

**TUESDAY AFTERNOON
FEBRUARY 26, 2002**



**California
Bar
Examination**

**Performance Test A
INSTRUCTIONS AND FILE**

ESTATE OF KEEFE

Instructions..... i

File

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Estate of Keefe

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work, a **File** and a **Library**. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
4. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.
7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response.

McIntyre, Yost and Amrein, LLP

MEMORANDUM

TO: Applicant
FROM: Gretchen Pronko
DATE: February 26, 2002

Our client, Mason Finch, is the former caretaker of decedent, Sandra Keefe, who promised to leave him a life estate in certain real and personal property in exchange for Mr. Finch's agreement to care for her. We recently filed a complaint on behalf of Mr. Finch, asserting a simple cause of action against the administrator of Ms. Keefe's estate for specific performance of an oral contract. Defendant has filed a motion for summary judgment.

The file contains a number of documents and some relevant cases you will need to review in order to perform the following tasks:

A. Draft declarations for all witnesses whose testimony will be useful in establishing that there are disputed issues of fact and in supporting our arguments. Don't take time to write out headings or other boilerplate language. Our client, the witnesses interviewed by our investigator, and the friend contacted by our client (see Mr. Finch's letter on this subject in the file) have all agreed to sign declarations if you think their testimony will help.

B. Draft only sections III and IV of a Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment.

In performing this assignment, please comply with the Internal Memorandum regarding Oppositions to Motions for Summary Judgment.

McIntyre, Yost and Amrein, LLP
INTERNAL MEMORANDUM

TO: Associates
FROM: Myron Taylor
RE: Oppositions to Motions for Summary Judgment

DECLARATIONS

All facts asserted in opposition to motions for summary judgment must be supported by admissible evidence established in declarations or by judicial notice.

Declarations must:

- Be limited to facts relevant to the motion for summary judgment.
- Include only admissible evidence that the declarant could testify to if called as a witness.
- Be concise and direct statements of facts; a declaration should not be a summary of everything the declarant knows.
- Be drafted before the memorandum of points and authorities; then, the statements of undisputed and disputed facts and argument can cite to the declarations by paragraph number, and need not repeat all of the facts.

MEMORANDUM OF POINTS AND AUTHORITIES

The Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment consists of five different sections, as follows:

Section I. Introduction: This consists of a concise one-paragraph summary of the nature of the underlying case, the basis for the summary judgment motion, and the basis for the opposition.

Section II. Response to Moving Party's Statement of Undisputed Facts: This is in two-column format. In the first column we restate the alleged Undisputed Facts. In the

second column, we respond with "Agree" or "Disagree," indicating whether we agree or disagree that the fact alleged to be undisputed is in fact undisputed.

Section III. Responsive Party's Statement of Disputed Facts: This is a two-column section identical in format to the Moving Party's Statement of Undisputed Facts (Section II of their Memorandum). In the first column, we state those facts we believe are disputed. The second column lists citations to evidence that establish these facts.

Section IV. Response to Moving Party's Arguments: In this section, we draft arguments that respond point by point to the arguments made in the moving party's Memorandum of Points and Authorities in Support of Motion for Summary Judgment. In support of our arguments, we cite to our Disputed Facts by the number assigned in Section III, and to relevant cases to support our legal assertions. We also make any additional arguments that support the position that there are triable issues of fact or that there are legal issues precluding entry of judgment as a matter of law.

Section V. Conclusion: This is a brief statement asking the court to find in our favor.

1 Paul Price
HIMMLER & MATZEN
2 1 West Union Plaza, 15th Floor
Garden City, Columbia 00987
3 (555) 267-0001

4 Attorneys for Defendant

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7 SUPERIOR COURT OF THE STATE OF COLUMBIA
8 IN AND FOR THE COUNTY OF CHESTER
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11 In re ESTATE OF SANDRA KEEFE,
12 Deceased.

Case No. 171757

13 _____/
14 MASON FINCH,

Plaintiff,

15
16 vs.

17 GRANT KEEFE, as Administrator of
the Estate of Sandra Keefe,

18 Defendant.
19 _____/

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

20
21 I. INTRODUCTION

22 This is an action for specific performance of an oral contract to make a will.
23 Plaintiff, Mason Finch, claims that the decedent, Sandra Keefe, promised to leave him a
24 life estate in certain real and personal property as consideration for his agreement to
25 provide care for her. Defendant, Grant Keefe, seeks summary judgment on three
26 grounds: the undisputed facts establish that there was no oral contract between plaintiff
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1 and decedent; this claim is barred by the statute of frauds; and, this claim is barred by
2 the applicable statute of limitations.

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6 II. DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

<u>Statement</u>	<u>Citation to Evidence</u>
7 1. Defendant is the administrator of 8 decedent's estate.	Declaration of Grant Keefe, ¶ 1
9 2. Defendant is decedent's nephew.	Declaration of Grant Keefe, ¶ 2
10 3. Defendant reviewed decedent's papers, 11 documents, and personal effects, and 12 found no writing signed by decedent 13 promising interests in her estate to plaintiff.	Declaration of Grant Keefe, ¶ 3
14 4. Defendant spent significant time with 15 decedent in the months before she died.	Declaration of Grant Keefe, ¶ 4
16 5. Defendant had many conversations with 17 decedent in which she discussed defendant 18 and plaintiff and Megan Finch.	Declaration of Grant Keefe, ¶ 5
19 6. Decedent indicated that she felt she had 20 more than provided compensation to 21 plaintiff for the services he provided.	Declaration of Grant Keefe, ¶ 6
22 7. Decedent indicated that she would not 23 leave a will, as she knew and desired that 24 defendant would inherit everything if she 25 died intestate.	Declaration of Grant Keefe, ¶ 7
26 8. Decedent died on August 26, 1999.	Declaration of Grant Keefe, ¶ 8
27 9. This action was filed on January 11, 28 2002.	Request for Judicial Notice of Complaint

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III. ARGUMENT

1 A. Plaintiff's Claim Based on an Oral Contract to Make a Will Must Fail Because
2 There is No Evidence to Establish the Existence of an Oral Contract.

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4 The undisputed facts in this case show that there was no oral contract to make a
5 will. Defendant was decedent's nephew. [Defendant's Undisputed Fact (hereafter DU
6 Fact) 2.] Toward the end of decedent's life, defendant spent substantial amounts of time
7 with her. [DU Fact 4.] Defendant had many conversations with decedent in which she
8 discussed defendant and plaintiff and Megan Finch. [DU Fact 5.] Decedent indicated
9 that she felt she had more than provided compensation to plaintiff for the services he
10 provided. [DU Fact 6.] She further indicated that she would not leave a will, as she
11 knew and desired that defendant would inherit everything if she died intestate. [DU Fact
12 7.]

13 These undisputed facts establish that decedent never promised to make a will
14 with provisions in favor of plaintiff. Thus, no contract, oral or written, existed.

15 B. Even if an Oral Contract Exists, It Cannot be Enforced Because It Is Not in
16 Writing.

17 Defendant was named administrator of decedent's estate. [DU Fact 1.] In this
18 capacity, he examined decedent's records, papers, and personal effects. [DU Fact 3.]
19 He did not discover any will or any other writing signed by decedent indicating any
20 promises made to plaintiff. [DU Fact 3.]

21 Columbia Probate Code §150 provides as follows:

22 A contract to make a will . . . can be established only by one of the following:

- 23 (a) Provisions of a will stating material provisions of the contract.
- 24 (b) An express reference in a will to a contract and extrinsic
25 evidence proving the terms of the contract.
- 26 (c) A writing signed by the decedent evidencing the contract.

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1 4. I spent on average two hours, three times per week with my aunt in each of the
2 six months before she died.

3 5. During the last six months of her life, I had many conversations with my aunt in
4 which she discussed Mason Finch, Megan Finch, and me.

5 6. In a number of these conversations, my aunt indicated that, while she
6 appreciated what Mr. Finch had done for her, she also felt she had more than provided
7 compensation to Mason Finch for the services he provided.

8 7. My aunt stated on several occasions that she would not leave a will, as she
9 knew that I would inherit everything if she died without a will. She made it clear to me
10 that this was her wish.

11 8. Sandra Keefe died on August 26, 1999.

12 I declare under penalty of perjury under the laws of the State of Columbia that the
13 foregoing is true and correct, and that this declaration was executed on February 16,
14 2002 in Garden City, Columbia.

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17 Grant Keefe
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TRANSCRIPT OF INTERVIEW WITH MASON FINCH BY ATTORNEY GRETCHEN PRONKO

Ms. Pronko (Q): The tape recorder is on now. As I said, this will give us an accurate record of what you say for use later on.

Mr. Finch (A): That's fine with me.

Q: Good. First, let me tell you what I know about your case. An elderly woman whom you befriended some time ago promised to leave you certain property in her will, but she died without making a will.

A: Yeah, that's pretty much it in a nutshell, but of course there are lots of details

Q: Why don't you begin with a little background information about yourself?

A: Okay. I'm 38 years old. I'm a single dad raising a daughter on my own. Her name's Megan and she's 16 years old. I've been an MFCC — a Marriage, Family and Children's Counselor — for about 12 years now. I got my Master's Degree in 1988, and opened my own practice in 1990. I've lived in Columbia for the last 16 years. Let's see, what else would you like to know?

Q: Why don't you tell me how you first met — what is the elderly woman's name?

A: Actually, there were two of them, sisters, Sandra and Mabel Keefe. I had just gotten my MFCC license and was looking for office space, so this was about 12 years ago. Sandra and Mabel owned a commercial building here in Columbia with six office spaces in it. I couldn't afford the rent they were asking, so I asked if they'd be willing to work out an exchange of some sort. They were very nice. We agreed I would manage the office building for them in exchange for a 50% discount in rent. I think what really clinched the deal was their meeting Megan. She was 4 years old at the time, and quite a charmer. Neither Sandra nor Mabel had children, and they absolutely fell in love with Megan. They invited us over for dinner, and after that, we became quite close. We reciprocated with dinners, and eventually took weekend trips together. Actually, they were quite adventurous, and we did lots of hiking and traveling together to quaint towns and sites throughout the country.

Q: How was their health?

A: About four years after we met, Mabel had a stroke. It was a pretty bad one. She was in the hospital for about six weeks. She moved to a rehabilitation facility for another six weeks. After that, Mabel was able to return home, but her mobility was very limited. She could get around with a walker, but really couldn't be left alone for long periods of time. It was difficult for Sandra to provide the level of care Mabel needed, so she approached me with an idea. Sandra was still well enough to do grocery shopping,

and light housekeeping, and to provide care to Mabel in the mornings and on weekends. She asked if I would be willing to cut back my counseling practice to the mornings only. This way, I could provide care for Mabel in the afternoons. Sandra also asked me if I'd be willing to fix dinner for Mabel and Sandra in the evenings. In exchange, Sandra said that Megan and I could move in and live with them in a small in-law unit attached to their house. It was a converted garage. We'd be able to live there rent-free. Sandra also said I could use the office space rent-free. By this time in our friendship, this was a "no-brainer" decision for me. I had to do it.

Q: They must have felt very close to you to ask this of you.

A: It really was like having a wonderful second family, you know? They really felt like relatives to me, so, like I said, I had to do it.

Q: Well, you've described at least two different agreements, one involving the office rent, and a subsequent one involving taking care of Mabel. Do you have a sense of the respective market values of each of the arrangements?

A: Well, somewhat. The full rent for the office I leased was \$500 per month, so half was \$250. I would say that I spent an average of one-and-a-half hours per week on management tasks, such as taking calls about vacant offices, showing prospective tenants around, collecting rents, arranging for repairs, both routine and emergency, overseeing maintenance. I also know that similar positions charge a percentage of the gross rents, like five percent per month. So, either way, my management duties were worth about \$250 per month. At first, I was charging \$40 per hour for counseling, but I soon raised it, as my clientele built up, to \$85 per hour. I'm telling you this so you may have an idea of what I feel my time was worth at the time.

Then, in terms of the second arrangement, I have no idea what my services were worth, but I was losing money, even with the free rent at both places. I'd estimate that I was losing about \$1000 per month in income because of the reduction in work hours.

Q: How was your financial situation?

A: It was tough financially. I was just starting out. I had been living on student loans, and graduated with about \$30,000 in loans to pay back. The first year I only made \$12,000, so having a 50% reduction in rent really helped out. Four years later, though, my situation had changed pretty dramatically. I had a full-time practice, and was actually turning clients away.

Q: Were there any other consequences to your finances or otherwise as a result of the agreement?

A: Yeah, there were. First off, I spent a fair amount of time during the first four years building up my reputation in the community. I made lots of presentations, attended

professional luncheons, seminars, and conferences, and actually started being asked to make presentations myself. That tailed off pretty much down to zero once I started caring for Mabel. I simply didn't have time anymore. It's hard to measure the effects of that sort of thing, but I'd have to say that my reputation has sort of plateaued now, instead of heading upward steadily like it was before. Oh yeah, I had also been thinking about getting my Ph.D. The local university offers a night program. I had to put that on hold indefinitely.

Q: How long did this arrangement continue?

A: Well, unfortunately, after about a year, Mabel passed away. Of course I helped Sandra as much as I could, but she was pretty devastated, as you can imagine. Just after the estate got settled, Sandra's health took a real turn for the worse — I think that Mabel's death took a lot out of her. She never really regained her spunk afterwards. Anyway, I ended up providing the same type of care for Sandra that I did for Mabel, only it was harder because I had to do it all myself. I had to cut down my practice some more, only working three mornings a week, about 33% of full time.

Q: Were you able to return to a full-time practice after Mabel died?

A: No, I had just started taking more clients when Sandra's health went downhill quite quickly.

Q: Did your care for Sandra differ from your care for Mabel?

A: Sandra's wasn't nearly as intensive, but because I had to do it myself I had to spend quite a bit of time doing errands like shopping, cleaning, and taking her to the doctors. Megan and I actually moved into the main house so I could be more available.

Q: It sounds like it must have been incredibly demanding.

A: Well, yes and no. I wouldn't have traded it for the world in a lot of ways. Mabel and Sandra lived life to its fullest, so if even a little of that rubbed off on me, I'm grateful.

Q: How long did you care for Sandra?

A: Five years. She was pretty lucid the entire time, except at the very end. She died the way she wanted to — at home.

Q: You mentioned that Sandra made some promises to you?

A: Yes, Sandra was extremely grateful. She realized all of the sacrifices I was making — not that I minded, you know. Anyway, she said she wouldn't forget me. Having inherited her sister's estate, Sandra now owned a 100% interest in the office building and residence. She said that she would meet with her lawyer and set it up so I would be able to live in the residence for the rest of my life and also get the income from the office building during my lifetime. In addition, Sandra made a series of cash contributions of \$10,000 for each of five years to Megan's college fund.

Q: So Sandra gave you \$50,000?

A: Yes.

Q: And she died without making the will she promised, right?

A: Yes, that's why I'm here. I actually thought things were going to work out fine. It turns out that Mabel and Sandra had a nephew they'd never even mentioned. Grant, the nephew, suddenly appeared about six months before Sandra died. He was named administrator of the estate because Sandra died without a will. I had a conversation with Grant soon after Sandra's death. I told Grant about the promises Sandra had made to me. Grant was noncommittal, but made no move to evict Megan and me from the house. As for the office building, Grant took over management of the building, but continued to charge me no rent. The income from the office building would have been nice, but I didn't really need it, and I thought Sandra and Mabel were very generous as it was. About two months ago, a real estate broker came by saying that Grant was going to sell the house, and I also got a 30-day notice terminating my use of the office. I called you right away.

Q: Did Grant Keefe say or do anything that led you to believe that he would honor the agreement?

A: No. Like I said, he was noncommittal, and I didn't push him. Maybe I should have. He said that his aunt had never mentioned anything about such promises. I think I just assumed that Grant was like his aunt, and that he would honor her promises. He's now taking the position that there were no such promises.

Q: When did Sandra die?

A: About two-and-a-half years ago. I thought that time might be a problem. That's why I was in such a hurry to find an attorney.

Q: Well, hopefully we'll be able to help you. What would you like the outcome of this situation to be?

A: To be honest, I'd like to get Grant to make good on the promises of his aunt.

Q: Let me ask you this. Was anything ever put into writing?

A: No, not that I ever saw.

Q: Were there any witnesses to any of these conversations you had with Sandra?

A: Well, there is Mildred Fowler. She helped with housekeeping for years. I'm sure Sandra talked to her. Oh, there was also Tori Phillips. She was a home-healthcare worker who helped out for about the last six months.

Q: Well, this gives me a good start. I will probably have my investigator talk to Ms. Fowler and Ms. Phillips, if that's all right with you.

A: That's fine. Anything that'll help.

Q: Mr. Finch, you'll probably have to sign a complaint, so you should hear from me by the end of the week, okay?

A: That's fine. Thank you very much.

TRANSCRIPT OF INTERVIEW WITH MILDRED FOWLER BY INVESTIGATOR CHARL MALONE

Ms. Malone (Q): Thank you for agreeing to talk to me, Ms. Fowler.

Ms. Fowler (A): Sure.

Q: I've asked your permission to tape-record this conversation, and you said that it would be okay, right?

A: Yes, that's right.

Q: My name is Charl Malone, and, as you know, I work for attorney Gretchen Pronko, who is representing Mason Finch in his dispute with Grant Keefe. I'm here to ask you questions about Sandra and Mabel Keefe. How long did you know them?

A: I first met them when I came to work for them about 20 years ago. They hired me to clean their house once a week.

Q: How well would you say you got to know them?

A: I'd say we got to know each other pretty well. They were around most of the time, so we'd chat about what was going on in our lives. They always asked about my family. They were both very sweet.

Q: That's certainly the impression one gets from Mason Finch. Speaking of Mason, what can you tell me about his relationship with the Keefes?

A: Mr. Finch rented an office space from Sandra and Mabel. They mentioned that he was managing the office building for them. They always spoke very highly of him. Then Megan and Mason moved in with Sandra and Mabel after Mabel's stroke, you know. Mason came home from work just as I was leaving, usually around lunchtime. Sandra told me that he took care of Mabel in the afternoons and fixed dinner in the evenings.

Q: Then Mason continued caring for Sandra after Mabel's death, right?

A: That's right. Over time he began to provide more and more care for her. At the end she was quite dependent on him to do just about everything.

Q: Did Sandra ever talk to you about whether she was paying him for the care?

A: Well, I didn't want to pry. She did mention quite frequently that she didn't know what she would have done without Mason. She also mentioned that she would help Megan with her college expenses and that she would make sure that she left Mason in good financial shape.

Q: Do you have any idea what she meant by leaving him in good financial shape?

A: She mentioned that she would be making a will so that Mason could use the house during his lifetime. I know that. Beyond that, I really don't know.

Q: Did she say this on more than one occasion?

A: Oh yes, definitely. I just can't say how many times for certain.

Q: Do you recall when she first mentioned it?

A: The first time must have been soon after Mabel died. She took it really hard. She was feeling quite lonely and depressed, I think. She'd never admit it, but she missed Mabel terribly. She was so grateful when Mason and Megan stayed on to help her out. I'm sure it was during this time that she decided she'd take care of Mason to show him how much it meant to her.

Q: This would have been in what year?

A: Well, Mabel died in 1995, so it was within six months or so of then.

Q: Do you have any recollection of other occasions when she mentioned taking care of Mason and Megan?

A: Sorry, I really don't, but it was a number of occasions over the next number of years, I'm sure.

Q: Did Sandra mention anything about the office building?

A: No.

Q: Well, thank you so much, Ms. Fowler. This has been very helpful. Here's my card. If you think of anything else, please get in touch with me, okay?

A: Yes, I certainly will.

TRANSCRIPT OF INTERVIEW WITH TORI PHILLIPS BY INVESTIGATOR CHARL MALONE

Ms. Malone (Q): Ms. Phillips, my name is Charl Malone. I've asked your permission to tape-record this conversation, and you indicated that this would be okay with you, right?

Ms. Phillips (A): Yes, that's fine.

Q: You probably know that I work for Attorney Gretchen Pronko, who has been retained by Mason Finch to represent him in an action against the estate of Sandra Keefe?

A: Yes, I understand.

Q: Please tell me about how you came to know Sandra Keefe.

A: I was hired by Grant Keefe to provide home healthcare for his aunt, Sandra Keefe.

Q: When were you hired?

A: I worked for about six months — until two weeks before she died, so I guess that would mean I was hired in early 1999.

Q: How many hours per week did you provide care?

A: I came in Monday through Friday, from 8:00 a.m. until 1:00 p.m., so that was 25 hours a week.

Q: How much were you paid and who paid you?

A: I was paid \$27 per hour, and I was paid by my agency. Mr. Keefe hired me through my agency.

Q: What duties did you perform for Ms. Keefe?

A: She was confined to her bed. I had to assist her in getting her meals, administering medication, making sure that she changed positions in bed, emptying her catheter bag and changing bedding and clothing as necessary. I also provided companionship to her — someone to see to her needs, talk to her, cheer her up, that kind of thing.

Q: Could you describe Ms. Keefe's physical and mental state during this period?

A: Physically, she was pretty weak and, as I said, bedridden. Mentally, though, she was quite sharp, I would say.

Q: Did she ever talk to you about Megan and Mason Finch?

A: Oh, yes, she was quite fond of them. She was very glad that things had worked out for all of them.

Q: What do you mean by "things had worked out"?

A: She felt that Mason and Megan had provided her with companionship and care over the years, and that she had reciprocated by allowing them to live with her. She also mentioned that Mason had gotten some sort of deal with his office space. Oh yeah, I almost forgot. She also said that she had given Megan a pretty sizable sum of money for her college expenses.

Q: Did Ms. Keefe ever mention anything about making a will or making specific provisions in a will?

A: No, in fact she said she didn't really need one because she wanted her nephew to get everything. Since he was her only heir, he would get everything whether she had a will or not.

Q: Did she ever mention anything about allowing Mason and Megan to continue living in the house after her death?

A: No, she didn't.

Q: Did she ever say anything about letting Mason get income from the office building after she died?

A: No.

Q: You just mentioned her nephew, Grant Keefe. Was he around at all?

A: Yes, he came to visit Ms. Keefe pretty frequently, I'd say at least twice a week.

Q: Can you describe the interactions between Ms. Keefe and her nephew?

A: They obviously felt very warmly toward each other. I never heard her laugh as much as when he was in the room with her.

Q: Can you compare these interactions to those between Mr. Finch and Ms. Keefe?

A: To be honest, I didn't see that much of Mr. Finch. He came home at around 1:00 p.m., just when I was getting off.

Q: Did you see any interactions between Mr. Finch and Grant Keefe?

A: No, I can't say I did. As far as I know, Mr. Keefe only came when I was there. I don't think he visited when Mr. Finch was around.

February 23, 2002

Dear Ms. Pronko:

As we discussed, I contacted a close friend of mine named Ralph Sanchez. My career would have been closely parallel to his if I hadn't taken time off to care for Mabel and Sandra Keefe. He's also an MFCC, and we did both our undergraduate and masters degrees together, with very comparable academic records. Ralph is very willing to sign a declaration if it will help.

Here's a summary of his earnings compared to mine over the last 12 years:

	<u>My net earnings (including rent savings)</u>	<u>Ralph's Earnings</u>
1990	\$15,000	\$12,000
1991	\$20,000	\$20,000
1992	\$30,000	\$30,000
1993	\$48,000	\$48,000
1994	\$33,000 (Mabel has stroke at mid-year)	\$24,000 (Ralph in Ph.D. program)
1995	\$45,000 (Mabel dies mid-year)	\$24,000 (Ralph in Ph.D. program)
1996	\$33,000 (begin caring for Sandra)	\$65,000
1997	\$31,000	\$67,500
1998	\$31,000	\$71,000
1999	\$35,000 (Sandra dies mid-year)	\$72,500
2000	\$45,000	\$75,000
2001	\$50,000	\$78,000

I hope this helps. Remember, I would have entered the Ph.D. program the same year as Ralph and could have had similar earnings to his. By the way, I looked into whether I could enter the University of Columbia's Ph.D. program this coming year, and

learned that the costs of doing so would be prohibitive at this point. In 1994 they would have waived tuition and even paid me a stipend. That program is no longer available.

Thanks,

Mason Finch

**TUESDAY AFTERNOON
FEBRUARY 26, 2002**



**California
Bar
Examination**

Performance Test A

LIBRARY

ESTATE OF KEEFE

LIBRARY

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RIGANTI v. McELHINNEY
Court of Appeal of Columbia (1967)

This is an action for quasi-specific performance of an oral contract between plaintiffs and one James R. Trissel, now deceased, wherein plaintiffs agreed to look after Trissel's improved real property, collect the rents, and account to him for same, and to care for Trissel so long as he lived, and show respect and obedience toward him as children toward a father. For this service, attention, and care, Trissel agreed plaintiffs should have free rent of the living quarters on his property that they then occupied, and that on his death he would leave them a part of his property by his will. Although plaintiffs carried out their part of the agreement, decedent failed to provide for them in his will.

The court rendered judgment in favor of plaintiffs. Defendant, Muriel McElhinney, niece of Trissel and the residuary devisee and legatee under the will, has appealed.

The judgment decrees, *inter alia*, that plaintiffs have quasi-specific performance of an oral agreement with Trissel; that plaintiffs are the sole and only beneficial and equitable owners of the improved real property here in question; that defendant has no right, title, interest, or estate whatsoever in and to said real property or the rents, issues, and profits therefrom, and that she and her heirs, representatives, transferees, or assigns, and each of them, is permanently restrained and enjoined from claiming or asserting any right, title, interest, claim, or estate whatsoever in, to, or over said real property.

Defendant pled the statute of frauds as embodied in Probate Code section 150 and the statute of limitations. But even though the agreement is oral, sufficient facts may be shown to take the case out of the statute of frauds.

Where a contract is within the statute of frauds, as it is here, the mere rendition of services is not usually such a part performance of a verbal agreement as will relieve the contract from the operation of the statute. If the services are of such a peculiar character, however, that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, and if the plaintiff, after the performance of the services, could not be restored

to the situation in which he was before the rendition of the services, it is such a part performance of the verbal agreement as will remove the contract from the rule. Equity, where other objections are not present, will decree specific performance. But in such cases the reason for the interposition of equity is quite obvious. The plaintiff has rendered services of extraordinary and exceptional character, such service as in contemplation of the parties was not to be compensated for in money, and as in contemplation of law, cannot be compensated for in money; therefore, by no action at law could a plaintiff be restored to his original position. It would be in the nature of a fraud upon him to deny him any relief, and, the law failing by reason of its universality, equity, to promote justice, makes good its imperfections.

Applying these principles to the facts as found by the trial court, we conclude the judgment must be affirmed.

Plaintiffs had been living in Trissel's downstairs duplex at 623 South Catalina Avenue for a little more than five years when the oral agreement here in question was entered into. They had ample time and opportunity to get well acquainted and had apparently developed confidence and respect for each other. Trissel was without immediate family except for a son with whom his relations were not friendly and with whom he seldom communicated. His health was not good and he faced surgery. He was then 62 years of age. In these circumstances Trissel no doubt felt alone in the world and in need of "a family" who would take an interest in him and look after his needs and welfare, and treat him like a father. It seems that over the next two years plaintiffs gave Trissel the care and attention he needed and wanted and served him as though they were members of his family. He recognized this by referring to plaintiffs as "his kids" and stating to a friend that they were closer to him than the members of his own family had ever been. These services and this type of devotion for the rest of Trissel's life were of such a peculiar character that it was impossible to estimate their value by any pecuniary standard. Furthermore, it is evident that the parties did not intend to measure the value of these services by any such standard, for if they had so intended they could have fixed a fee therefor just as they had agreed that free rent would compensate for plaintiffs' taking care of Trissel's rental units and the collection of the rentals.

Having special skills as a mechanic and in certain trades of the building industry, Wade Riganti could have improved his station in life by leaving Trissel's living accommodations and "walking away" from his and his wife's obligations under their agreement with Trissel. But they did not do that. They honored their commitment with Trissel. As a result, plaintiffs, after the performance of their services, could not be restored to the situation in which they were before the rendition of the services. The failure therefore of Trissel to leave his will as agreed works a fraud upon plaintiffs and serves to remove the oral agreement from the statute of frauds. Equity then steps in, as it did in this case, and decrees what we call "quasi-specific" performance to avoid the perpetration of a fraud upon plaintiffs and unjust enrichment of defendant. Of course, equitable relief should not be granted where it would work a gross injustice upon innocent third parties. No such problem is presented in the case at bench, for the trial court drew the conclusion, *inter alia*, that plaintiffs were entitled to quasi-specific performance "to avoid . . . unjust enrichment of defendant."

There is no merit in defendant's suggestion that plaintiffs failed to show that the consideration rendered by them was adequate. It sufficiently appears that there was adequate consideration for the contract, for the extent of the consideration is to be measured by the breadth of the undertaking rather than by the eventuality. Plaintiffs might have had to serve and nurse Trissel for many years. Each party to the agreement knowingly stood to lose or gain by that contingency.

We can also dispose of the statute of limitations argument. An action for quasi-specific performance accrues on the death of the person who breached the agreement. Where quasi-specific performance by declaration of a constructive trust on real property is sought on the basis of an oral agreement pursuant to which that property was to have been left by will, a four-year period applies rather than the two-year period of limitation generally applicable to contracts not in writing.

The judgment is affirmed.

KENNEDY v. BANK OF COLUMBIA
Court of Appeal of Columbia (1965)

This appeal originated in an action brought by plaintiff against the Bank of Columbia National Trust & Savings Association, as executor of the will of Thomas J. McDermott, deceased (hereinafter referred to as executor). The complaint contained a single cause of action for quasi-specific performance of an alleged oral contract between plaintiff and decedent, by which decedent agreed to devise and bequeath his property to plaintiff by his will as compensation for personal services rendered and to impose a constructive trust upon the property. Executor filed a motion for summary judgment. The motion was granted, and judgment was entered.

The allegations of the complaint upon which plaintiff's case must stand or fall are these: On or about May 1, 1941, decedent offered to employ plaintiff in his home as a domestic servant and as an assistant in his retail gasoline station business, and orally promised that, if she would perform services for him and his family and would remain at Bakersfield and assist him in building up his business, he would execute an irrevocable will leaving her his entire estate; prior to May 1, 1941, plaintiff was a healthy woman and used her time to care for her own household and to earn money working at various tasks; plaintiff accepted decedent's offer of employment and worked for him substantially all of the time from May 1, 1941 until about June 15, 1953, at which time decedent orally informed her that he was retiring from business and he would no longer need her services, but that a will theretofore made by him in her favor would remain irrevocable.

Further, plaintiff alleged that, in order to fulfill her portion of said oral agreement between the parties, she gave up most of her own social life, opportunities to move to other cities with her husband, and opportunities to work for other persons so as to assist her husband in accumulating savings and property of their own. In general, plaintiff alleged, in reliance upon the oral agreement of decedent to leave all of his property to her by will upon his death, she put aside most of her personal pleasures, comforts, and affairs, and forsook many of her friends while she was performing services as housekeeper and assistant to decedent in his business.

Plaintiff alleged that in doing all of these things she was acting in reliance upon the promise of decedent to make her beneficiary of his will, and upon his promise that he would not change said will. Had it not been for such oral promises plaintiff would not have performed said services without receiving compensation therefor, which plaintiff did not receive, and were it not for said promises plaintiff would not have altered her way of life in the manner in which she did.

Plaintiff further alleged that the nature of her services and contributions was such that compensation therefor may not be measured, nor would compensation for services rendered be fair and reasonable under the circumstances; nor was it the intent of the parties that compensation be measured except by the total value of decedent's estate. Plaintiff alleged that she has no adequate or speedy remedy at law.

Executor filed a motion for summary judgment on the ground that the alleged contract is oral and unenforceable under our statute of frauds, section 150 of the Probate Code. The principal concern on this appeal is whether plaintiff has alleged evidence sufficient to demonstrate that triable issues of fact exist in this action.

In order to enforce an oral contract to bequeath or devise property in equity by quasi-specific performance, it must be shown that the contract is definite and certain, the consideration adequate, the contract is founded on good morals and not against public policy, the character of the services is such that a money payment would not furnish adequate compensation to the plaintiff, there is such a change in the plaintiff's condition and relations in reliance on the contract that a refusal to complete the contract would be a fraud upon him, and the remedy asked for is not harsh, oppressive, or unjust to innocent third parties.

The doctrine of estoppel, which lifts an agreement to make a will out of the operation of the statute of frauds, is based on either of two grounds. It has been applied where an unconscionable injury would result from denying enforcement after one party has been induced to make a detrimental change of position in reliance upon the oral agreement. It has also been applied where unjust enrichment would result if the party who has received the benefits of the performance of the other were allowed to invoke the statute.

Courts have found a detrimental change of position where there is a family relationship or close friendship, and the decedent has turned to the plaintiff for care, solace, comfort, and companionship. Oftentimes, at the decedent's supplication, the plaintiff has moved from an established home, leaving an established position or business in his or her hometown or state, to make a residence in the home of the decedent far from friends and family, and devoting himself or herself with dedicated care to the needs of the decedent, sometimes until the death of the decedent. Where the services rendered by the plaintiff consisted in nursing and caring for a person enfeebled and suffering from a horrible disease, requiring constant and unceasing watchfulness, harrowing to the mind, destructive to the peace and comfort of the one performing the services, and possibly injurious to the health, it has been held that it is impossible to estimate their value by any pecuniary standard; and where it is evident that the decedent did not intend so to measure them, it is out of the power of any court, after the performance of such services, to restore the plaintiff to the situation in which he was before the contract was made or to compensate him therefor in damages.

Plaintiff in this case has not submitted evidence sufficient to create triable issues as to either ground. The best description of the nature of the services that plaintiff can make is that she acted as a domestic servant and as an assistant in the retail gasoline station business operated by decedent. The services of both a domestic servant and a gasoline station assistant may be adequately compensated for in money. Such services are neither peculiar, nor exceptional, nor unique. They are performed for wages by thousands of employees similarly situated. It is not alleged that plaintiff made her home with decedent; or that she occupied a close or continuing familial relationship with him; or that she attended to his personal needs; or that she nursed him through any illness; or that she did anything that was "harrowing to the mind" or "destructive to her peace and comfort" or "injurious to her health" for which money cannot compensate. The allegation in the complaint that the nature of the services was such that compensation therefor may not be measured is a mere conclusion.

The allegations of the declaration that plaintiff gave up her social life, opportunities to move to other cities and to work for other persons, opportunities to

assist her husband in accumulating savings and property of their own, and that she put aside most of her personal pleasures and forsook many of her friends are not sufficient.

Nor does the declaration establish sufficient facts to show that decedent or anyone else will be unjustly enriched if the purported oral contract is not enforced. There are no allegations that services rendered to decedent, either in his household as a domestic servant or in his service station business, substantially contributed to the value of the business or to the assets that comprise the estate. No unjust enrichment results, or may be implied, from mere allegations that plaintiff performed services of an impersonal nature for decedent.

We conclude that there are no triable issues of fact as to the inapplicability of the statute of frauds. The grant of the motion for summary judgment is affirmed.

HORSTMANN v. SHELDON
Court of Appeal of Columbia (1962)

Plaintiff, Ella Horstmann, brought this action to establish a trust in real and personal property held in the estate of her deceased mother, Bertha Horstmann. The complaint alleged that "on numerous occasions during the approximately 20 years before decedent's death, decedent urged plaintiff to reside with decedent and care for decedent; that decedent offered if plaintiff would so reside with and care for decedent and not undertake to obtain regular gainful employment outside the home of decedent, decedent would provide a home for plaintiff during the lifetime of decedent and would by a will leave the home of decedent, including the real property upon which it was situated and the furniture and furnishings therein, to plaintiff." The complaint further alleged that "plaintiff accepted each of decedent's offers and proposals and did all things required to be done in compliance therewith; that in connection therewith plaintiff refrained from undertaking any general employment outside the home and resided with decedent and cared for her and for her property for many years up to the time of the death of decedent; that during all of the aforesaid period of time decedent reiterated the aforesaid promises on numerous occasions." Plaintiff further alleged that she received no compensation for her services, and that decedent breached the alleged agreement by her will naming her brother-in-law, defendant George Sheldon, sole devisee and legatee of decedent's entire estate and the executor of her will.

The answer denied the existence of the contract and affirmatively asserted that plaintiff had been entirely supported by decedent during her lifetime.

At trial, plaintiff testified consistent with her complaint. In addition, several witnesses testified to extensive personal services rendered by plaintiff to decedent, including nursing and personal care, cooking, housework, serving meals, gardening, cutting wood, house repairs, and a multitude of other duties and responsibilities relating to the premises where the parties lived.

The trial court found the existence of the contract as alleged by plaintiff, and that plaintiff had fully performed her part of the bargain but that decedent had not performed

her part of the agreement. The judgment imposed a trust upon the home property for the lifetime of plaintiff and also allowed her the life use of certain personal property.

The chief contention of defendant on appeal is that the evidence is insufficient to support the judgment. The record, however, is replete with evidence to support the making of the agreement between plaintiff and decedent and the full performance of the contract by plaintiff. Under long established rules it is not for this court to review the evidence and determine its weight and sufficiency. Where, as here, there is substantial evidence in the record to support the judgment, it will not be disturbed on appeal in the absence of some error requiring reversal on other grounds.

Defendant also urged that plaintiff filed no claim against decedent's estate and therefore the complaint does not state a cause of action. There is no merit in this contention, however. Plaintiff's suit here is not one for the recovery of damages for breach of contract, nor in quantum meruit for the value of her services. Plaintiff's suit is in equity for the purpose of enforcing her contract by having defendant declared trustee of the described property for plaintiff's benefit. She seeks no relief at law but only in equity, and under such a pleading no claim against the estate of the decedent need be filed.

Another question presented by this appeal is whether our statute of frauds, Probate Code section 150, bars the enforcement of plaintiff's contract. We conclude that it does not.

The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may contribute to the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract, or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute.

At the time of trial, plaintiff was 63 years of age. The understanding or agreement between plaintiff and decedent commenced about 1926, and from that date to the date of decedent's death plaintiff had been engaged in the performance of her part of the bargain. As the trial court found, many of the years of her youth and all of the years of her maturity were spent in the care and maintenance of decedent. The

agreement was breached at a time when plaintiff was approaching the later years of her life. It can hardly be said that to permit this would not result in unconscionable injury to plaintiff. Having made this finding, we need not address the second prong.

If plaintiff is not permitted to pursue her remedy in a court of equity, she would be relegated to an action at law for damages for the breach of her contract, or left to pursue her quasi-contractual remedy for the value of services rendered. Neither is adequate for the breach of a contract to leave property by will in exchange for services of a peculiar nature involving the assumption or continuation of a close family relationship.

The judgment is affirmed.