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Family Drama: Dangling Inheritances and Promised Lands

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FAMILY DRAMA: DANGLING INHERITANCES AND PROMISED LANDS

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HENDRIK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE (2012). Pp 368. Hardcover $31.00.

INTRODUCTION

Those of us who as law professors teach Wills, Trusts, and Estates are familiar with the many different stories that arise when money and death create family conflicts. Think *King Lear*.[1] Think another play, *The Heiress* (also a movie starring Olivia de Havilland).[2] Families create very interesting and dramatic narratives whenever a propertied patriarch or matriarch dies, survived by disappointed heirs and friends. In his book, *Someday All This will be Yours: A History of Inheritance and Old Age*,[3] legal historian Hendrik Hartog[4] tells many of those stories, primarily from mid-nineteenth century to mid-twentieth century New Jersey.[5] Because he has access to trial court records, the stories he is able to tell are much richer than those that have been edited in appellate reporters.

Hartog's focus is on stories of property owners, mostly middle class, who dangle promises of inheritance before whatever person in a younger generation they can find to tempt to remain on the premises and care for them in their old age.[6] A related story line involves property owners who promise nearby land to a child or other relative (and sometimes not even a relative) if the promisee will settle down,

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1. WILLIAM SHAKESPEARE, THE TRAGEDY OF KING LEAR (telling the story of a wealthy man who gave away his wealth too soon). Hartog refers to the problem of giving away property and power too soon as the "King Lear problem." *See* HENDRIK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE 33-34 (2012). He notes that older people using their property to influence their children to care for them were all familiar with the King Lear problem and were regularly advised not to part with their wealth too soon. *See id.* One character in the cases Hartog discusses used the phrase "keep the loaf under one's [sic] own arm." *Id.* at 66 (citing Updike v. Ten Broeck, 32 N.J.L. 105, 115 (N.J. 1866)).

2. RUTH GOETZ & AUGUSTUS GOETZ, THE HEIRESS (1947) (a play in which a wealthy father worries about the motives of a suitor who is courting his somewhat plain daughter; adapted from WILLIAM JAMES, WASHINGTON SQUARE (1880)).

3. *See generally* HARTOG, *supra* note 1.

4. Class of 1921 Bicentennial Professor in the History of American Law and Liberty, Princeton University.

5. HARTOG, *supra* note 1, at 7.

6. *Id.* at 8-9.

build a home and raise his or her family on the nearby land.[7] These promises are intended to keep the younger generation close at hand as needed and to avoid potential loneliness that might set in once the promisor is too old and frail to travel about in society.[8]

The older generation promisor, however, wanted to avoid the "King Lear problem."[9] That meant most of these promises were not fulfilled during lifetime. And, not surprisingly, many were not fulfilled at death either. Things changed over time. Family members had fallings out. The promisor remarried and decided to leave everything to the new spouse. Creditors of the promisor pressed claims against the land before death. As a result, the disappointed promisee ended up in court claiming an ownership interest in the land at stake.

All of these cases have core common facts. Almost always, the promise is not in writing.[10] That, of course, raises a Statute of Frauds problem.[11] And, whereas part performance can often overcome that problem, often the performance is the provision of services by someone who either is a close family member or functions as a close family member.[12] In such cases, it was common for courts to presume that the services were gratuitous.[13] This was especially true when the services were performed by women and involved tasks such as cooking and cleaning. These services were the sorts of services that a father would have expected from a daughter, or even a daughter-in-law, and such daughters or daughters in-law should not have expected remuneration.[14] Even when the tasks involved nursing duties, the presumption was against remuneration.[15] During this time period, nursing was not a recognized trade,[16] and besides, this work is what family members did for each other.

Some of these presumptions began to change once we moved into the twentieth century. The first wave of feminism had strengthened the rights of women, and

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7. *Id.* at 142.
8. *Id.*
9. *Id.* at 55-57. *See supra* note 1, explaining the "King Lear problem."
10. *Id.* at 81.
11. *Id.* at 177. Agreements for the transfer of land generally must be in writing. The English Statute of Frauds, entitled *An Act for the Prevention of Frauds and Perjuries*, was enacted in 1677, providing as follows for contracts:

> [N]o action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; … upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them … unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

29 CHARLES II ch.3, § 4.

Most American jurisdictions adopted statutes similar to the English Statute of Frauds. The Restatement of Contracts states: "(1) The following classes of contracts are subject to a statute, commonly called the Statute of Frauds, forbidding enforcement unless there is a written memorandum or an applicable exception . . . (d) a contract for the sale of an interest in land (the land contract provision) . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 110 (1981).

12. *Id.* at 177-78.
13. *Id.* at 209.
14. *Id.* at 214-17.
15. *Id.* at 263.
16. *Id.*

married women's property acts had given married women a claim to be paid for their services.[17] By the 1940s, many members of the middle-class became entitled to social security payments in their old age, lessening their need to rely on promises of gifts of land after death to secure the care they desired.[18] But, for the approximately one-hundred years of litigation history that Hartog reviews, in New Jersey, family squabbles over broken promises to transfer land to the promisee were heard in courtrooms around the state.

SAMPLE CASES

Hartog's retelling of the stories in each case is full of rich detail that it would be otherwise impossible to glean from the recorded opinions in the cases. These stories help us to imagine that world of the late 1800s and early 1900s. Here are a few brief summaries of some of these cases, based on Hartog's rich retellings.

Ridgway v. English (1850)[19]

A daughter stayed with her father after she turned twenty-one. Her mother passed away and her father asked her to stay and help him run the household and raise the younger children. She stayed for four years, performing these requested duties. She then married and moved into her own home. The father told the daughter of his intention to pay her, and neighbors who witnessed this also supported her claim. She understood that he would leave her something at his death, but he left her nothing. She sued in assumpsit,[20] requesting payment for her labor and also in *quantum meruit*.[21] The court ruled against the daughter, finding that she had only done what any dutiful daughter would have done, and that essentially, all the father had done was make an oral promise to make a future gift. Such promises are not enforceable in law or in equity.[22]

Davison v. Davison (1861)[23]

A father promised his son that if he would join him on the farm, live there and work on the farm, he would leave the farm to the son at his death. The son accepted the promise and moved onto the farm. The son worked on the farm for fifteen years to the full satisfaction of the father. He married and built a separate home for his

17. Although in the early days of married women's property acts, this right to remuneration was often limited by court decisions that said married women only had a right to contract for services outside of the home. *See id.*

18. *See id.* at 270.

19. Ridgway v. Ex'rs of English, 22 N.J.L. 409 (N.J. 1850). *See generally* HARTOG, *supra* note 1, at 98-99.

20. A cause of action in assumpsit is basically a claim for breach of contract. A plaintiff sues in assumpsit when the defendant has failed to pay compensation that was promised. Assumpsit was a common law cause of action that arose around 1500. *See* EDGAR BODENHEIMER, JOHN B. OAKLEY & JEAN C. LOVE, AN INTRODUCTION TO THE ANGLO-AMERICAN LEGAL SYSTEM: READINGS AND CASES 40-41 (4th ed. 2004).

21. Quantum meruit translates roughly into "as much as he deserved." It is an action by which reasonable compensation can be recovered if the services were performed under circumstances in which reasonable compensation was to be expected. *Id.* at 41.

22. *Ridgway*, 22 N.J.L. at 423.

23. Davison v. Davison, 13 N.J. Eq. 246 (N.J. Ch. 1861). *See generally* HARTOG, *supra* note 1, at 37-53.

family on the farm. However, the father and son had a falling out over a number of incidents involving the son's wife. She had accused the father of being a lecher and the father accused her of adultery. Once the father's accusations became more public, the son filed a slander suit against his father. The father then transferred title in the farm to his two other sons in exchange for their promises to care for him for life. The two sons sued their brother for ejectment. Ultimately, the court of equity agreed with the son who had worked the land for fifteen years. He had not been paid, except of course, he had rent-free lodging. In any event, the court did not think this looked like a case of gratuitous services. The son expected compensation for his work. And he expected the land as compensation. The court ordered specific performance, which meant that the son would be required to specifically perform his side of the bargain—to continue providing services. At his father's death, he would be paid by getting title to the farm. If the father refused the services of the son, which surely seemed a possibility given the depth of their falling-out, then some adjustment would have to be made, but the court hoped that the parties could work it out. This is the first case in New Jersey to establish a clear right to specific performance on facts such as these.

Horsfield v. Gedicks (1922)[24]

Frances moved in with her aunt and uncle after her mother died. She was nine years old. The aunt and uncle, childless, raised Frances as their own child. When Frances married, she and her husband continued to live with her aunt and uncle. Then the aunt and uncle purchased property in New Jersey and moved there. They held title as tenants by the entireties, which assured that the property would go to the surviving spouse. Frances, her husband, and their children also moved and shared the New Jersey home with the aunt and uncle. Three years later, now with three kids in tow, Frances and her husband wanted to move into a home of their own. They began looking for an appropriate rental. But the aunt and uncle did not want them to move away. The tract they owned was large enough to accommodate another home, so they offered to give Frances the corner of their lot if they would build a house and stay there. Frances and her husband accepted the offer. The aunt provided much of the construction costs, but she and the uncle did not transfer title to the land to Frances and her husband. Then, the aunt died and title vested one-hundred percent in the uncle. He again promised he would draw up a deed and take care of Frances, but he did not. And one year later, now in his late fifties, Frances's uncle married a twenty-seven year old woman. When they had their first child, the uncle deeded the property to his new wife. She demanded rent from Frances, who refused, claiming it was her property. But with no papers to prove anything, she was on shaky ground. The uncle's new wife sued to evict the family based on non-payment of rent. Frances argued that the property was hers, and that it had been gifted to her, even though no deed had been delivered. The court agreed, finding that the oral promise to make the gift could be enforced in equity.

24. Horsfield v. Gedicks, 118 A. 275 (N.J. Ch. 1922). *See generally* HARTOG, *supra* note 1, at 109-120.

Danenhauer v. Danenhauer (1930)[25]

Lee Danenhauer and his wife lived in Philadelphia, but he wanted to move to the country and become a horticulturist. He found some suitable land in Pennsylvania and visited it with his father, who lived in New Jersey. The father and mother convinced their son, Lee, that he should not buy the land in Pennsylvania, but should instead ply his desired trade on a place they owned near the Jersey Shore, which they used only as a summer house. They promised him that if he did move there and make the place his own, his mother, who was in fact the owner of the property, would leave the property to him by will. Lee and his wife accepted the offer, sold their Philadelphia home, and moved to New Jersey. He raised irises and peonies on the property after investing much time and capital in the venture. He improved the summer house so that it would be suitable for year-round living for his family. During the summer, Lee's parents stayed with them at the house. And Lee's brother, George, and his family visited as well. About six years into this venture, Lee's mother died. Less than three weeks later Lee's father died as well. The mother's will, as it turned out, left the summer home to her husband for life, then to her two sons, Lee and George, for life, and then to George's children. The promise had been breached. Lee sued for specific performance and won.

COMMENTARY

There are many more cases, but they tend to follow the same trend toward enforcement of oral promises to convey land when there was sufficient evidence of partial performance—enough evidence to take the case out of the Statute of Frauds. Benefit to the promisor or detriment to the promisee could both serve to provide the basis for partial performance. The stories that lawyers put together on behalf of their clients who were suing for performance of an agreement, based on rendition of services, tended to center around two core ideas: (1) that, in the case of services performed, the services were so extraordinary that the continued work by the promisee could not be understood but for reliance on a promise to compensate, and (2) the services were not performed by a person in the role of a close family member who might be expected to provide such services gratuitously.

The last two cases discussed above do not really fall into the category of providing services in exchange for future payment.[26] Instead, they involve detrimental reliance on a promise and the investing of significant capital in the promised land. The *Horsfield v. Gedicks* case is interesting because the court was willing to count the investment of the aunt's capital in the construction of the home as siding with niece, Frances, since it was clear that the aunt intended the investment to be a completed gift.[27]

During this same period of time, there were numerous plaintiffs who lost their

25. Danenhauer v. Danenhauer, 148 A. 390 (N.J. Ch. 1930). *See generally* HARTOG, *supra* note 1, at 136-40.

26. *See supra* notes 24-25 and accompanying text.

27. Horsfield v. Gedicks, 118 A. 275, 276 (N.J. Ch. 1922).

cases.[28] Nonetheless, as someone who reads and teaches cases about promises to make a will in favor of someone, I was struck by how many cases ruled in favor of the claimant. I suspect many of these cases would turn out differently today, certainly in states that have adopted Section 2-514 of the Uniform Probate Code.[29] This provision contains its own Statute of Frauds as applied to a contract to make a will in favor of another person and it contains no exception for partial performance or reliance.[30]

New Jersey adopted this Uniform Probate Code provision, effective as of May 1, 1982.[31] But, before adoption of that statute, and at least as recently as 1969, New Jersey courts were willing to enforce parol (oral) promises to change a will in favor of the promisee in cases where the promisee agreed to take care of the promisor.[32]

Emerging Themes

After thinking about the rather common practice of tempting children and others with promises of inheritances that were the focus of the cases in this book, I noticed several themes. First, as Hartog points out, this period of time had a particular way of dealing with old age and infirmity.[33] Modern practice for managing old age and illness has changed tremendously as the older generations have resources other than children, informally adopted children, or the kindness of neighbors and employees. Today those of us approaching the twilight of our days can rely on social security, private retirement plans, Medicare, and Medicaid if we become penurious. In addition, commercial entities, some purely charitable, have arisen that specialize in providing care to the elderly. We now have assisted living options and nursing homes. Parents are often left alone in their homes, or move to smaller condominiums or apartments once the children have left the nest, which ultimately most chil-

28. *See e.g.*, Smith v. Smith, 28 N.J.L. 208, 219 (N.J. 1860) (finding that the Statute of Frauds prevented specific performance of the promise to convey, but that the promisee may be entitled to claim the value of the improvements he made on the property since that claim, although based on an oral promise, did not involve the land). In addition, services provided by women were often discounted as valid consideration for promises because they were not really extraordinary; *see e.g.*, Disbrow v. Durand, 24 A. 545, 545 (N.J. Ch. 1892) (sister lived with older brother and cared for him for twenty years, but claim against estate for remuneration was dismissed as unviable on the basis that she had voluntarily stayed there and participated in the household as any family member would have done without remuneration); Updike v. Titus, 13 N.J. Eq. 151, 153, (N.J. Ch. 1860) (holding that a mother could not recover for services rendered to her son, but the son could recover money he gave his mother as a loan).

29. UNIF. PROBATE CODE § 2-514 (1990). This section provides:

> A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this [article], may be established only by (i) provisions of a will stating material provisions of the contract, (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (iii) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

30. *Id.*

31. N.J. STAT. ANN. § 3B:1-4 (West 2013).

32. *See, e.g.*, Klockner v. Green, 254 A.2d 782, 785-86 (N.J. 1969) (stepdaughter and stepson, the children of testator's deceased husband, agreed to take care of testator after she promised she would execute a new will in their favor; testator had the will drawn up in favor of the stepchildren, but being suspicious about signing a will and the inevitability of death, she never executed it; court held that stepchildren deserved specific performance despite the fact that they testified that they would have provided the services gratuitously).

33. *See* HARTOG, *supra* note 1, at 32-33.

dren do. Thus, most of the themes that arise from the one-hundred year's worth of cases that are the center of this book tell us very little about the future. Rather, they tell us something about a social history of a past era.

Past Social History Themes

I was struck by a consistency among most of the cases whereby the parent of the promisee was unwilling to part with property now, in order to pay the person who had agreed to take care of the parent. This is the "King Lear problem" that Hartog addresses throughout the book.[34] But, the problem is more complex when you focus on the needs of the caregiver. Why would anyone provide caregiving services, sometimes for decades, without any assurance that the promise would be carried out, and without any current compensation? Of course for some, there was current compensation in the form of free room and board. But, any reasonable person would realize that that free lodging would disappear at the death of the property owner unless the promise was fulfilled. The "King Lear problem" then, becomes one of how to give enough—or appear to give enough—without giving away too much too soon.

The answer in the cases seems to be this: promise again and again.[35] Repeating the promise makes it more real and it also makes it more susceptible of proof if made in front of neighbors and other witnesses. I was surprised that in many of the cases, lawyers had advised the promisor not to worry about carrying out the promise before death because there was enough evidence for the promisee to have the claim settled after death. This advice tells us something about the culture of this time. It seemed to be a breach of manners to insist on settling such accounts before death. The better course was to maintain the fiction that services were performed out of love and affection and not in exchange for inherited bounty. The social norm appears to have been one that would enforce such promises after death no matter what the promisor did or did not do about his or her last will and testament. As a result, one can assume that there were many more cases of these promises, sometimes informally called "retirement contracts,"[36] where the administrators of the deceased promisor's estate fulfilled the promise. Only in cases of greed, or serious family disharmony, or indeed lack of good evidence that there really was a promise in the first place would litigation ensue.

Another surprising thing about these cases is the tension that enforcement of the promise after death creates with the principle of freedom of testation, which Hartog mentions.[37] However, he stresses that freedom of testation needed to be protected in part to support the testator's ability to obtain care late in life.[38] The ability of the testator to change his or her mind was sufficient to keep the caregiver

34. *Id.* at 33-34.
35. *See generally id.*
36. *See* Hendrik Hartog, *Someday All This Will Be Yours: Inheritance, Adoption, and Obligation in Capitalist America*, 79 IND. L.J. 345, 360 n.102 (2003) (discussing retirement contracts).
37. HARTOG, *supra* note 1, at 15-16.
38. *Id.*

in line, to assure the testator of continued services.[39] That makes some sense. The risk of a falling out, however, one that would result in being disinherited, would seem to create doubt in a reasonable caregiver's mind as to whether continued service was really a good idea. The number of decisions finding in favor of the claimant suggest a nuanced understanding of freedom of testation. The testator should have just enough freedom to change his or her mind, but if the testator stepped over the line drawn in equity for what was fair and expected, that freedom could be curtailed. This nuance would suggest that the claimant should more readily win in cases where the promisor died intestate, simply failing to carry out the promise, which could occur for many reasons and not just because the promisor had changed his or her mind. On the other hand, when the promisor specifically repudiated the deal by changing the will and disinheriting the promisee, especially on grounds that the promise was not being fulfilled on the other end, I should think the claimant's possibility of success would be significantly reduced.[40] However, I can find no evidence in Hartog's discussion of the cases that this was the case.

Finally, another interesting fact that came out in many of these cases was how often the promisor changed his or her will,[41] or, in some cases, had a deed drawn up that was never delivered.[42] One gets the impression that the middle class (and, of course some of these cases involve more propertied classes) tended to be familiar with the law of wills and deeds and had a personal lawyer on call whenever a change was needed. The images that these cases and the activities of their actors evoke are clearly of a different age than today where countless visits to the local estate planner would tend to drive up expenses in excess of what these cash-poor but land-rich clients seemed able to manage.

Themes of Future Value

While the use of these informal "retirement contracts" has greatly diminished, equitable claims to the property of a deceased on grounds of a promised inheritance are very much with us today. Often such claims involve long-term cohabitants whose relationships are not recognized by the state. The dependent cohabitant today has replaced the child or other younger generation promisee, although often the cohabitant may in fact be a member of a younger generation.

Only a handful of states continue to recognize common law marriage, a doctrine that would give a long-term cohabitant a spousal share upon intestacy or a forced share if not mentioned in the will. Ever since the *Marvin v. Marvin*[43] decision

39. *Id.* at 16.

40. Yet in *Davison v. Davison*, the first case to adopt a clear rule of specific performance, the claimant won even though the promisor claimed a breach of the promise on grounds of the actions of the claimant's spouse. Davison v. Davison, 13 N.J. Eq. 246, 248, 253 (N.J. Ch. 1861).

41. *See e.g.*, Grandin v. Reading, 10 N.J. Eq. 370, 371 (N.J. Ch. 1855) (a mother executed a will in favor of her daughter while living with her, and then moved to her son's house and shortly thereafter changed the will in favor of her son).

42. *See e.g.*, Vreeland v. Vreeland, 53 N.J. Eq. 387, 32 A. 3, 4 (N.J. Ch. 1895) (involving numerous deeds that appear never to have been delivered, which would have fulfilled the promise during lifetime).

43. Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) (holding that contracts between unmarried cohabitants for domestic services are enforceable and not against public policy).

in 1976, cohabitants across the country have tried to enforce their equitable rights to property owned by the other cohabitant.[44] These claims have been particularly important for same-sex cohabitants who, until recently, were not able to form legal relationships that would give them spousal rights.

Too often, when a cohabitant is making an equitable claim to property under *Marvin*, the court will apply the rule from these earlier cases, presuming that any services provided were gratuitous and not consideration that would entitle the claimant to a share of the deceased partner's estate. Understanding the genesis of that rule is useful for modern-day claimants who stand more closely to the position of spouses than that of children, nieces, or housekeepers. Yes, even spouses may be presumed to have provided their labor and caretaking services gratuitously. However, it is very hard, except in the state of Georgia,[45] to disinherit a spouse. Caretaking and related services performed by a long time cohabitant who is standing in the shoes of a spouse deserve a different sort of analysis.[46] If there is an understanding that continued support will be forthcoming and the promisor dies before fulfilling that promise, there ought to be a viable claim against the estate, just as there was for caretakers of elderly property-owners in New Jersey in the 1860 to 1950 era. Given the enactment of statutes based on Uniform Probate Code Section 2-514, however, it may be that the remedy in such cases is limited to *quantum meruit* rather than specific performance. In any event, the cases from New Jersey, although from a different time and a different sort of family relationship, do tell us something about how to construct a story that will help claimants to win in such cases.

CONCLUSION

Hendrik Hartog's book is a brilliant example of legal and social history. It is also a work that reminds us of great literature. When I finished it, I felt like I was emerging into the present from a Henry James novel. The great family dramas of literature are at the core of this study of inheritance and care for the elderly and Hartog describes these dramas beautifully. Times have changed and, on the surface, the use of property and inheritance to sway the young may look very different today, but the dramatic stories that underlie cases involving family disputes over inheritance are not that much changed. Reading Hartog's *Someday All This Will Be Yours* enriches one's knowledge and understanding of these age-old sagas in ways that help us to understand the complexity of similar modern-day disputes.

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44. *See e.g.*, Byrne v. Laura, 60 Cal. Rptr. 2d 908, 914, 916 (Cal. Ct. App. 1997) (holding support agreements and property agreements between cohabitants enforceable).

45. Georgia does not have an elective share provision in its probate code to protect the disinherited spouse, but it does have a year's allowance for support that is often generously awarded in such cases. Kristi L. Barbre, Comment, *Death and Disinheritance in Georgia: Reconciling Year's Support and the Elective Share*, 4 J. MARSHALL L.J. 139, 140-41 (2011).

46. The state of Washington has agreed with this principle by enforcing quasi-community property rights upon the death of a partner who has been in a meretricious or long-time committed relationship with another person, whether that person is of the same-sex or opposite sex. *See e.g.*, Vasquez v. Hawthorne, 33 P.3d 735, 737-38 (Wash. 2001).