, the obligation of Alice Melvin, if any such resulted, commenced at the time when her obligation came into being, if it ever did. . . .

60 Cal. App. 2d at 428-29, 140 P.2d at 725.

point is *Harris v. Larter*,<sup>122</sup> where the husband conveyed to his wife his interest in the property held by them and she agreed to "take a good living out of it," and then upon her death to divide it in half between relatives of both spouses.<sup>123</sup> The court of appeal refused to grant specific performance after the wife did not comply, holding that the agreement was too uncertain to support enforcement. There was nothing to show which member of the respective families should share, nor what should be the exact proportionate share of each party. Simply stated, the contract was not sufficiently complete or definite to clearly disclose such an intention.<sup>124</sup> As in *Harris*, many courts would likewise fail to find any supportable evidence, unless the existence of a writing embodying part or all of the agreement was found.

### *B. Collateral Writings Between Parties*

In many cases, the party intent upon proving the existence of a valid and enforceable contract will look toward some outside indication of the contract. Postal letters have found their way into several cases and have been urged to be a sufficient writing to satisfy the Statute of Frauds. Recently, however, such letters have been found not to provide clear and convincing evidence of an agreement.<sup>125</sup>

In *Berdan v. Berdan*,<sup>126</sup> there was a contract between plaintiff's father and mother to leave property by will equally to their two sons, and the contract was evidenced by a letter stating that the father "has executed a will, leaving the property to [the wife]."<sup>127</sup> The court pointed out that despite this writing nowhere had the writer agreed to leave his property to his wife nor had he agreed not to revoke the will made in her behalf.<sup>128</sup> The hornbook rule pronounced by the court stated that even where a letter states that the writer had executed a will disposing of the property in a certain way, it did not express any agreement to do so, and was

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122. 36 Cal. App. 2d 587, 97 P.2d 1035 (1940).

123. *Id.* at 593, 97 P.2d at 1035.

124. *Id.* at 594, 97 P.2d at 1038. See CAL. CIV. CODE § 3390(5) (West 1970): "The following obligations cannot be specifically enforced: . . . An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable."

125. *Bee v. Smith*, 6 Cal. App. 3d 521, 86 Cal. Rptr. 115 (1970) (grandfather and wife had made reciprocal mutual wills, except both provided that on the survivor's death the grandfather's heirs would take; wife breached the oral agreement; however, the trial court found that a letter used to support the existence of a contract was insufficient evidence).

126. 39 Cal. App. 2d 478, 104 P.2d 622 (1940).

127. *Id.* at 485, 103 P.2d at 627.

128. *Id.*

insufficient as a contract.<sup>129</sup> The court will look to see if any written words are present to indicate reliance on a contract by the complying party.<sup>130</sup>

In another important "letter" decision, *Bee v. Smith*,<sup>131</sup> the grandfather and the wife had made mutual wills, each leaving all property to the other, and if the respective spouse did not survive, to the grandfather's heirs. Subsequently the grandfather wrote a letter to the wife referring to the agreement as of that time and telling her not to change it. He wrote on the letter that the wife had agreed but the court noted that neither her signature nor her initials could be found on the letter. The wife had stated she would abide by the agreement, but after the grandfather's death, she breached the agreement by leaving all of her estate to her brothers and sisters.<sup>132</sup> Centering on the issue of whether a binding contract to make a will existed, the court flatly found none since the facts necessary to uphold such an agreement could not be readily located in the record of the trial court.<sup>133</sup>

In contrast to postal letters, collateral writings recently have grown to include other written evidence signed by both husband and wife. A court found the execution of a written transmutation agreement, characterizing all the property as the community

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129. *Id.* See 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 29 at 5254 (8th ed. 1973). The *Berdan* case involved a letter stating the writer *had* executed a will disposing of property in a certain way, without expressing any *agreement* to do so, and therefore was insufficient to create a contract.

130. *Id.* This subject deals particularly with the Statute of Frauds; see notes 144 *infra* and accompanying text.

131. 6 Cal. App. 3d 521, 86 Cal. Rptr. 115 (1970).

132. *Id.* at 523-24, 86 Cal. Rptr. at 116-17.

133. The court stated:

Absence a reference to such an agreement in either will plus the failure of the 1948 letter to suggest any earlier agreement negate existence of the essential agreement when their separate wills were executed. Thus the provisions of the 1945 wills cannot be looked to for corroboration of the claimed agreement of 1948.

We must look to the letter as evidence of that essential agreement. That letter, as well as its statement that it was "OKd by Edna," admittedly is in the handwriting of Ulysses, but is nowhere signed or initialed by Edna. It is evidence of Ulysses' [*sic*] agreement, but can hardly be extended to show that Edna joined in or consented to the asserted agreement. [citations omitted] The only competent evidence of oral joinder in the agreement by Edna is the testimony of appellant as to a conversation following Ulysses' [*sic*] death. The question of credibility of this testimony was wholly for the trial court, and should not be determined by us. The trial court found that no such agreement was joined by Edna, and thus apparently determined appellant's testimony to be inaccurate in this respect.

*Id.* at 526, 86 Cal. Rptr. at 118.

property of the spouses, to be a strong factor negating the existence of any joint or mutual will contract. The court's reasoning is that execution of a community property agreement and its subsequent utilization is sufficient to negate an intention of the spouses to enter into an agreement that would establish a mutuality of testamentary purpose for the ultimate disposition of their property after the death of both spouses.<sup>134</sup> All these collateral writings serve to either weaken or strengthen the existence of a binding contract.

In summary, technicalities in the contractual requirements in this area are legion. A revocation of a will is an innocent act except when there has been some mutual promise and detrimental reliance. From a very early date it was evident a person could make a valid contract binding himself to dispose of property in a certain manner by testament, and a court of equity could enforce such an agreement.<sup>135</sup> It became similarly evident that clear evidence of the presence of a contract was necessary.<sup>136</sup> Gradually, the formation test became a game of factual hide and seek with the court looking to such diverse factors as whether a will was found, existence of relevant correspondence,<sup>137</sup> circumstances surrounding the making of the agreement,<sup>138</sup> and oral testimony of a witness to circumstantial evidence denoting a contract.<sup>139</sup> In a recent case the California Supreme Court went so far as to enforce an oral will contract on the basis of testimony given by a domestic employee who testified that she had witnessed the wills, and heard the promisor speak of a contract to protect the children.<sup>140</sup>

California courts are quick to point to the number and frequency of decisions involving oral will contracts, and catalogue the sometimes sordid motives of the person creating the oral will contract. For example, possible illicit business motives may play a role in the decision,<sup>141</sup> as may the promisor's desire for personal

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134. *In Re Estate of Richardson*, 11 Wash. App. 758, 525 P.2d 816, 818 (1974), *petition for review denied in orders*, 84 Wash. 2d 1013 (1974) (the question was whether or not a 1970 or 1973 document should be admitted to probate as decedent's last will; the appellate court held that the ambiguities on the face of the 1970 document, identified as a joint will, prohibited a clear decision on whether the parties had entered into a contract as a matter of law.

135. *Estate of Rolls*, 193 Cal. 594, 599, 226 P. 608, 609-10 (1924).

136. *See* note 108 *supra* and accompanying text. *Blanc v. Connor*, 167 Cal. 719, 723, 141 P. 217-18 (1914).

137. *See* notes 126-35 *supra* and accompanying text.

138. *See generally* *Bell v. Wyman*, 147 Cal. 514, 515, 82 P. 39, 39 (1905).

139. *Crail v. Blakely*, 8 Cal. 3d 744, 748-49, 505 P.2d 1027, 1033, 106 Cal. Rptr. 187, 190-91 (1973).

140. *Id.*

141. *Redke v. Silvertrust*, 6 Cal. 3d 94, 490 P.2d 805, 98 Cal. Rptr. 293 (1971).

or financial gain following the death of the other spouse.<sup>142</sup> Despite the motive, many cases have not turned on the sufficiency of the evidence of a contract, but rather on the requirements of the Statute of Frauds, and more importantly the exceptions thereto.<sup>143</sup> What was clear and convincing evidence of a Contract to make a Will in 1935, may not have to be so clear and convincing in 1980 given recent developments in the court supported by exceptions to the Statute of Frauds.

### III. EXCEPTIONS TO ENFORCEMENT OF THE STATUTE OF FRAUDS

Since 1905, an agreement to devise or bequeath any property, or to make any provision for any person by will, must be in writing.<sup>144</sup> The Statute of Frauds requires evidence more reliable than parol testimony, and absent a writing or sufficient memorandum the agreement will not be enforced.<sup>145</sup> As discussed earlier,<sup>146</sup> the Statute in California was enacted to prevent fraud and was not intended to shield, protect or aid a party to commit fraud.

Classically, if a joint or mutual will is destroyed or revoked by a party who has orally agreed not to do so, a cause of action for quasi-specific performance of the oral agreement and for the imposition of a constructive trust would be barred by the Statute of Frauds. An oral agreement which does not comply with the Statute of Frauds is unenforceable. A party to such an agreement may assert the Statute as an absolute defense to enforcement.<sup>147</sup>

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142. 8 Cal. 3d at 750, n.2, 505 P.2d at 1030 n.2, 106 Cal. Rptr. at 191 n.2. See also 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 254 (Supp. 1979).

143. *Id.*

144. See notes 28-31 *supra* and accompanying text. CAL. CIV. CODE § 1624 (6) (West 1973). *Bonnear v. Bank of America*, 84 Cal. App. 2d 107, 109, 190 P.2d 307, 309 (1948); *Murdock v. Swanson*, 85 Cal. App. 2d 380, 383, 193 P.2d 81, 83 (1948); Note, *Separation Agreements to Make Mutual Wills for the Benefit of Third Parties* 18 HASTINGS L.J. 423, 427 (1967). Cf. CAL. COM. CODE § 2201 (West 1973) (similar provision for the sale of goods).

145. *Riley v. Bear Creak Planning Comm.*, 17 Cal. 3d 500, 509, 551 P.2d 1213, 1220, 131 Cal. Rptr. 381, 387-88 (1976).

146. See text accompanying notes 12-22 *supra*.

147. 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 199 (8th ed. 1973). See B. SPARKS, *CONTRACTS TO MAKE WILLS* at 40 (1956):

At an early date it was decided that a contract not to be performed within a year was within the meaning of the Statute of Frauds since it was possible that it might be performed within that time. Although there has been an occasional dissent from this position it is the almost universal opinion and it is in accord with the construction placed upon that provision of the Statute in other types of contracts.

*Id.* (Footnotes omitted.)

Plaintiffs, however, may turn toward several important tools to negate the statute's effectiveness.

### *A. Equitable Estoppel in the Oral Will Contract Setting*

The word "estoppel" means simply that someone is prevented from making a claim or assertion. For example, estoppel might arise if Y makes a statement or performs an act, and the act or statement was intended to induce and did induce X to change position.<sup>148</sup> This doctrine has been codified in California as Evidence Code Section 623.<sup>149</sup>

Estoppel operates by depriving the party against whom it is in-

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148. The basis of estoppel was founded in the RESTATEMENT OF CONTRACTS § 90 (1932):

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Section 90 did not mention the Statute of Frauds directly in its text, but in the RESTATEMENT OF CONTRACTS § 178, comment f. (1932), it specifically does so as follows:

Though there has been no satisfaction of the Statute, an estoppel may preclude objection on that ground in the same way that objection to the non-existence of other facts essential for the establishment of a right or defense may be precluded. A misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representation precludes proof by the party who made the representation that it was false; and a promise to make a memorandum, if similarly relied upon, may give rise to an effective promissory estoppel, if the statute would otherwise operate to defraud.

RESTATEMENT (SECOND) OF CONTRACTS 217A (Tent. Draft Nos. 1-7-1973). 217A specifically codified situations in which reliance on oral contracts was involved:

- (1) A promise which the promisor reasonably expects to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
- (2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:
  - (a) The availability and adequacy of other remedies, particularly cancellation and restitution.
  - (b) The definite and substantial character of the action or forbearance in relation to the remedy sought.
  - (c) The extent to which the action or forbearance corroborates evidence of the making and terms are otherwise established by clear and convincing evidence.
  - (d) The reasonableness of the action or forbearance.
  - (e) The extent to which the action or forbearance was foreseeable by the promisor.

Applying this to the California position on oral will contracts it becomes clearly evident that the courts have emphasized, without reference, some portions of § 217A, particularly § 217 2(b) and 2(e). See e.g., *Crail v. Blakely*, 8 Cal. 3d 744, 749, 505 P.2d 1027, 1031, 106 Cal. Rptr. 187, 191 (1973); *Stahmer v. Schley*, 96 Cal. App. 3d 200, 202, 157 Cal. Rptr. 756, 757 (1979).

149. CAL. EVID. CODE § 623 (West 1966) provides:

"Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act

voked of opportunity to prove the truth of a fact or to assert a substantial right.<sup>150</sup> Since this operates contrary to the fact-finding functions of a court of law, the use of estoppel *in law* is disfavored.<sup>151</sup> The legal estoppel doctrine is founded upon a judicial policy of encouraging finality and conclusiveness in recorded transactions.<sup>152</sup> Most estoppel defenses, therefore, arise in equity, rather than in law.<sup>153</sup> In an equitable sense, the doctrine is not directly limited to a specific factual situation, nor is it structured by exceptions, rules and regulations, rather it is founded upon a balancing process.

An illustration of estoppel in the oral will contract context can be quickly posed for review. *X* and *Y*, who are husband and wife, enter into an *oral* agreement that each will execute a reciprocal will that leaves all property to *B*. The wills in question refer to an oral agreement between *X* and *Y* concerning the above dispositions of their property. *X* dies first and her will is probated. The relationship between *X* and *B* deteriorates after the death of *X*. *Y* then marries *Z* and subsequently changes his will leaving all of the property to his selected beneficiaries, *P*, *Q*, and *S*. *Y* then dies and his will is probated. *B* files an action requesting that the court determine that *B* is the beneficiary under *Y*'s will, asserting that an oral agreement to make joint wills with himself as beneficiary should be controlling. *B* is asking the court to impose a con-

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upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."

150. See D. DOBBS, LAW OF REMEDIES 41-42 (1973).

151. S. FORD, THE AMERICAN LEGAL SYSTEM 34-35 (1974). This is a balancing approach that does not lend itself well to the law court. The principle that a wrongdoer should not be able to take refuge behind the shield of his own wrong is a truism. The United States Supreme Court has espoused the doctrine in these terms: "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts. . . ." *Glus v. Brooklyn Terminal*, 359 U.S. 231, 232-33 (1959).

The promise by the obligor to leave property in a certain manner upon his death is a binding promise upon consideration being rendered, being supported by the co-extensive legal performance or forbearance by the obligee. If the contract is oral, this consideration rendered in reliance on the promise constitutes a primary reason for enforcement. The fact that obligor is said to be estopped to plead the Statute of Frauds is a more formal way of saying that the promise will now be enforced, even though it may not have been enforceable when made.

152. D. DOBBS, LAW OF REMEDIES 42 (1973).

153. *Moss v. Bluemm*, 229 Cal. App. 2d 70, 72-73, 40 Cal. Rptr. 50, 52 (1964). See also, e.g., *City of Culver City v. State Board of Equalization*, 29 Cal. App. 3d 404, 411, 105 Cal. Rptr. 602, 606 (the defense of estoppel is applicable against governmental entities in California.)



constructive trust on *P*, *Q*, and *S*, with himself as the beneficiary. A constructive trust may be judicially imposed if a court determines that a person will be unjustly enriched if he or she receives certain property. To remedy this unjust enrichment, the court will say, in effect, that the unjustly enriched person does not really have full ownership of the property but is really holding it in trust for the true owner and must give it to the true owner.<sup>154</sup>

By bringing the action in equity, *B* has circumvented a defense of *P*, *Q*, and *S* that *B* did not make a claim in the administration of the estate of *Y*.<sup>155</sup> However, assuming that this action is one to impose a constructive trust, there is possibly a requirement that a claim must be filed in the administrative proceeding.<sup>156</sup>

*P*, *Q*, and *S* would argue that the agreement is invalid because it falls under the Statute of Frauds and, as such, must be in writing and signed by the party to be charged.<sup>157</sup> Since the oral agreement not to change the reciprocal wills was not evidenced by a writing,<sup>158</sup> a cause of action for quasi-specific performance of the alleged oral agreement and to impose a constructive trust should be barred by the Statute of Frauds.<sup>159</sup>

*B* would argue that the Statute of Frauds was enacted to prevent fraud and not to shield *Y*. The estoppel argument would be asserted by *B* to counter *P*, *Q* and *S*'s Statute of Frauds defense. A survey of the California cases shows the burden would be

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154. The constructive trust may be characterized as a passive trust in that the only duty is to convey the property. In California, constructive trusts are covered by two general code sections. CAL. CIV. CODE § 2224 (West 1954) states: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." See also CAL. CIV. CODE § 2223 (West 1954).

155. *Alderson v. Houston*, 154 Cal. 1, 96 P. 88 (1908); *McManis v. Bendlage*, 82 Cal. App. 2d 916, 187 P.2d 854 (2nd Dis. 1947); CAL. CIV. PROC. CODE § 430.10-432 (West Supp. 1980).

156. *Morrison v. Land*, 169 Cal. 580, 147 P. 259 (1915). See CAL. PROB. CODE § 707 (West Supp. 1979), discussing the requirement to bring a legal claim in the Probate court. The claims must be filed within four months after the first publication of the notice. CAL. PROB. CODE § 700-19 (West Supp. 1979). See *Palmer v. Phillips*, 123 Cal. App. 2d 291, 299, 266 P.2d 850, 853 (1954) (complaint insufficient to state a cause of action for quantum meruit since no claim filed). It is interesting to speculate whether *B* acquires his cause of action at the death of *X*, or whether the filing of a complaint would be premature during the life of *Y*, see notes 208-210, 212 *infra* and accompanying text.

157. *P*, *Q*, and *S* would further argue that the wills themselves are not sufficient writing to make such an agreement enforceable unless it specifically refers to the agreement in its contents. *Zellner v. Wasserman*, 184 Cal. 80, 85-86, 193 P. 84, 86-87 (1920).

158. *Riley v. Bear Creek Planning Comm.*, 17 Cal. 3d 500, 509, 551 P.2d 1213, 1220, 131 Cal. Rptr. 381, 387-88 (1976).

159. *Estate of Crawford*, 69 Cal. App. 2d 607, 608, 160 P.2d 64, 65 (1945) (oral agreement held unenforceable because it was not in writing).

placed on *B* to prove the estoppel.<sup>160</sup> California courts applying the estoppel doctrine would find estoppel against *Y* where *X* had died having relied to her detriment on *Y*'s promise to make a reciprocal will leaving all property to *B*.<sup>161</sup>

A recent example is the case of *Redke v. Silvertrust*.<sup>162</sup> In *Redke*, *X* predeceased *Y*. In reliance upon *Y*'s oral promise to provide for *X*'s child, *X* refrained from changing her will. The court stated that "*X* changed her position by maintaining the status quo despite her concern over her daughter's welfare"<sup>163</sup> and held, in accordance with prior case law,<sup>164</sup> that *Y* was estopped from asserting the Statute of Frauds as a defense.<sup>165</sup>

### *B. Part Performance in Oral Will Contract Situations*

Another equally important exception to the assertion of the Statute of Frauds is the doctrine of part performance.<sup>166</sup> An oral agreement that is otherwise unenforceable may become binding when there has been part performance. There are several re-

160. *Id.*

161. *Notten v. Mensing*, 3 Cal. 2d 469, 473-74, 45 P.2d 198, 200 (1935).

162. 6 Cal. 3d 94, 490 P.2d 805, 98 Cal. Rptr. 293 (1971), *cert. denied* 405 U.S. 1041 (1972).

163. 6 Cal. 3d at 101, 490 P.2d at 809, 98 Cal. Rptr. 297.

164. *Day v. Greene*, 59 Cal. 2d 404, 409, 380 P.2d 385, 388, 29 Cal. Rptr. 785, 788-89 (1963); *Brewer v. Simpson*, 53 Cal. 2d 567, 588, 349 P.2d 289, 302, 2 Cal. Rptr. 609, 616 (1960); *Monarco v. LoGreco*, 35 Cal. 2d 621, 674, 110 P.2d 737, 739-40 (1950). In *Day* the husband intentionally changed his position by abstaining from making a testamentary gift to his daughter and instead left his entire estate to a second wife in reliance on the wife's oral promise to care for his daughter in the wife's own will. *Day* held that the enforcement of the oral promise was not barred by the Statute of Frauds, the court stating:

We are of the view that the trial court correctly determined that the statute of frauds did not render the agreement unenforceable. Although the statute requires that an agreement to make a provision by will be in writing (Civ. Code Sec. 1624, subd. 6; Code Civ. Proc., Sec. 1973, subd. 6), a party will be estopped from relying on the statute where fraud would result from refusal to enforce an oral contract . . . The doctrine of estoppel has been applied where an unconscionable injury would result from denying enforcement after one party has been induced to make a serious change of position in reliance on the contract or where unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to invoke the statute . . . As we have seen, both these grounds of estoppel were found to be present here.

59 Cal. 2d at 409, 380 P.2d at 388-89, 29 Cal. Rptr. at 788-89.

165. 6 Cal. 3d at 101.

166. See note 12 *supra*. For an excellent historical treatment of the part performance doctrine see Kepner, *Part Performance in Relation to Parol Lands*, 35 MINN. L. REV. 1 (1950).

quirements for the use of part performance.<sup>167</sup> The performance must flow from the party seeking to enforce the agreement. Usually an act will not be considered as part performance unless to refuse relief against the party breaching the contract would work a fraud upon the promisee.<sup>168</sup> For example, the mere making of a will by a promisor under an oral agreement is not part performance of that agreement sufficient to invoke the part performance doctrine.<sup>169</sup> On the other hand, the rendition of services by a promisee pursuant to an oral agreement may be sufficient part performance to remove the agreement from the Statute of Frauds when the pecuniary value of the services is hard to evaluate.<sup>170</sup>

### C. *Written Memorandum of Agreement*

The third major exception to the Statute of Frauds is the existence of written memoranda that brings the oral agreement out of the purview of the statute. This has been previously discussed with respect to the adequacy of collateral writings such as letters

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167. See generally Moreland, *Statute of Frauds and Part Performance*, 178 U. PA. L. REV. 51 (1929).

168. 35 CAL. JUR. 3d Statute of Frauds § 92, at 121-22 (1977). The Section on part performance states:

Oral agreements were originally unenforceable as a result of part performance. The doctrine of part performance is based entirely on equitable considerations, and hence there is no right to a jury trial. The primary ground is that it would be a virtual fraud for the defendant, after permitting part performance, to interpose the statute of frauds as a bar to the plaintiff's remedy. Therefore, courts of equity in specifically enforcing agreements where there has been part performance do not dispense with the statute, but act within its true spirit and policy. However, part performance, to take an oral agreement out of the statute of frauds, must be performance by the party seeking to enforce the agreement, performance by the other party not having any such effect. And nothing will be considered a part performance that does not put the purchaser or donee in a situation where to refuse relief would operate as a fraud on him. Moreover, the facts in such cases must be so clear that there can be little or no question of their effect or that they plainly and clearly call for the favorable interposition of equity. However, if the trial court determines that specific performance is allowable, an appellate court should not interfere unless it clearly appears that the decision is inequitable and unjust.

*Id.* (footnotes omitted).

169. *Shive v. Barrow*, 88 Cal. App. 2d 838, 848, 199 P.2d 693, 699-700 (1948) (party agreed to advance various sums of money "as needed" for the improvement of realty in consideration of receiving the property in fee upon the death of the life tenants); *DeMattos v. McGovern*, 25 Cal. App. 2d 429, 432, 77 P.2d 522, 523 (1938) (complaint in specific performance of oral agreement wherein deceased promised to bequeath property to plaintiff by will in compensation for services rendered in an employer-employee relationship held unenforceable as within the statute of frauds).

170. *Walker v. Calloway*, 99 Cal. App. 2d 675, 678-80, 222 P.2d 455, 457-58 (1950) (husband who had terminal cancer contacted his divorced wife and offered and agreed that if plaintiff would leave her home and come to Los Angeles he would leave his entire estate to her by will enforceable through the doctrines of fraudulent inducement and justifiable reliance).

and separate related agreements,<sup>171</sup> and is aptly illustrated by decisions such as *Fallon v. American Trust Company*,<sup>172</sup> *Berdan v. Berdan*,<sup>173</sup> and *Bee v. Smith*.<sup>174</sup> The underlying rationale in these cases is that a note or memorandum will satisfy the Statute of Frauds where there is no serious probability of perpetrating a fraud, even where the note or memorandum is informal or does not contain all the terms to the agreement. Courts routinely find that an adequate memorandum does exist, if there is sufficient clarity of the essential terms of the agreement.<sup>175</sup>

#### D. Decisional Expansion of Exceptions to the Statute

The original policy that allowed the enforcement of oral will contracts was abrogated specifically by the legislature in 1905.<sup>176</sup> In spite of this, the validity of oral will contracts has been upheld by the courts because of the judicially created exceptions of part performance, written memorandum, or estoppel<sup>177</sup> have been invoked, effectively preventing the application of the Statute of Frauds. On occasion the courts have found an agreement too indefinite to enforce;<sup>178</sup> but more frequently courts have treated the oral agreement as a valid and enforceable contract.<sup>179</sup>

In the last eighty years the decisions determining the enforceability of oral will contracts have tended to expand the exceptions to the Statute of Frauds drastically narrowing the number of oral will contracts that come within the statute, and in some cases, opening the door to the types of inequities the Statute of Frauds was enacted to prevent. In short, the exceptions may have swal-

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171. See text accompanying notes 126-135 *supra*.

172. *Fallon v. American Trust Company*, 176 Cal. App. 2d 381, 385, 1 Cal. Rptr. 386, 389 (1959).

173. *Berdan v. Berdan*, 39 Cal. App. 2d 478, 103, P.2d 622 (1940).

174. *Bee v. Smith*, 6 Cal. App. 3d 521, 86 Cal. Rptr. 115 (1970). See notes 115, 117, 125-27 *supra* and accompanying text.

175. See generally 2 A. CORBIN, *CONTRACTS, Statute Of Frauds* § 275 at 470-83, 498-506 (1950). If there is no writing, courts appear to require a stronger showing of certainty. See text accompanying notes 105-16 *supra*.

176. See notes 24-27 *supra* and accompanying text.

177. See notes 12-13, 84, 167 *supra* and 183-84 *infra* and accompanying text.

178. See *supra* section II, Formation of Will Contracts In California.

179. See note 183 *infra* and accompanying text. But see *Kessler v. Lauretz*, 39 Cal. App. 3d 441, 114 Cal. Rptr. 42 (1974) (alleged oral promise to bequeath not enforceable since the underlying right to reliance was not present and the alleged agreement was in contradiction to plaintiff's approval of a marital property settlement agreement).

lowed the rule.<sup>180</sup> Admittedly, the statute permits persons who have made an oral will contract to breach their promise, thereby working a potentially grave inequity upon the intended beneficiaries of the will. But the legislature has determined that this type of inequity is either less distasteful or more easily avoided than the injustice that occurs when the intended beneficiaries of an estate are deprived of their inheritance by false claims of an oral agreement.<sup>181</sup>

The courts seem to regard the Statute of Frauds as a mere technical requirement rather than a measure that reflects the legislature's view of the substantive merits of the controversy,<sup>182</sup> and have given in to the temptation to expand the statute's exceptions in oral will contract cases, to the point of total emersion.<sup>183</sup> Clearly such expansion may have caused widespread uncertainty; and considering the specificity of the statute,<sup>184</sup> it is curious that the courts were permitted to rely on such exceptions, particularly when such exceptions had the effect of making social policy that

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180. An increasing number of cases have demonstrated a judicial propensity to invoke the doctrines of part performance, fraud, equitable estoppel, detrimental reliance, constructive trust or quasi-contracts to defeat the operation of the Statute of Frauds. These areas tend to overlap and facts that will assist in one doctrine frequently do so for another. The trend recently has grown with the codification of yet another exception to the statute into the RESTATEMENT (SECOND) OF CONTRACTS, § 217A (Tent. Drafts No. 1-7, 1973). See Steinberg, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORDHAM L. REV. 114, n. 53 (1975).

181. See text accompanying notes 28-40 *supra*.

Reports of legislative hearings on this amendment are not available, but it is important to say that originally problems with the jury system, a lack of consistent and unified rules of evidence, i.e. the disqualification of plaintiff's testimony under the Dead Man's Statute, all served to prompt enactment of the subsection that is discussed in this article. Cf. Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U. PA. L. REV. 440, 441 (1931); The writing requirement in California probably impresses upon the parties the importance of the act they are about to enter into with each other. It also makes the court emphasize a danger of perjury concerning such contracts. Cf. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-03 (1941).

182. 2 A. CORBIN, CONTRACTS, *Statute of Frauds*, § 275.

183. Comment, *Estoppel and the Statute of Frauds*, 26 KAN. L. REV. 327, 334 (1978). See e.g., *Crail v. Blakely*, 8 Cal. 3d 744, 505 P.2d 1027, 106 Cal. Rptr. 187 (1973) (estoppel—party committed suicide in reliance on the oral agreement); *Potter v. Bland*, 136 Cal. App. 2d 125, 129-30, 288 P.2d 569, 572 (1955) (written memorandum); *Redke v. Silvertrust*, 6 Cal. 3d 94, 101, 490 P.2d 805, 808-09, 98 Cal. Rptr. 293, 296-97 (1971), cert. denied 405 U.S. 1041 (1972) (estoppel). See note 181 *supra*.

184. CAL. CIV. CODE § 1624(6) (West 1973). See also Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 42-43, n.29 (1974); Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L. J. 427 (1928); Note, *Exception is the Rule*, 37 MOD. L. REV. 695 (1974) (in English cases a memorandum is sufficient to constitute a valid contract); Comment, *Operation of the Doctrine of Part Performance in Particular to Actions for Damages*, 8 U. QUEEN L. REV. 79 (1973); Comment, *Doctrine of Estoppel Gains a Foothold Against the Statute of Frauds*, 1 CAP. L. REV. 205 (1972).

determined the distribution of substantial wealth.<sup>185</sup>

Oral will contracts have been held enforceable in the face of the Statute of Frauds in the area of pre-trial procedural appeals. One example is the 1979 case of *Stahmer v. Schley*.<sup>186</sup> In that decision, a wife died subsequent to entering an oral agreement with her husband to make a joint will disposing of their respective estates. Under the joint will, the property of the predeceased spouse would go to the survivor. Upon the survivor's death all of the estate would then go to named beneficiaries. Instead of probating the joint will, the husband kept his wife's property, and then executed a new will.<sup>187</sup>

On the husband's death, the new will was offered for probate. The beneficiaries under the joint will brought a complaint for quasi-specific performance of the agreement to leave property by will and for a constructive trust. Defendant's demurrer was sustained on the grounds that there was no *written* agreement not to revoke the joint will by the survivor. The appellate court reversed the trial court judgment and found the factual allegations of the complaint to state a cause of action for quasi-specific performance and constructive trust under a derivative fraud theory. The court stated that "[c]oncededly, the legal structure of quasi-specific performance based on derivative estoppel to prevent unjust enrichment is a somewhat rickety bridge with which to span the Statute of Frauds. . . ."<sup>188</sup>

The derivative fraud theory is based upon the actual, constructive, implied or extrinsic fraud inherent when one party relies on a promise to his or her detriment, only to have the promisor breach the agreement.<sup>189</sup> Upon proof of a transfer or will made in reliance upon an oral agreement to hold in trust and upon proof of the subsequent repudiation of the agreement, it can success-

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185. *Flast v. Cohen*, 392 U.S. 83, 111 (1968) (Douglas, J., concurring) (on the danger of the courts legislature becoming a super legislative group that overrules the decisions of the democratically elected branches).

186. 96 Cal. App. 3d 200, 202, 157 Cal. Rptr. 756 (1979).

187. *Id.* at 203, 96 Cal. Rptr. at 757-58.

188. *Id.* at 204, 96 Cal. Rptr. at 758.

189. The doctrine is entwined along with theories of constructive trust within the meaning of Civil Code Section 2224 enacted in 1872:

One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

CAL. CIV. CODE § 2224 (West 1954).

fully be inferred that the maker of the promise had an intention not to perform at the time the original promise was made, which can be argued to the trier of fact in the form of actual fraud.<sup>190</sup> Fraud has already been used in oral will contract cases.<sup>191</sup>

#### IV. CHARACTERIZATION OF A PROTECTABLE INTEREST

The vagueness and lack of legislative guidelines surrounding cases involving oral will contracts serves to further complicate the present position of the law. Many gray spots surround this area. If mutual wills are present, can promisors violate an oral agreement while they are both living? Is there adequate consideration to enforce an oral will contract before the death of one of the parties? If so, what remedies would be available?

A promisor may breach an alleged oral will contract by an inter vivos transfer of property after the death of the other party, but before his own death. In California these gifts are characterized as testamentary. "[I]n order to protect the agreement or obligation, . . . courts of equity will treat this gift in the same manner as if it were purely testamentary, and were included in the will. . . ."<sup>192</sup> Exactly where the line is to be drawn is unclear.

##### *A. Judicial Remedies After Breach of an Oral Will Contract*

In *Estate of Cooper*,<sup>193</sup> *M* and *B* each signed joint wills and gave "to the survivor [of *M* and *B*] all and any real and personal property [each] owned . . . for his or her own use and benefit forever."<sup>194</sup> The survivor was to leave the property to designated nephews, and a clause in the will was provided naming these beneficiaries who would then take on the death of the spouse surviving.<sup>195</sup> There was no breach of contract in the case, but there were substantial inheritance tax issues presented. After both spouses died and inheritance tax reports were filed, a probate hearing was held and the survivor was found to have a life interest in the assets of the estate subject to a reasonable use by her. The controller determined the tax on the estate of *M* by taxing a life interest of *B*, and the remainder to the named devisees. The

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190. *Jarkieh v. Badagiacco*, 75 Cal. App. 2d 505, 170 P.2d 994 (1946).

191. See e.g., *Kessler v. Lauret*, 39 Cal. App. 3d 441, 446, 114 Cal. Rptr. 42, 44 (1974); (the court sometimes will imply the perpetration of a "constructive" fraud under the facts of the case). See e.g., *Stahmen v. Schley*, 96 Cal. App. 3d 200, 203-04, 157 Cal. Rptr. 756, 758 (1979).

192. *Rogers v. Schlotterback*, 167 Cal. 35, 49, 138 P. 728, 734 (1914), citing *Johnson v. Hubbell*, 10 N.J. Eq. 332, 66 Am. Dec. 773 (1885).

193. 274 Cal. App. 2d 70, 78 Cal. Rptr. 740 (1969).

194. *Id.* at 78, 78 Cal. Rptr. at 744.

195. *Id.* at 79, 78 Cal. Rptr. at 745.

court characterized the interest as a power of use and consumption. The *Cooper* court felt perfectly content with its holding since the instrument provided a limitation over to a third party; the life estate was created in the devisee wife, even though it was not expressly declared as such.<sup>196</sup>

In *Cooper*, the court discussed the several remedies available to the ultimate beneficiaries. If the spouse had attempted during her life either to transfer the property or to execute a new will, she would have been in violation of the provisions of the agreement. Assuming a joint or mutual will is executed during the lives of the couple, the original contract rights vest on the mutual promise of the contracting parties, carried forth by the execution of a mutual will, and the vested contract rights apparently are protected against revocation, except by mutual consent.<sup>197</sup> This is inconsistent with the rule of law that allows the free revocation of a will before death,<sup>198</sup> recognizing no vested rights in the beneficiaries until death.<sup>199</sup> The *Cooper* case shows the possibility that an agreement between two parties relating to their mutual dispositive scheme might establish enforceable rights at the moment of execution.<sup>200</sup>

This analysis is equally compelling in the event of execution of a new will. In practice, the presence of the new will can usually be kept secret until its admission into probate<sup>201</sup> because while the party is still living such information is confidential and cannot be disclosed by the party's attorney to any person without consent.<sup>202</sup> Regardless, the oral will agreement is violated when the original will is revoked by an inconsistent subsequent will.<sup>203</sup> Arguably a party or beneficiary need not wait until the death of both

196. *Id.*

197. 274 Cal. App. 2d at 79, 78 Cal. Rptr. at 743.

198. CAL. PROB. CODE §§ 70-75, B. WITKIN, SUMMARY OF CALIFORNIA LAWS, *Wills and Probate* § 150, at 5666 (8th. ed. 1974).

199. *Cook v. Cook*, 17 Cal. 2d 639, 644, 111 P.2d 322, 326 (1941) (controversy concerning the proceeds of life insurance and its apparent distribution under a will previously written).

200. *Estate of Cooper*, 274 Cal. App. 2d 70, 79, 78 Cal. Rptr. 740, 743-46 (1969); *Rogers v. Schlotterback*, 167 Cal. 35, 53 (1914).

201. CAL. PROB. CODE § 27 (West Supp. 1980) states in relevant part: "A testamentary disposition may be made. . . to natural persons capable by law of taking property. . . ."

202. I, CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA DECEDENT ESTATE ADMINISTRATION § 1.19 at 17 (Victor C. Chuan & Irving Slater ed. 1971).

203. In *Cooper* the court stated, "[I]t has also been recognized that the promises of such a contract need not wait until the death of the promisor but may seek



parties to bring an action to enforce an agreement not to revoke a will.<sup>204</sup>

### *B. The Prerequisites of Probate Procedure*

Upon the initiation of probate, an oral promisee may be barred from asserting legal claims if he or she does not file a copy of the supporting contract, or supply affidavits supporting the oral promise that was relied upon as a "claim" for a liability under Probate Code Section 707.<sup>205</sup> A claimant who does not file a claim against the estate in a timely fashion may be barred from proceeding against the estate, assuming proper notice was received.<sup>206</sup>

This bar arises most often in cases where services of a personal nature are promised in exchange for a promise to be provided for by will. Holders of such a claim cannot file an action, unless a claim is first presented to an executor or administrator.<sup>207</sup> After rejection, or if no rejection within 10 days of service or filing,<sup>208</sup> a complaint can be brought outside of probate.<sup>209</sup> If services have been rendered, the cause of action has been held to not involve enforcement of an oral contract, rather the plaintiff would be seeking to recover under *quantum meruit* for the value of the

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equitable relief against inter vivos conveyances made by him in fraud of their rights . . . ." 274 Cal. App. 2d at 79.

204. See note, *Mutual Wills: Undue Influence, Revocability, and Rights of Third Party Beneficiaries*, 48 CALIF. L. REV. 858, 861 (1960).

205. CAL. PROB. CODE § 700 (West Supp. 1980) governs the time to file a claim based on a contract: (a) [A]ll claims arising upon contract, whether they are due, not due, or contingent, and all claims for funeral expenses and all claims. . . must be filed or presented within the time limited in the notice or as extended by the provisions of section . . . 709 of this Code. CAL. PROB. CODE § 707 (West Supp. 1980).

206. In re Estate of Cross, 51 Cal. App. 3d 80, 88, 123 Cal. Rptr. 825, 830 (1975); Estate of Hincheon, 159 Cal. 755, 759-60, 116 P. 47, 49 (1911).

207. CAL. PROB. CODE § 716 (West 1956) states in pertinent part: "No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the clerk or presented to the executor or administrator. . . ."

208. CAL. PROB. CODE § 712 (West 1956) states as follows in pertinent part:

If, when a claim has been filed without presentation, the executor or administrator refuses or neglects to file his allowance or rejection for ten days after the claim has been filed, or if, when a claim has been presented before filing, the executor or administrator refuses or neglects to indorse such allowance or rejection for ten days after the claim has been presented to him, or if the judge refuses or neglects to indorse such approval or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day.

209. The Statute of Limitation is three months after rejection of a claim if the debt is then due, or two months after it becomes due. CAL. PROB. CODE § 714 (West 1956); See also *Drvol v. Bant*, 183 Cal. App. 2d 351, 355-57, 7 Cal. Rptr. 1, 5-6 (1960) (3 month statute).

services performed.<sup>210</sup> A more important case in California is where the oral contract to devise is not entered into in exchange for the rendering of personal services, but for some other reason such as family ties, estate planning, dissolution judgments, or some moral obligation. In these cases the property expected to be received may be much more than if only personal services were rendered.

### *C. The Cause of Action and its Impact*

To prevent distribution of assets to the devisees of the new will, courts allow the circumvention of the legal avenue of relief if the remedy at law is inadequate.<sup>211</sup> It may be argued that the action at law is deferred until completion of the probate of the estate. This, of course, gives rise to the traditional equitable defenses.

The typical cause of action is a claim to impose a constructive trust.<sup>212</sup> Quasi-specific performance of the oral contract or joint agreement is required to avoid the perpetration of an alleged fraud on the promisee and unjust enrichment of the promisor's beneficiaries. The prayer in such an action is for enforcement of the oral will contract by a declaration that the court or the beneficiaries under the new will hold the property as constructive trustees for the plaintiff with a request for distribution.<sup>213</sup> Importantly,

210. 183 Cal. App. 2d at 356, 7 Cal. Rptr. 5.

211. 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, EQUITY § 3 at 5230-31 (8th ed. 1974).

212. *Id.* § 28 at 5253. Importantly, the use of this type of cause of action in relation to creditor's claims tolls the probate "claim" period. *Lazar v. Lazar's Estate*, 208 Cal. App. 2d 554, 25 Cal. Rptr. 354 (1962).

213. *Smith v. Smith*, 126 Cal. App. 2d 194, 196-97, 272 P.2d 118, 120 (1954) (action on oral agreement to leave property to plaintiff in consideration of services to be rendered and in quantum meruit, instituted against the executor of the estate of one of the promisors); *West v. Stainback*, 108 Cal. App. 2d 806, 240 P.2d 366 (1952) (mother's oral promise to will to the surviving husband of her deceased daughter her estate upon his reliance by dismissal of various petitions against her made said oral agreement enforceable through his prior full performance under the statutory rule found in CAL. CIV. PROC. § 1624 (West 1973); *Bonnear v. Bank of America Nat'l Trust & Savings Ass'n.*, 84 Cal. App. 2d 107, 110-11, 190 P.2d 307, 309-10 (1948) (under property settlement agreement, a divorced husband conveyed realty to the wife and agreed to make monthly payments to her, but upon her death the property was sold by a bank acting as executor allegedly in contravention to an oral agreement as spelled out in a complaint; the bank was successful in interposing a demurrer to the complaint). The prayer must be carefully written because the court will closely examine its content. *See e.g.*, *Stahmer v. Schley*, 96 Cal. App. 3d 200, 96 Cal. Rptr. 756 (1979) (by reason of execution of joint and mutual wills, and the acceptance by the surviving party of its benefits, the oral agreement evidenced by the wills become irrevocable and enforceable against the husband).

both the promisee to the oral will contract and the intended devisees, as third party beneficiaries, may bring the action to enforce the agreement.<sup>214</sup> It may be wise to seek injunctive relief against breach in addition to the specific performance.<sup>215</sup> This could be accomplished in California by invoking the Declaratory Judgment Act.<sup>216</sup>

For the practitioner, the creation of an irrevocable trust might be the best avenue for preventing a breach during the lifetimes of both parties. Technically, the surviving party could still breach the contract, but the wrong would be easy to prove from the existence of the trust. Trusts capable of amendment, modification, and alteration would not be effective. An alternative possibility for those who wish to prevent a false claim of an oral agreement might be to include a clause in the will such as: "This will represents the sole evidence of the disposition of the property governed thereby and expressly overrides any oral agreements that have been made in the past, present or future."

Various other factors appear to influence courts in their willingness to afford a judicial remedy. The party who sues to enforce the oral agreement in equity must have performed all of the acts required under the agreement.<sup>217</sup> Enforcement of will contracts

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214. *Brown v. Superior Court*, 34 Cal. 2d 559, 563-64, 212 P.2d 878, 881 (1949).

215. Perhaps the standard phrase "all other proper, equitable or legal orders" would give the court sufficient authority to allow injunctive relief, but one would best be advised to include a prayer which specifically requests such relief.

216. CAL. CIV. PROC. CODE § 1060 (West 1980) states that "[a]ny person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another . . ." See also CAL. CIV. CODE § 3384 (West 1970) (relating to specific performance).

217. CAL. CIV. CODE § 3392 (West 1970) states:

Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default.

Other defenses against enforcement of specific performance are found in CAL. CIV. CODE § 3390 (West 1970) as follows:

The following obligations cannot be specifically enforced:

1. An obligation to render personal service;
2. An obligation to employ another in personal service;
3. An agreement to perform an act which the party has not power lawfully to perform when required to do so;
4. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; or,
5. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

CAL. CIV. CODE § 3391 (West 1970) is also important in the oral will contract area. Under § 3391, specific performance cannot be enforced against any party to a contract in any of the following cases:

1. If he has not received an adequate consideration for the contract;
2. If it is not, as to him, just and reasonable;

also is more likely if the wills have stood for some time unrevoked although specific case authority on this point was difficult to locate.<sup>218</sup> Other text writers have pointed out that an oral will contract is not enforceable if the first to die is the first to revoke.<sup>219</sup>

## V. CONCLUSIONS AND RECOMMENDATIONS

This article has attempted to trace the trends in the oral will contract area during the past eighty years into some logical summary and to evaluate selected points. There is no longer any certainty that one can successfully argue that purely oral mutual promises to bequeath property are unenforceable. In an effort to avoid harsh results case law has developed and relied upon exceptions that allow oral will contracts to be enforced during the lifetime of the promisor, or more frequently after his or her death.<sup>220</sup>

The drive for a consistent rule by the *Owens* and *Notten* courts planted the seeds that eventually generated a continuous expansion in the enforcement of an oral will contract resting in parol

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3. If his assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled; or,

4. If his assent was given under the influence of mistake, misapprehension, or surprise, except that where the contract provides for compensation in case of mistake, a mistake within the scope of such provision may be compensated for, and the contract specifically enforced in other respects, if proper to be so enforced.

*Id.*

Of course, there is still the common law requirement that the remedy must be mutual, subject to certain exceptions. CAL. CIV. CODE § 3386 (West 1970).

218. See E. SCOLRD & E. HALBACK, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 175-76 (2nd ed. 1973).

219. In the landmark case of *Stone v. Hoskins* L.R.P. 94, 97 (1905) this point was reflected in dictum:

If two people had made wills which were standing at the death of the first to die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from the arrangement on his part, because. . . the will of that part of the arrangement may have become irrevocable; *but that case is entirely different from the present*, where the first to die has not stood by the bargain and her 'mutual' will has in consequence not become irrevocable. The only object of notice is to enable the other party to the bargain to alter his or her will also, but the survivor in the present case is not anyway prejudiced.

*Id.* (emphasis added).

220. See 35 CAL. JUR. 3d *Statute of Frauds* §§ 89-118 (1977). See also Perillo, *The Statute of Frauds in the Light of Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 42-43 n.29 (1974).

evidence. Estoppel has grown from a relatively secondary doctrine to a general remedy applicable to those who could show adequate reliance or unconscionable injury.

As in other areas involving the Statute of Frauds, the decisions in the oral will contract cases have not avoided the temptation to expand the exceptions to the point where the exceptions swallow statute in one gulp.<sup>221</sup> The original purpose of the statute has become clouded.

Perhaps the time has come to recognize that the requirement of a writing for oral will contracts is based on a legal perspective that is no longer prevalent. At the time of its enactment, the statute manifested the legal community's apprehension that the flow of property to the natural objects of a testator's bounty would be interrupted by the perjured testimony of a faithless servant or disfavored relative. To avoid such a result, a rule was propounded that regulated the allocation of a type of property in a class of cases while leaving no room for the requirements of justice in particular circumstances involving individual persons. Since the turn of the century, with the first judicial sidestepping of the legislatively imposed requirement of a writing, the courts have sought to temper the harshness of the rule in actual cases. Perhaps contemporary values would be better served by returning to the approach employed by courts prior to the statute's enactment in 1905.

The earliest decisions generally enforced these oral agreements.<sup>222</sup> The existence of the statute has not deterred breaches by spouses, heirs, and beneficiaries.<sup>223</sup> The pre-1905 solution first presented in *Owens v. McNally*<sup>224</sup> offers a good test which at least presented a direct burden on the potential heir to prove up the case.<sup>225</sup> The clear, just, and certain test provides a direct route to

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221. *Id.* See Comment, *Estoppel and the Statute of Frauds*, 26 KAN L. REV. 327, 334 (1978). The California Legislature recently abrogated several important holdings of the California Supreme Court in the vehicular guest statute area. The legislature went so far as to actually cite the Supreme court holdings. See CAL. CIV. CODE. § 1714 (West Supp. 1980).

222. See note 54 *supra* and accompanying text.

223. Cf. *Lamborn v. Watson*, 6 H. & J. 252, 255, 14 Am. Dec. 275 (Md. 1824) (statute generates as many frauds as it prevents).

224. 113 Cal. 444, 45 P. 710 (1896).

225. See notes 68-72 and accompanying text *supra*. There is a great propensity for the legislature's wording to be given a broad interpretation leading to unforeseen consequences. See e.g., *People v. Colver*, 107 Cal. App. 3d 277, 105 Cal. Rptr. 614 (1980) (author was attorney for defendant and definition of "proponent" given overbroad meaning by the trial court causing reversal on appeal). See also Bouret, *The California Going and Coming Rule: A Plea for Legislative Clarification*, 15 CAL. W. L. REV. 116 (1979) (overbroad nature of CAL. LAB. CODE § 3600 (West Supp. 1980) causes disproportionate results in the courts in the Workers' Compensation area).

the truth and was effectively applied in cases such as *Monsen*.<sup>226</sup> Therefore it is recommended that the existence of section 1624(6) be reevaluated. Its effect seems more often to rob from one party and give to another under the guise of broad exceptions. The issue of the actual existence of the oral will agreement is too easily subordinated to the pursuit of a reason to bar the application of the Statute of Frauds.

The judiciary has been willing to adjust to changing perceptions of justice by discarding long held rules in favor of fresh approaches, as has recently been done in the area of parent-child immunity.<sup>227</sup> Judicial rejection of the old rule took place when the vitality of the rule had been sapped by exceptions.<sup>228</sup> The legislature ought to be as willing to recognize that the rule has outlived its usefulness, and to permit, in a straight forward manner, the disposition of property in accordance with the true wishes of

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226. See notes 67-71 *supra*. There are many different factual twists that can arise in these types of cases. For example, the will can be probated in a state that is not the state where the beneficiaries live or the property is located. In other cases, there are many subsequent wills written, rescinding a mutual or joint will. Frequently, a will cannot even be found or has long since been destroyed. Often there is an oral understanding with the only possible writing consisting of a letter from the promisor to the promisee or to the beneficiaries.

The Statute of Limitations can frequently be a problem in many types of cases, but no cases could be found concerning the oral will contract area. The issue could arise as to when the Statute of Limitations starts to run. Does it begin when the will is changed? When the first spouse dies and the second changes his or her will? When any party has knowledge? When the second spouse dies? When the probate is closed? The Statute of Limitations in California for an oral contract is two years. See CAL. CIV. PROC. CODE, § 339 (West Supp. 1980).

It is interesting to note that the surviving spouse can use gifts as a way of dissipating the estate during their remaining lifetime. This could easily be interpreted as a breach by the surviving beneficiaries who were supposed to take the remaining property. Sheridan, *The Floating Trust: Mutual Wills*, 15 ALBERTA L. REV. 211, 213, 230-40 (1977) (the author discusses floating trusts in the framework of mutual wills, restrictions on both parties are identified and their subsequent powers of disposition, revocation and the encumbent trust relationship is delineated). It changes the outcome a great deal if the first spouse makes the gift before death, or the second spouse makes the gift after the first has died. If it is the first, then query whether this is a substantial breach entitling the remaining party after the first party's death to no longer honor the oral contract.

227. *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971). "We have concluded that parental immunity has become a legal anachronism, riddled with exceptions and seriously undermined by recent decisions of this Court." *Id.* at 915-16, 479 P.2d at 648, 92 Cal. Rptr. at 288. See generally Comment, *Negligent Parental Supervision as Grounds for Contribution in Tort: The Case for Minimal Parental Liability*, 12 U.C.D. L. REV. 828, 830-35 (1979).

228. 3 Cal. 3d at 918, 479 P.2d at 649, 92 Cal. Rptr. at 290.

a testator.<sup>229</sup>

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229. Naturally, California lawyers have pursued the most advantageous arguments and championed the exceptions to the Statute of Frauds. Ironically, it would seem that the draftsmen of the Statute would probably observe that it has not completely satisfied its original purpose. Without a reevaluation of the reasons for the existence of the statute and a movement to consider its removal, we can only expect the status quo to continue.

It is hoped that this summary and evaluation has shed enough light to bring about change in the law surrounding agreements to bequeath or make provision by will. The criteria for enforcement of oral will contracts in California must be brought back to the basics. Courts must take their consideration outside of the ambit of § 1624(6) into the limelight of a clear and just test.