

This case involves a dispute between a devisee under a Will and a relative of the testatrix claiming under an oral agreement. The Virginia Supreme Court applied the Virginia Statute of Frauds [Virginia Code § 11-2] and the "Dead Man's Statute [Virginia Code § 8.01-397] to the facts of this case.

In an appellate proceeding the facts of the case are stated in the light most favorable to the prevailing party at trial. William Ray Phillips [Phillips] grew up in Sussex County. He lived with his parents near the farm of his uncle and aunt, Wayland and Margaret Council. At the age of ten, Phillips moved to the Council home and lived with them. He helped with farm work until he graduated from high school. The Councils had no children and Phillips was described by another relative as like a son to them.

In 1977, Wayland Council asked Phillips to come to the farm to discuss a proposal. During the conference at the kitchen table, Wayland Council proposed that Phillips move to the farm. The Councils proposed to sell Phillips a parcel of land on which he could build a home for his family. Phillips would work on the farm and assist his uncle until the uncle's retirement in 1980.

After the uncle's retirement, Phillips would take over the farming operation, pay rent to the Councils for the land, machinery and farm equipment and a wage to Wayland for any farm work he performed. Phillips was also asked to be available for any business or personal help the Councils might need in their later years. In return for Phillips help, the Councils would leave him their assets real and personal when the survivor among them died.

This agreement was entirely oral and no written record of it ever existed. No one else was present at the meeting between the Councils and Phillips.

Phillips sold his existing home and moved to the farm near the Council's. He performed the agreement outlined above

In 1982, Wayland Council died and his wife probated her husband's Will. At the clerk's office, Margaret Council informed Phillips that her will was exactly the same as her husband's. [In estate planning this type of will is often called a mirror will.]

After Wayland's death, his widow, Margaret, became angry, very eccentric, and very reclusive. In 1992, she gave Phillips a general durable financial power of attorney, but revoked it in 1996. She also changed her Will and informed Phillips that there were changes in her estate plan. Margaret died on April 6, 2005.

Margaret Council's Will was admitted to probate and except for a few household furnishings, all of her real and personal property was bequeathed to the Virginia Home for Boys in Richmond, Inc.

Phillips filed a complaint in the circuit court naming the Virginia Home and the Executrix of Margaret Council's Will as defendants. He sought imposition of a trust on Margaret's assets and specific performance of the parole agreement he made with the Councils in 1977. [A parole contact is one that is not in writing.] Phillips did not contest the validity of Margaret Council's

second Will that was admitted to probate nor her testamentary capacity to sign the second Will.

The circuit court heard the evidence, reviewed the briefs and arguments of counsel and by a memorandum opinion ruled in Phillips' favor. The trial court found that his part performance of the parol agreement was sufficient to take the case out of the Statute of Frauds and the existence of the agreement between the Council's and Phillips was sufficiently corroborated by circumstantial evidence. The trial court issued an order directing transfer to Phillips all the net personal estate and real property of Margaret Council.

On appeal, the Virginia Supreme Court analyzed the Virginia Statute of Frauds and the Dead Man's Statute and reversed the lower court.

The Virginia Statute of Frauds's is found in the Code of Virginia § 11-2 and provides in pertinent part:

Code § 11-2 When written evidence required to maintain action.

Unless a promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, is in writing and signed by the party to be charged or his agent, no action shall be brought in any of the following cases:

6. Upon the contract for the sale of real estate, or for the lease thereof for more than a year; ...

This section has been repeatedly been held applicable to oral contracts to devise real estate.

A parol contract to devise land may be taken out of the Statute of Frauds by evidence of part performance on the promisee's part. To prevail, the promisee must establish: (1) that the parol agreement relied on is "certain and definite in its terms," (2) that his acts of part performance were done "in pursuance of the agreement proved," and (3) that the agreement has been "so far executed that a refusal of full execution would operate a fraud" upon him. [Clark v. Atkins, 188 VA 668, 674-675 (1949)]

The Virginia Home contended that Phillips' evidence did not take the case out of the Statute of Frauds because he failed to show proof of an agreement.

Phillips contended that circumstantial evidence abundantly corroborates the existence of an agreement.

Virginia's Dead Man Statue is found at Virginia Code § 8.01-397 and provides in part:

Corroboration required and evidence receivable when one party incapable of testifying. In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator or heir, or other representative of the persona so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony.

At common law, when one party who would have been a party to the litigation died, the other party to the litigation was disqualified as a witness in his own behalf on the ground of self-interest. The Dead Man's Statute substituted the more flexible requirement that the testimony of the surviving litigant-witness be corroborated by an independent witness..

The Virginia Supreme Court noted that it is well established that corroboration may be shown by circumstantial evidence, and that not every point must be corroborated but need only serve to strengthen the surviving litigant-witness' account. Nevertheless, one essential requirement is implicit in all Virginia cases: evidence, to be corroborative must be independent of the surviving litigant-witness. It may come from any other competent witness or legal source, but it must not come from the interested party.

The Virginia Home argued that the trial record is devoid of any independent evidence substantiating the agreement with Phillips. Without independent evidence at trial substantiating the agreement between Phillips and the Council's, Phillips could not meet the exception to the Statute of Frauds and his claim to the proceeds of Margaret Council's estate was denied.

The moral of this story:

To avoid this result, Phillips or the Council's could have put their agreement in writing. Sometimes a little legal help and advice can go a long way to ensuring the result originally intended by the parties.