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Contracts of the Dead: When Should They Haunt the Living?

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CONTRACTS OF THE DEAD: WHEN SHOULD THEY HAUNT THE LIVING?

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ABSTRACT

Contracting parties can negotiate death and expressly deal with it in their written contracts. They seldom do, perhaps because of social taboos about discussing death. When the agreement fails to directly say whether the contract lives or dies upon an obligor's death, two bedrock principles of contract law conflict. On the one hand, serious agreements should be enforced; on the other hand, you should not be forced into a contract with a stranger. An English court in the days of Shakespeare established rules, and many courts still use those rules and require a decedent's children or other successors to fulfill farming, construction, and various other contractual obligations of the dead.

Economic life is different from 400 years ago in England. Occupations are less often "inherited." Today, children and other successors often make their own way in the world unencumbered by the vocational and geographic choices of their parents. In many situations today, requiring a child or other successor to imitate the deceased, and forcing the surviving contract party to accept performance from an out-of-town novice, is commercial senselessness. This Article proposes an ascribed-intent approach for dealing with many contracts of the dead.

"No one can trace up this branch of the law very far without becoming entangled in a thicket, from which [it will be difficult to extricate]."[1]

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1. Dickinson v. Calahan's Adm'rs, 19 Pa. 227, 231 (1852), *quoted in* Brearton v. De Witt, 234 N.Y.S. 716, 718 (App. Div. 1929), *rev'd*, 170 N.E. 119, 121 (N.Y. 1930).

INTRODUCTION

Before the age of penicillin, Doctor DeWitt negligently or intentionally injected a patient, Mae Brearton, with the syphilis germ.[2] As part of the settlement, Doctor DeWitt agreed to provide medical care to Brearton.[3] Doctor Dewitt died fifteen months after signing the settlement, and the court decided that the doctor's estate had no obligation to arrange for, or pay for, any future medical care for Brearton.[4]

Arthur Roccamonte was a married man with two children who told his mistress that he would support her financially for the rest of her life.[5] On Arthur's death, over the objections of his surviving wife and children, a court concluded that Arthur's oral extramarital promise survived his death, and his estate must promptly pay his mistress a lump sum approximating the total cost of supporting her for the rest of her life.[6]

Shortly before her death, Glen Altman agreed to spend $2.3 million for a Park Avenue co-op apartment in Manhattan for herself and her two dogs. She did not even survive until the closing, and she and her two dogs never moved in.[7] Her surviving family apparently had no need for a $2.3 million apartment and simply requested the deposit back. The court held the family liable for damages of almost a quarter-million dollars because they did not promptly pay the balance of over $2 million.[8]

Welcome to the centuries-old thicket of life and death decisions about executory contracts of the dead. This thicket is haunted with challenging cases. The fact patterns are as varied as the economic transactions people create,[9] and two bedrock tenets of contract law conflict. On the one hand, courts should enforce

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2. *See Brearton*, 170 N.E. at 121. Before 1943 and the introduction of penicillin, treatment for syphilis patients could include infecting the patient with malaria (and then attempting to cure the malaria with quinine) or using mercury or arsenic. John Frith, FRD, *Syphilis - Its Early History and Treatment Until Penicillin and the Debate on Its Origin*, 20 J. MIL. & VETERANS' HEALTH, Nov. 2012, at 49, 54; *see also* John Frith FRD, *Arsenic – the "Poison of Kings" and the "Savior of Syphilis*," 21 J. MIL. & VETERANS' HEALTH, Dec. 2013, at 11.

3. *See Brearton*, 170 N.E. at 120 (explaining that Doctor DeWitt also agreed to pay Brearton $1,000 a month for her life).

4. *See id.* ("The law . . . has no substitute for the special personal element contracted for."); *see also infra* notes 229–233 and accompanying text (asserting that Brearton could have prevailed under other contract doctrines).

5. *See* Sopko v. Slackman (*In re* Estate of Roccamonte), 808 A.2d 838, 840–41 (N.J. 2002), *superseded by statute*, N.J. STAT ANN. § 25:1-5(h) (West, Westlaw through L.2018, c. 93 and J.R. No. 9)).

6. *See id.* at 844 (enforcing the oral contract, in part because the mistress's services qualified as legal consideration); *id.* at 847 (describing the authority for awarding a lump-sum payment). In 2010, the New Jersey legislature amended its statute of frauds to prohibit enforcement of oral palimony agreements. *See* Maeker v. Ross, 99 A.3d 795, 797 (N.J. 2014) (citing § 25:01-5(h) (Westlaw)).

7. *See* Warner v. Kaplan, 892 N.Y.S.2d 311, 313 (App. Div. 2009).

8. *See id.* at 316; *see also infra* notes 226–228 and accompanying text (arguing that the court could have determined the damages in a more reasonable manner).

9. *See* CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 44 (Wolters Kluwer Law & Bus. in N.Y. 7th ed. 2012) (1976) ("[T]he number of types of . . . contract[s] is staggeringly large. . . . ").

serious agreements,[10] but on the other hand, "neither party [should be] required to accept performance by strangers."[11] The consequences can cut either way. Sometimes an executory contract's continuance would be a curse for the decedent's family,[12] and sometimes it would be a blessing.[13]

Over 400 years ago, when the English economy was largely agrarian[14] and when "[o]ccupations were usually inherited,"[15] an English court set the foundation with a general rule and an exception. The general rule was that the executor (or other successor) was obligated to fulfill the contracts of the dead,[16] and the only exception was for contracts "to be performed by *the person of* the testator, which [the executor] cannot perform."[17] As examples of this 400-year old foundation's applications today, some courts automatically presume that obligations to perform farming or construction duties survive death, so that the decedent's family or other successors must farm, construct, or otherwise perform in place of the decedent.[18] In summarizing nearly four centuries of case law, a modern court stated, "Few contracts are terminated by death in the absence of explicit provisions [in the contract] to the contrary."[19]

This Article asserts that courts can reach unfortunate results when they rely solely upon these centuries-old, single-factor rules or presumptions.[20] Instead, the

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10. *See infra* notes 66–73 and accompanying text.

11. Vogel v. Melish, 203 N.E.2d 411, 413 (Ill. 1964); *see also* JOSEPH M. PERILLO, CONTRACTS § 18.28 (Thomson Reuters 7th ed. 2014) (1970) ("*Delectus Personae* was the Law Latin catch phrase to indicate that a party had a right to choose the persons with whom to deal.").

12. *See, e.g.*, Unit Vending Corp. v. Lacas, 190 A.2d 298 (Pa. 1963) (describing situation in which father's will included a clear invitation for sons to move from Albania to Philadelphia to operate the father's diner, but the sons declined).

13. *See, e.g.*, Horning v. Ladd, 321 P.2d 795, 796 (Cal. Dist. Ct. App. 1958) (describing estate's voluntarily tender of payments and filing a lawsuit to enforce contract under which decedent agreed to purchase real estate in exchange for payments over time); Ames v. Sayler, 642 N.E.2d 1340, 1341, 1344 (Ill. App. Ct. 1994) (stating that this issue can cut both ways and describing surviving family's attempt to continue farming the land under sharecropping agreement; property owners eventually contacted the sheriff to evict the decedent's relatives from the land).

14. *See* Tim Lambert, *Life in 16th Century England*, WORLD HIST. ENCYCLOPEDIA, www.localhistories.org/tudor.html (last updated 2018) ("In 16th century England most of the population lived in small villages and made their living from farming.").

15. Jon D. Wisman & Nicholas Reksten, *Rising Job Complexity and the Need for Government Guaranteed Work and Training* (referring generally to "pre-modern agricultural societies" with "low levels of technology and specialization"), *in* THE JOB GUARANTEE 5, 7 (Michael J. Murray & Mathew Forstater eds., 2013).

16. *See* Hyde v. Dean and Canons of Windsor, (1597) 78 Eng. Rep. 798, 798; Cro. Eliz. 552, 553.

17. *Id.* (emphasis added).

18. *See infra* Section II.C.1.c.

19. Shutt v. Butner, 303 S.E.2d 399, 401 (N.C. Ct. App. 1983); *see also* Horning v. Ladd, 321 P.2d 795, 798 (Cal. Dist. Ct. App. 1958) ("Contracts do not die with the contractor (with a few exceptions . . .) unless they contain [a] provision to that effect."), *quoted in* Burka v. Patrick, 366 A.2d 1070, 1073 (Md. Ct. Spec. App. 1976). Other courts have stated, "[T]he line of demarcation" between contracts which terminate at death, and those which survive "is not very clearly marked." Carlock v. La Salle Extension Univ., 185 F.2d 594, 595 (7th Cir. 1950) (quoting 12 AM. JUR. *Contracts* § 375); *accord* Burch v. J.D. Bush & Co., 106 S.E. 489, 490 (N.C. 1921); *see also* 14 JAMES P. NEHF, CORBIN ON CONTRACTS § 75.2 (Joseph M. Perillo ed., Matthew Bender & Co., Inc. rev. ed. 2001) [hereinafter CORBIN ON CONTRACTS] ("[I]n the abstract a contract cannot easily be categorized as personal or not personal.").

20. *See, e.g.*, supra notes 2–8 and accompanying text.

courts should decide challenging cases with what might be described as an ascribed-intent approach that would allow courts to consider post-sixteenth century economic realities, such as occupational mobility, geographic mobility, labor and task specialization, and today's nearly boundless availability of information. A couple of reported cases arguably support such an approach, but neither the cases nor the existing commentary indicate that these cases could be the bedrock for a distinct method of analysis.[21]

Part I of this Article describes why courts often must decide whether a contract lives or dies upon someone's death. Reasons include that contracting parties often do not negotiate death terms, courts do not interpret boilerplate contract provisions consistently and in a way that resolves these disputes, and the conflicting tenets of contract law invite uncertainty.

Part II discusses three approaches courts typically use to resolve these disputes. The first and second approaches demonstrate that some courts still use the 400-year old foundation and latch onto a single, crusty adage without rigorously analyzing all the circumstances. The third approach relies upon the parties clearly expressing their intent about the consequences of death, which occurs with disappointing frequency in contract documents.

Part III proposes a reorganized method of analysis beginning with a search for the clearly expressed intent of the parties. If the hunt for expressed intent fails, a subject matter approach can decide cases clearly falling at one end or the other along a spectrum. At one end of the spectrum, the contract would survive when fulfilling the decedent's obligation involves merely ministerial tasks, such as paying part of the decedent's money or property. At the other end of the spectrum, the contract would terminate when it is doubtful that anyone else could do the job in the same way as the decedent, such as with uniquely gifted and talented painters, singers, or actors.

For the remaining cases, Part III suggests courts use what might be described as an ascribed-intent approach, developed in this Article. This Part discusses a variety of key factors courts could consider under this approach such as the greater occupational and geographic mobility, increased task specialization, and the expanded opportunities to obtain information and find service providers in the modern global economy. These factors support this Article's view that the more reasonable result in these cases will be to discharge the decedent's remaining contractual duties more often than centuries ago. Part III also asserts that if courts move past the old, rigid presumptions, they may be more likely to apply flexible contract doctrines to reach reasonable results in certain cases.

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21. *See, e.g.*, 30 RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS BY SAMUEL WILLISTON § 77:75 (West, a Thomson Bus. 4th ed. 2004) [hereinafter WILLISTON ON CONTRACTS] (discussing briefly *Unit Vending Corp. v. Lacas*, 190 A.2d 298 (Pa. 1963) under the generic heading "Actions surviving death"); CORBIN ON CONTRACTS**,** *supra* note 19, § 75.1, at 122 (using neither the phrase "ascribed intent" nor discussing economic trends but describing the *Unit Vending* case).

I. WHY COURTS MUST OFTEN DEAL WITH CONTRACTS OF THE DEAD

A. Denying Death in Negotiations

When negotiating contracts, contracting parties apparently seldom discuss their own deaths. The Ninth Circuit observed, "While always a court must seek to divine the intent of the parties, it may be doubtful if the parties here ever put their minds to the question of 'suppose Ulmann, Sr., dies.' . . . The use of words of survivorship generally has gone out of fashion in ordinary contracts."[22]

Americans engage in death denial[23] and may believe in "the taboo of death talk."[24] "[D]eath is a thought modern [persons] will do almost anything to avoid. . . ."[25] When we do discuss death, the topic inspires an amazing assortment of euphemisms, such as "guess who's not going to shop at Wal-Mart anymore?"[26] Over half of adults in the U.S. have not signed a last will and testament.[27] And estate planning should be easier because there is no need to discuss death with a business associate or adversary. Human nature likely inspires us to focus more on self-preservation and the continuation of humanity than the financial consequences that may visit the living after our death.[28]

In contract negotiations, if you raise the issue of what happens if you die before you fully perform the contract, would that be a sign of weakness? If you insist on negotiating what happens if the other party dies before performing all the contractual duties, does that make you a ghoul? Are you being morbid? Would it create bad karma? Would the other side say, "Can't we talk about something more pleasant?"[29] Some believe that discussing death will hasten it.[30]

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22. Ulmann v. Sunset-McKee Co., 221 F.2d 128, 133 (9th Cir. 1955).

23. *See* Tanya K. Hernández, *The Property of Death*, 60 UNIV. PITT. L. REV. 971, 1026 n.301 (1999); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1050 (2004).

24. Hernández, *supra* note 23, at 1026.

25. GERRY W. BEYER, STATUTORILY ENACTED ESTATE PLANNING FORMS (1990) [hereinafter ESTATE PLANNING FORMS], *as reprinted in* GERRY W. BEYER, TEACHING MATERIALS ON ESTATE PLANNING § 1(C), at 7 (Thomson Reuters 4th ed. 2013) (1995) (second alteration in original) (quoting Thomas L. Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376, 377 (1969)).

26. Richard Nordquist, *Never Say "Die": Euphemisms for Death*, THOUGHTCO., https://www.thoughtco.com./euphemisms-for-death-1692674?print (last updated Mar. 07, 2017); *see also, e.g.*, Esther Heerema, *Euphemisms for Dead, Death, and Dying: Are They Helpful or Harmful?*, VERYWELL, https://www.verywell.com/euphemisms-for-dead-death-or-dying-1131903?print (last updated Aug. 29, 2018).

27. *See* ESTATE PLANNING FORMS**,** *supra* note 25, § 1(C), at 5.

28. *See generally* Timothy L. Fort, *Corporate Makahiki: The Governing Telos of Peace*, 38 AM. BUS. L.J. 301, 327 (2001) ("[I]n all [human societies,] self-preservation is generally accepted as a proper motive. . . . All human societies regard the procreation of a new human life as in itself a good thing. . . . " (quoting JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 83 (1980))).

29. ROZ CHAST, CAN'T WE TALK ABOUT SOMETHING MORE PLEASANT? (2014).

30. *See* ESTATE PLANNING FORMS, *supra* note 25 ("In the past, many people believed that they would not live long after executing a will. . . . For many, this belief persists today.").

B. Boilerplate Puzzles: Were the Parties Thinking Death?

Even if a contracting party thinks about post-mortem consequences, that party may believe a boilerplate clause in the contract addresses the topic, and another more specific clause in the contract would be redundant. Many contracts refer to the parties and their "successors or assigns"[31] or include a miscellaneous clause stating this "agreement . . . shall bind the heirs, executors and administrators of the parties."[32] Parties might be surprised to discover that such language often will *not* cause the contract to survive the death of a party.

For example, in *Browne v. Fairhall*, the court decided that the "express stipulation in the agreement that it shall bind the heirs, executors and administrators of the parties" did not obligate the heirs or other successors to perform the decedent's remaining contractual duties.[33] In order to satisfy the maxim that words in a contract must be given some effect, and not be meaningless,[34] the court indicated the boilerplate meant the heirs or other successors would have been liable if the decedent breached the contract before death.[35]

C. Contract Law Flexibility Promotes Uncertainty Rather than Peace

Under estate law, often the estate simply steps into the decedent's shoes. For example, the personal representative, on behalf of the estate, is entitled to take possession and control of the decedent's assets.[36] Also, the decedent's creditors can

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31. *See, e.g.*, Smith v. Zuckman, 282 N.W. 269, 270 (Minn. 1938).

32. *See, e.g.*, Browne v. Fairhall, 100 N.E. 556, 557 (Mass. 1913).

33. *Id.*, *cited in* 17A AM. JUR. 2d *Contracts* § 656, at 636 n.6 (2016); *see also* Cal. Packing Corp. v. Lopez, 279 P. 664, 665 (Cal. 1929); Frankel v. Bernstein, 334 So.2d 37, 37 (Fla. Dist. Ct. App. 1976); Vogel v. Melish, 203 N.E.2d 411, 412 (Ill. 1964); *Smith*, 282 N.W. 269; Estate of Stormer, 123 A.2d 627, 630 (Pa. 1956). *But see In re* Estate of Sauder, 156 P.3d 1204, 1215 (Kan. 2007) (reversing the lower court and concluding that boilerplate language expressed the parties' intent that the contract survive the death of one party); Stein v. Bruce, 366 S.W.2d 732, 734 (Mo. Ct. App. 1963); Warner v. Kaplan, 892 N.Y.S.2d 311, 315 (App. Div. 2009) (emphasizing that the boilerplate was the "crux" of the case); Shutt v. Butner, 303 S.E.2d 399, 401 (N.C. Ct. App. 1983).

34. Several cases support this view. *See, e.g.*, Home & Auto. Ins. Co. v. Scharli, 293 N.E.2d 914, 916 (Ill. App. Ct. 1973) ("No part of a contract should be rejected as meaningless or surplusage unless absolutely necessary. The reason for the rule is that it is presumed that all the provisions of a contract are inserted deliberately and for a purpose, and that the parties to a transaction did not intend to employ language idly."); Maxus Energy Corp. v. Occidental Chem. Corp., 244 S.W.3d 875, 879 (Tex. App. 2008) ("We are to interpret the contract 'in a way that does not render any provision "illusory or meaningless."'" (quoting O'Brien v. Progressive N. Ins. Co., 785 A.2d 281, 287 (Del. 2001))). On the other hand, the Restatement takes a different view. RESTATEMENT (SECOND) OF CONTRACTS § 203 cmt. b (AM. LAW INST. 1981) ("[A] standard form may include provisions appropriate only to some of the transactions in which the form is to be used. . . . [E]ven agreements tailored to particular transactions . . . include . . . redundant or meaningless provisions.").

35. *See Browne*, 100 N.E. at 558 (relying upon *Marvel v. Philips*, 38 N.E. 1117, 1118 (Mass. 1894)).

36. *See, e.g.*, 755 ILL. COMP. STAT. 5/28-8 (Westlaw through Public Acts effective August 28, 2018, through P.A. 100-1114, of the 2018 Reg. Sess.); UNIF. PROBATE CODE § 3-709 (UNIF. LAW COMM'N 2010) ("[E]very personal representative has the right to, and shall take possession or control of the decedent's property. . . .").

enforce their claims against the assets of the decedent's estate (if the creditors follow certain reasonable procedures).[37]

In regard to contracts of the dead, however, estate law defers to the pliable doctrines of contract law. Specifically, estate law typically authorizes the decedent's estate to perform contracts that are enforceable against the estate but provides no guidance on when contracts are enforceable against an estate.[38] The personal representative, or the probate court if asked, must determine whether the estate has to fulfill the decedent's unperformed contractual duties using contract law principles. It should be noted that usually the decedent's estate, executor, heirs, beneficiaries, or other successors will be the decedent's surviving family members.[39] Thus, any surviving duties are apt to fall on the decedent's family.

Contract law is beset with conflicts. Contract law tends to support freedom of contract, specifically the view that you choose who you are in a contract with.[40] But, modern contract law also favors implying the right to delegate duties and assign rights to third parties.[41] Particularly relevant to this Article, courts historically have applied rigid, fundamental principles to resolve contract disputes; but, after the 1920s, that approach gave way to more flexible standards allowing courts greater discretion.[42] In summarizing this trend, leading contract law commentators wrote, "courts have broadened their role in interpreting agreements and in implying contractual provisions to produce what the courts consider to be just outcomes."[43]

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37. *See, e.g.*, 755 ILL. COMP. STAT. 5/18-1 to -15; UNIF. PROBATE CODE §§ 3-801 to -816 (UNIF. LAW COMM'N 2010).

38. *See, e.g.*, 755 ILL. COMP. STAT. 5/28-8(f); UNIF. PROBATE CODE § 3-715(3) (UNIF. LAW COMM'N 2010) (authorizing a personal representative to "perform, compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances").

39. Generally, the person designated in the decedent's last will and testament may petition the probate court to serve as the executor. *See, e.g.*, *id.* 5/6-8. If the last will and testament fails to name an executor, or the person named is unable or unwilling to serve, state law will list who may serve, usually beginning with the surviving spouse, and then the beneficiaries under the last will and testament and the next of kin. *See, e.g.*, *id.* 5/9-3. If the decedent had no last will and testament, state law will list who may serve as administrator of the intestate estate. *See, e.g.*, *id.* 5/9-3. And under the laws of intestacy, a state statute will provide who inherits. *See, e.g.*, *id.* 5/2-1 (generally providing that if the decedent has no surviving spouse, the decedent's property shall pass to the decedent's descendants).

40. *See* PERILLO, *supra* note 11; Sarah Abramowicz, *Childhood and the Limits of Contract*, 21 YALE J.L. & HUMAN. 37, 40 n.3 (2009) ("[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts . . . shall be held sacred and shall be enforced by Courts of justice.") (alteration in original) (quoting Printing and Numerical Registering Co. v. Sampson (1875) 19 LR Eq. 462 (Ch) at 465 (Eng.)).

41. *See* PERILLO, *supra* note 11 ("Today . . . the general proposition is that, subject to exceptions, duties are delegable.").

42. *See* KNAPP ET AL., *supra* note 9, at 9.

43. *Id.* at 555.

II. CASE LAW THICKET: ORIGINS, CONFLICTING POLICIES, AND THREE METHODS

A. 1597 Origin Story and Early Developments Which Favor Contract Survival

In *Hyde v. Dean and Canons of Windsor*, the parties failed to negotiate death; the covenant of the parties was silent about post-death duties.[44] After one party died, the surviving party sued the decedent's executor to enforce the obligation. In a one-paragraph opinion issued in 1597, the Queen's Bench established the general rule that "a covenant lies against an executor *in every case*, although he be not named."[45] The court applied this general rule and held that the executor must perform the decedent's remaining obligations.

In dictum, the court provided a two-part exception based on subject matter—a "covenant [terminates upon death if it was] . . . to be performed by *the person* of the testator [and the executor] cannot perform."[46] Unfortunately, the court provided no guidance on either (i) when an obligation was to be performed by *the person of* the original contracting party or (ii) when an executor will be unable to perform that obligation.[47] Furthermore, the court's description of the facts was negligible, referring only to a "covenant which runs and rests with the land."[48] That the case involved land is not surprising; the English economy of the time was land centric.[49] Subsequent authorities confirm that *Hyde* set the foundational legal rules for contracts of the dead,[50] and both its general rule and its subject matter exception reverberate throughout U.S. cases.

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44. Hyde v. Dean and Canons of Windsor (1597) 78 Eng. Rep. 798, 798; Cro. Eliz. 552, 552. (explaining that the covenant was silent regarding the obligations of any assignee, including an executor), *cited in* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 9.5 (Aspen Publishers 3d ed. 200), *and in* JOHN EDWARD MURRAY JR., MURRAY ON CONTRACTS § 113 (Matthew Bender & Co. 5th ed. 2011).

45. *Id.* Cro. Eliz. at 553 (emphasis added). "In its broadest usage, [the word 'covenant'] means any contract," but "[t]he term is currently used primarily with respect to promises in conveyances or other instruments relating to real estate." *Covenant*, BLACK'S LAW DICTIONARY (5th ed. 1979); *see also* Jenkins v. John Taylor Dry Goods Co., 179 S.W.2d 54, 58 (Mo. 1944) (citation omitted) ("A covenant is a promise, an agreement or a contract; formerly it was a contract under seal.").

46. *Hyde* 78 Eng. Rep. at 798 (emphasis added).

47. *See* Dickinson v. Calahan's Adm'rs, 19 Pa. 227, 231 (1852).

48. *Hyde* 78 Eng. Rep. at 798. "A covenant is said to run with the land, when not only the original parties or their representatives, but each successive owner of the land, will be entitled to its benefits, or be liable (as the case may be) to its obligation." *Covenant running the land*, BLACK'S LAW DICTIONARY (5th ed. 1979); *see also, e.g.*, Andrade v. Castell, 185 P.2d 51, 52 (Cal. App. Ct. 1947) ("[A]n option to purchase contained in a lease is a covenant running with the land. . . . "); Weintz v. Bumgarner, 434 P.2d 712, 717, 718 (Mont. 1967) (noting that a provision in a lease that it "shall bind and benefit the heirs and other successors of the owner and tenant . . . constitute[d] a 'covenant running with the land'" and was therefore enforceable against the landlord's heirs).

49. *See* KNAPP ET AL., *supra* note 9, at 344 ("[I]n the seventeenth century, land was the basis of the English economy."); Lambert, *supra* note 14.

50. *See, e.g.*, *Dickinson*, 19 Pa. at 231; Taylor v. Caldwell (1863) 122 Eng. Rep. 309, 313; 3 B. & S. 826, 835; FARNSWORTH, *supra* note 44; MURRAY, *supra* note 44; *see also* Daniel P. O'Gorman, *Solomon and Strikes: Labor Activity, the Contract Doctrine of Impossibility or Impracticability of Performance, and Federal Labor Policy*, 28 HOFSTRA LAB. & EMP. L.J. 47, 52 n.30 (2010) ("This exception is traced to *Hyde v. Dean of Windsor*."); Note, *The Fetish of Impossibility in the Law of Contracts*, 53 COLUM. L. REV. 94, 94–95 (1953) (asserting that the idea of excusing performance under a contract when it becomes

Seventeenth-century English cases reinforced *Hyde's* general rule of contract survival. In 1615, in *Quick v. Ludborrow*, a seriatim opinion, Justice Coke stated that an agreement to "build a house for another" survives the promisor's death, and the executor must build it.[51] In the 1664 case of *Walker v. Hull*, the decedent covenanted to train an apprentice in a trade.[52] The King's Bench concluded the executors "ought to see the apprentice [is] taught his trade, and if they are not of the same trade, [the executors] ought to assign him to another who is of the trade, so that [the apprentice] may be taught according to the covenant."[53]

A nineteenth-century case employed these rules to take contract survival to an extreme level. A customer ordered a grand piano forte, made a down-payment, and then waited twenty years to return to England and close the deal.[54] After twenty years, the original seller was dead, but the Queen's Bench refused to declare the contract dead. Instead, the court stated that if the seller's family was no longer in the business of making pianos, the seller's family must buy a piano and sell it to the customer. Another case listed three fact patterns in which *Hyde's* general rule applied: "if a man build[s] half a house and die[s] . . . [i]f . . . a bookseller undertake[s] to publish a work in parts, and, before the completion, die[s] . . . [and] if a man make[s] half a wheelbarrow or half a pair of shoes, and die[s]."[55] In addition to the cases that applied *Hyde's* general rule of contract survival, some centuries-old cases applied *Hyde's* subject matter exception in rather clear situations, namely

impossible or substantially more burdensome "originated with three early English cases . . . [including] *Hyde v. The Dean of Windsor*").

51. Quick v. Ludborrow (1615) 81 Eng. Rep. 25, 26; 3 Bulstrode 29, 30; *see also* Marshall v. Broadhurst (1831) 148 Eng. Rep. 1480, 1480; 1 C. & J. 403, 405. *But see* Wentworth v. Cock (1839) 113 Eng. Rep. 17, 18; 10 AD. & E. 42, 45–46 (describing one party's argument based on a "case at Liverpool [with no citation to the case] where a contract to build a lighthouse was held to be personal . . . on the ground of its being a matter of personal skill and science").

52. *See* Walker v. Hull (1664) 83 Eng. Rep. 357, 357; 1 Lev. 176, 177.

53. *Id.*; *see also Taylor* 122 Eng. Rep. at 313 (speculating that if the apprentice died, the contract would terminate because it would be impractical to force the apprentice's father to become the apprentice of the surviving contract party); The King v. Pett (1666) 89 Eng. Rep. 669, 669; 1 Show. K. B. 405, 405 (stating in another apprentice case that "a covenant to maintain is not discharged by the master's death," but also concluding that because the apprentice in this particular case became "sick [and was] chargeable to the parish," the apprentice should not be sent to the executor's parish). Some recent cases indicate that if an employer dies and the employer's personal supervision or other participation was a key part of the contract, the contract would terminate upon the employer's death. *See, e.g.*, Farnon v. Cole, 66 Cal. Rptr. 673, 676 (Ct. App. 1968); Minevitch v. Puleo, 193 N.Y.S.2d 833, 836 (App. Div. 1959). Also, several early English cases held that a decedent's obligation to pay money survived, so the executor had to pay in those situations. *See, e.g.*, Berisford v. Woodroff (1616) 79 Eng. Rep. 345, 345; Cro. Jac. 404, 404 (requiring executor to fulfill testator's promise to pay twenty pounds upon the marriage of his cousin); Sanders v. Esterby (1615) 79 Eng. Rep. 356, 356–57; Cro. Jac. 417, 417–18 (requiring executor to fulfill deceased father's promise to pay one hundred pounds upon the marriage of his daughter).

54. Siboni v. Kirkman (1836) 150 Eng. Rep. 497, 498; 1 M. & W. 418, 418–19.

55. Marshall v. Broadhurst (1831) 148 Eng. Rep. 1480, 1480–81; 1 C. & J. 403, 405–06. (observing in regard to the bookseller that "otherwise those parts which [the buyer] has purchased . . . are useless").

contracts to marry,[56] contracts for a painter to paint a painting,[57] and contracts for an author to write a book.[58]

A close reading of the language in *Hyde* suggests that the court established a broad general rule and a narrow exception. This may explain the results in many cases. *Hyde* asserts survival as the general rule in "every case," and the part of the opinion describing the exception refers to a "covenant . . . to be performed by *the person* of the testator."[59] The court's inclusion of the phrase "the person" may indicate that the exception should apply only if the testator is expected to perform the contractual obligations almost exclusively with his or her own physical or mental effort, and that any materials, other resources, or the labors of others used in these situations will be trivial. As a consequence, if materials, other resources, or the labors of others are more than trivial, then arguably the exception would not be available, and the contract would survive. This could explain why the old English cases used examples such as contracts of portrait painters and contracts of authors to demonstrate the exception.[60] Aside from the paint brushes and canvas, or the paper and ink, in these situations, the individual performs the contractual duties solo with mental and physical effort.[61] It also would explain why a contract to build a house would survive, as in *Quick v. Ludborrow*.[62] In sixteenth and seventeenth-century England, home builders primarily used stone or brick, and presumably those materials were important resources in performing those contracts.[63]

Many U.S. cases support this notion of a broad general rule of contract survival and a narrow exception. A U.S. court in 1866, quoted with approval in 1970, indicates the exception is only for deals involving rare genius and extraordinary skill: "All painters do not paint portraits like Sir Joshua Reynolds, nor landscapes like Claude Lorraine, nor do all writers write dramas like Shakespeare or fiction like Dickens. Rare genius and extraordinary skill are not transferable, and contracts for their employment are therefore personal, and cannot be assigned."[64] In 1983, a court stated, "Few contracts are terminated by death in the absence of explicit provisions

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56. *See* Hall v. Wright (1858) 120 Eng. Rep. 688 (Q.B.) 692 (Erle J) ("[T]he cause of action for breach of promise of marriage [ends] with the person and cannot be enforced by the executor.").

57. *See id.* at 690 (Compton J) (excusing performance in the case of a lifetime disability, in particular, if the painter is "struck blind"), *quoted in Taylor* 122 Eng. Rep. at 313.

58. *See Taylor* 122 Eng. Rep. at 313.

59. Hyde v. Dean and Canons of Windsor (1597) 78 Eng. Rep. 798, 798; Cro. Eliz. 552, 552 (emphasis added).

60. *See generally Taylor* 122 Eng. Rep. at 313 (discussing an author writing a book, in dictum); *Hall* 120 Eng. Rep. at 692 (Compton J) (regarding a painter, in dictum).

61. Under the *Hyde* exception, a court also would need to analyze the second element of the exception—whether the executor or other successor can perform the obligations—to decide if the exception applies. *Hyde* 78 Eng. Rep. at 798.

62. Quick v. Ludborrow (1615) 81 Eng. Rep. 25, 25; 3 Bulstrode 29, 29.

63. Tim Lambert, WORLD HIST. ENCYCLOPEDIA: *Daily Life in 17th Century England*, http://www.localhistories.org/stuart.html (last updated 2018) ("In the Middle Ages ordinary people's homes were usually made of wood. . . . [However, b]y the late 17th century even poor people usually lived in houses made of brick or stone.").

64. Taylor v. Palmer, 31 Cal. 240 (1866), *quoted in* PERILLO, *supra* note 11 at § 18.28 n.260, *and in* Macke Co. v. Pizza of Gaithersburg, Inc., 270 A.2d 645, 648 (Md. 1970).

therein to the contrary."[65] This Article asserts that the result reached with the exception, namely discharging the decedent's remaining contractual duties, should occur more frequently because of the factors discussed later in Part III, Section C(2)(d)–(e).

B. Contracts of the Dead Are at the Crossroads of Contract Law Policies

The 400-year-old English foundation favoring contract survival at death is consistent with a few bedrock contract principles. Generally, contractual liability is strict liability,[66] so the non-breaching party should receive the benefit of its bargain regardless of the circumstances. Parties contract to allocate risks, including the risk of nonperformance.[67] A breaching party usually owes money damages to the innocent party regardless of any excuses. If a party wished to be excused from performing a particular duty upon the occurrence of an event, such as death, arguably the party should have negotiated for an express condition or an appropriate *force majeure* or similar clause in the contract.[68] "The fundamental maxim is *pacta sunt servanda*--agreements must be kept."[69] Other statements of policies and rules supporting this strict liability approach include the "community's interest in having

65. Shutt v. Butner, 303 S.E.2d 399, 401 (N.C. Ct. App. 1983).

66. *See, e.g.*, Piaggio v. Somerville, 80 So. 342, 344 (Miss. 1919) ("[T]he rule is that when a party by his own contract creates a duty . . . he is bound to discharge it, although so to do should subsequently become unexpectedly burdensome or even impossible. . . . "); Paradine v. Jane (1647) 82 Eng. Rep. 897, 897; Aleyn 26, 27 ("[W]hen the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident or inevitable necessity, because he might have provided against it by his contract."), *quoted in* KNAPP ET AL., *supra* note 9, at 689; KNAPP ET AL., *supra* note 9, at 937 ("[C]ontract law is a system founded not on 'fault' but on 'strict liability' for the consequences of breach; since culpability plays no part in determining liability it should also play no part in fashioning the remedy."); PERILLO, *supra* note 11, § 13.20; C. T. Foster, Annotation, *Modern status of the rules regarding impossibility of performance as defense in action for breach of contract*, 84 A.L.R. 2d 12, § 2 (1962). Courts normally do not award punitive damages, or damages for emotional distress, for breach of contract because the cause of the breach generally is irrelevant. *See* KNAPP ET. AL., *supra* note 9, at 937.

67. *See* Burka v. Patrick, 366 A.2d 1070, 1073 (Md. Ct. Spec. App. 1976) (Holmes J.) ("One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking." (quoting Day v. United States, 245 U.S. 159, 161 (1917))); Larry T. Garvin, *Disproportionality and the Law of Consequential Damages: Default Theory and Cognitive Reality*, 59 OHIO ST. L.J. 339, 344 (1998) ("[M]uch of the purpose of contracts in practice is to diminish and allocate risks of market shifts, product and labor scarcity, and the like.").

68. *See* Stein v. Bruce, 366 S.W.2d 732, 734 (Mo. Ct. App. 1963) ("In case a party desires to be excused from performance in the event of contingencies arising, it is his duty to provide therefor in his contract."). Courts often consider the foreseeability of the events when deciding whether to excuse performance on grounds of impossibility or impracticability. *See generally* Jennifer Camero, *Mission Impracticable: The Impossibility of Commercial Impracticability*, 13 U.N.H. L. REV. 1, 13 (2015) ("The focus of foreseeability stems from the theory that a party would, or should, protect itself from a foreseeable event. . . . "). But as death is always a foreseeable risk for mortals, "the normal foreseeability test is not applicable." PERILLO, *supra* note 11, § 13.7; *see also* Hollis v. Gallagher, No. 03–11–00278–CV, 2012 WL 3793288, at *5 (Tex. App. Aug. 28, 2012) ("[T]he developers' awareness of their own mortality at the time they adopted the restrictions is not dispositive here.").

69. PERILLO, *supra* note 11, § 13.20; *accord Stein*, 366 S.W.2d at 734.

contracts enforced according to their terms,"[70] that the contracting parties are "entitled to have [their agreement] respected,"[71] the freedom of contract,[72] and an innocent party's right to collect damages based on the benefit-of-the-bargain if the other side breaches (sometimes referred to as expectation damages).[73]

On the other hand, among the rationales courts assert for discharging the remaining duties[74] and terminating a contract at death is that the decedent's survival was an implied condition,[75] or a basic assumption[76] of the contract, and terminating the contract will fulfill the probable intent of the parties.[77] Also, "[c]ontract liability stems from consent," and if an unforeseen event occurs, the parties have not consented to what happens then.[78] Additional rationales include "*Delectus Personae* . . . the Law Latin catch phrase to indicate that a party ha[s] a right to choose the persons with whom to deal,"[79] also phrased as, "neither party [is] required to accept performance by strangers to the agreement,"[80] and the notion that legal remedies will be inadequate to compensate for the decedent's unique services.[81] Finally, from an estate law perspective, if the contract is binding on the estate, "the settlement of the estate of the decedent might . . . be unduly postponed."[82]

C. Three Approaches to Decide Between Survival or Discharge

In modern times, courts and commentators sometimes recite vague and conclusory tests for distinguishing between contracts that survive the decedent's death and those that perish, often employing the ubiquitous phrase "personal services contracts" to describe contracts that terminate. The Restatement and some courts recite a "necessary" standard.[83] Specifically, the Restatement provides, "If the existence of a particular person is *necessary* for the performance of a duty," his or

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70. PERILLO, *supra* note 11, § 13.16 (quoting Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966)).

71. *In re* Burke's Estate, 244 P. 340, 342 (Cal. 1926).

72. *See* Estate of Duncan v. Kinsolving, 70 P.3d 1260, 1262 (N.M. 2003).

73. *See* KNAPP ET. AL., *supra* note 9, at 72.

74. *See generally* McDaniel v. Rose, 153 S.W.2d 828, 830 (Mo. Ct. App. 1941) (demonstrating that death can operate as a "discharge").

75. *See generally* Tex. Co. v. Hogarth Shipping Corp., 256 U.S. 619 (1921) (adopting the "implied condition" theory); Mullen v. Wafer, 480 S.W.2d 332, 334 (Ark. 1972) (involving the purchase of an accounting practice); Buccini v. Paterno Constr. Co., 170 N.E. 910, 911 (N.Y. 1930) (Cardozo, C.J.); Taylor v. Caldwell (1863) 122 Eng. Rep. 309; 3 B. & S. 826; 17A AM. JUR. 2D *Contracts* § 656 (2016); MURRAY, *supra* note 44, § 113[A][1]; WILLISTON ON CONTRACTS, *supra* note 21, § 77.72.

76. *See* RESTATEMENT (SECOND) OF CONTRACTS § 262 (AM. LAW INST. 1981).

77. *See* WILLISTON ON CONTRACTS, *supra* note 21, § 77.72.

78. PERILLO, *supra* note 11, § 13.20; *see also* Clark v. Keller (*In re* Roy's Estate), 270 N.W. 196 (Mich. 1936) (concluding estate need not pay amount due under promissory note decedent signed and delivered before his death for valid consideration; neither party to contract to marry contemplated that prospective husband would die before the wedding day).

79. PERILLO, *supra* note 11.

80. Vogel v. Melish, 203 N.E.2d 411, 413 (Ill. 1964).

81. *See* Brearton v. De Witt, 170 N.E. 119, 120 (N.Y. 1930) ("The law . . . has no substitute for the special personal element contracted for.").

82. Howe Sewing-Machine Co. v. Rosensteel, 24 F. 583, 584 (C.C.W.D. Pa. 1885).

83. *See* FARNSWORTH, *supra* note 44 (citing cases therein).

her death will discharge the duty.[84] Others use the word "essential,"[85] or say that personal services contracts are those which require the continued "existence of a particular person,"[86] or have "distinctly personal considerations . . . at the foundation of the contract."[87] Some courts are a bit more detailed, stating that a personal services contract exists when "performance [will] vary materially,"[88] the contract requires "artistic or mechanical skill, ability, or training,"[89] or the contract involves the exercise of discretion.[90] These standards might provide guidance on extreme cases such as contracts for the services of a uniquely talented painter or actor, but courts do not appear to use these laconic standards to decide the close cases.[91]

When moving beyond these conclusory verbal summations and analyzing the cases, three distinct methods for resolving these disputes emerge. First, in the majority of reported cases, courts focus on the nature of the obligation and pigeonhole the obligation as either personal (in which case the obligation is discharged) or impersonal (in which case it survives). Second, some courts fall back on a centuries-old presumption that contracts generally survive. Third, when a court finds the expressed intent of the parties, that intent will control. In Part III, this Article discusses a couple of reported cases that could form the bedrock of a different method of analysis.

1. Approach #1: Labeling Based on the Nature of the Obligation

Following the sixteenth-century English foundation, courts often focus exclusively on the nature of the remaining contract obligations to decide survival. One court stated, "All contracts must be construed with reference to their subject-matter."[92] Another stated that sometimes the obligations were "so purely personal in

84. RESTATEMENT (SECOND) OF CONTRACTS § 262 (AM. LAW INST. 1981) (emphasis added).

85. *See, e.g.*, MURRAY, *supra* note 44, § 114[B]; *see also* Blakely v. Sousa, 47 A. 286, 286 (Pa. 1900) ("[I]f . . . the performance of the deceased himself be the essence thereof, his executors will not be liable [unless he breached] during his lifetime. . . . ").

86. Manhart v. Bajonski (*In re* Estate of Bajonski), 472 N.E.2d 809, 812 (Ill. App. Ct. 1984); 17A AM. JUR. 2d *Contracts* § 656 (2016); MURRAY, *supra* note 44, § 114[B].

87. Ryan v. Estate of Sheppard (*In re* Estate of Sheppard), 2010 WI App 105, ¶ 9, 328 Wis. 2d 533, 789 N.W.2d 616 (quoting Volk v. Stowell, 74 N.W. 118, 119 (Wis. 1898)).

88. BDI Laguna Holdings, Inc. v. Marsh, 689 S.E.2d 39, 43 (Ga. Ct. App. 2009) (quoting Dennard v. Freeport Minerals Co., 297 S.E.2d 222, 226 (Ga. 1982)); *see also* First Nat'l Bank of Danville v. Taylor, 67 N.E.2d 306, 310 (Ill. App. Ct. 1946) ("[W]here the personal acts and qualities of one of the parties form a material and ingredient part of the contract.").

89. Firebaugh v. Whitehead, 559 S.E.2d 2d 611, 616 (Va. 2002), *quoted in* MURRAY, *supra* note 44, § 114[B] n.91; *see also* WILLISTON ON CONTRACTS, *supra* note 21, § 77.72 (suggesting that a contract is only a personal services contract if performance by the decedent was the "controlling consideration").

90. *See* RESTATEMENT (SECOND) OF CONTRACTS § 262 cmt. b (AM. LAW INST. 1981); *see also* FARNSWORTH, *supra* note 44 (emphasizing discretion). One court stated that performance under a personal services contract requires exercise of the obligor's personal qualifications, which may include "special knowledge, genius, skill, taste, ability, experience, judgment, discretion, integrity, or other personal qualification[s]." Kelley v. Thompson Land Co., 164 S.E. 667, 668 (W. Va. 1932).

91. *See infra* Sections II.C.1.c, III.C.1 (discussing cases in which the courts did not rely on labels); *see also infra* Section III.C.2 (discussing various factors courts could consider).

92. Blakely v. Sousa, 47 A. 286, 286 (Pa. 1900) (quoting Bland's Adm'r v. Umstead 23 Pa. 316 (1854)).

their nature as to leave no room for doubt but that the contract" died with the decedent.[93]

a. Labeling as a Personal Services Contract—Contracts that Terminates

Courts have indicated that obligations in the nature of personal services, which die with the decedent, include scenarios involving an actor agreeing to star in a major movie,[94] a famous painter agreeing to paint a portrait,[95] a musician agreeing to play an instrument,[96] a writer agreeing to prepare a manuscript,[97] architects agreeing to design a building,[98] an accountant agreeing to work with another accountant for two years,[99] teachers agreeing to instruct pupils,[100] a booking agent serving as advisor and personal counselor for a country music band,[101] an insurance agent hired to sell group insurance to members of an association,[102] and a band manager.[103] Courts have stated that agreements of a physician or attorney to render services in their respective professions are also personal services contracts.[104]

For employment agreements, an employee's death generally allows an employer to terminate the contract.[105] The death of an employer will terminate an

93. McDaniel v. Rose, 153 S.W.2d 828, 830 (Mo. Ct. App. 1941).

94. *See* CNA Int'l Reinsurance Co. v. Phoenix, 678 So. 2d 378 (Fla. Dist. Ct. App. 1996); *see also* CORBIN ON CONTRACTS, *supra* note 19 (including a ball player and an automobile mechanic).

95. *See* Harrison v. Conlan, 92 Mass. (10 Allen) 85, 86 (1865) (in dictum); *see also Kelley,* 164 S.E. at 668 (in dictum); MURRAY, *supra* note 44, § 114[B]; *cf. In re* Burke's Estate, 244 P. 340, 342 (Cal. 1926) (in dictum) (noting that a contract for "a sculptor to produce a particular piece of statuary" would be a personal service contract).

96. *See Harrison*, 92 Mass. 85 (involving a pastor employing a church organist).

97. *See* Frissell v. Nichols, 114 So. 431, 434 (Fla. 1927) (in dictum).

98. *See* Stearns v. Blevins, 160 N.E. 417 (Mass. 1928); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 262, cmt. b, illus. 8 (AM. LAW INST. 1981).

99. *See* Mullen v. Wafer, 480 S.W.2d 332, 334 (Ark. 1972) (emphasis omitted) (contemplating that the selling accountant would cooperate fully in transferring the customers to the purchasing accountant, and "giving all encouragement possible to the continuation of business relations").

100. *See* Cox v. Martin, 21 So. 611, 612 (Miss. 1897) (in dictum).

101. *See* Int'l House of Talent, Inc. v. Alabama, 712 S.W.2d 78, 87 (Tenn. 1986) (describing the rise of the country music group Alabama from "relative obscurity to great national popularity" and the indispensable services of their booking agent); *see also* Deco Purchasing & Distrib. Co. v. Panzirer, 450 So. 2d 1274 (Fla. Dist. Ct. App. 1984) (involving an agreement to consult); Blakely v. Sousa, 47 A. 286 (Pa. 1900) (terminating a contract upon the death of musician John Phillip Sousa's business manager).

102. *See* Thomas Yates & Co. v. Am. Legion, Dep't of Miss., 370 So. 2d 700, 702 (Miss. 1979) (involving an insurance agent designated as the exclusive agent to sell group insurance to American Legion members; although the original insurance agent's son continued to provide the services to American Legion members for eight years after his father died, the court concluded the contract terminated when the father died; it was a personal services contract because of the need for "integrity, ability and skill in this branch of professional work" (quoting Mills v. Union Cent. Life Ins. Co., 28 So. 954, 954 (Miss. 1899))).

103. *See Blakely*, 47 A. at 287 (regarding the manager of John Philip Sousa's band); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 262, cmt. a, illus. 1 **(**AM. LAW INST**.** 1981) (an illustration in the Restatement includes someone agreeing to work as a confidential secretary**)**.

104. *See* Shultz & Co. v. Johnson's Adm'r, 44 Ky. (5 B. Mon.) 497, 501 (1845); *Cox*, 21 So at 612.

105. *See* Jones v. Servel, Inc., 186 N.E.2d 689, 693 (Ind. App. 1962) ("The death of an employee . . . discharges the employer from further duty. . . . [The employer] is not bound to receive or to pay for services offered by the employee's executor. . . . " (quoting 6 CORBIN, CONTRACTS § 1335, at 379 (1961))); CORBIN ON CONTRACTS, *supra* note 19 ("In a contract of employment for rendering personal

employment contract as long as the employer's "personal cooperation . . . is needed for the proper fulfillment of the contract."[106] For example, in *Minevitch v. Puleo*, Borrah Minevitch, the founder of a comedy troupe named "Borrah Minevitch and His Harmonica Rascals," employed John Puleo to "render his . . . professional and artistic services' in the field of amusement."[107] Upon Minevitch's death, Puleo stopped working with the Rascals, and Minevitch's estate sued him. The court stated that "the duty of performance is terminated by the death of the [employer] or that of the [employee]."[108]

b. Labeling as Impersonal Services—Contracts That Survive

When the decedent only agreed to perform ministerial acts, many cases conclude that the contract was not for personal services and survived death. Ministerial acts may include executing supplemental documents,[109] delivering property,[110] renting property to a tenant, renting property from an owner,[111]

service, the death of the servant or employee makes further performance impossible."); *see also, e.g.*, Kowal v. Sportswear by Revere, Inc., 222 N.E.2d 778, 781 (Mass. 1967) (finding that salesman worked exclusively for the company for twenty-two years and died with four months remaining on a one-year contract, and the "administrator could not have been expected to perform [the decedent's] contractual duties satisfactorily"); Peaseley v. Va. Iron, Coal and Coke Co, 169 S.E.2d 243, 247 (N.C. Ct. App. 1969) (explaining that a contract terminates on a salesman's death as long as the contract was based on the salesman's "peculiar attributes of fitness, personality, experience, contacts, industry and ability").

106. Kelley v. Thompson Land Co, 164 S.E. 667, 668 (W. Va. 1932); *see also* Harrison v. Conlan, 92 Mass. (10 Allen) 85 (1865) (involving the death of a pastor who had employed a church organist); RESTATEMENT (SECOND) OF CONTRACTS § 262, cmt. a, illus. 2 (AM. LAW INST. 1981); WILLISTON ON CONTRACTS, *supra* note 21, at § 77.76.

107. Minevitch v. Puleo, 193 N.Y.S.2d 833, 835 (N.Y. App. Div. 1959).

108. *Id.* at 836; *see also* Parker v. Arthur Murray, Inc., 295 N.E.2d 487, 490 (Ill. App. Ct. 1973) (permitting student who prepaid for dance lessons at a studio to obtain a refund after he was injured in a car accident and could no longer dance, even though he signed a contract with bold type phrases such as "non-cancellable negotiable contract" and "I understand that no refunds will be made"); Ryan v. Estate of Sheppard (*In re* Estate of Sheppard), 2010 WI App 105, ¶¶ 2, 11, 328 Wis. 2d 533, 789 N.W.2d 616 (2010) (involving a two-year contract for flight instruction services for $35,000 per year; the student died before the instructor provided any flight instruction under the agreement); WILLISTON ON CONTRACTS, *supra* note 21, at § 77.72.

109. *See* Gunderson v. Sch. Dist., 937 So. 2d 777 (Fla. Dist. Ct. App. 2006) (concluding the personal representative of the estate could execute a general release and a voluntary resignation under a workers' compensation settlement agreement signed by the decedent before death).

110. *See* Cates v. Cates, 104 So. 2d 756, 759 (Ala. 1958) (trucking milk from a dairy to Birmingham as part of a milk hauling business was not personal services); Neyland v. Brammer, 73 S.W.2d 884 (Tex. Civ. App. 1933) (delivering property upon the occurrence of an event); *see also Kelley*, 164 S.E. at 669.

111. *See* Burns v. McGraw, 171 P.2d 148 (Cal. Dist. Ct. App. 1946); Whidden v. Sunny S. Packing Co., 162 So. 503, 506 (Fla. 1935) (death of owner of citrus grove did not terminate contract with packer who agreed to pick, haul, and market the crop); *In re* Estate of Sauder, 156 P.3d 1204, 1212 (Kan. 2007) (alteration in original) ("Generally, 'the obligations of a lessee under the contract [pass] on his death to his personal representative who assumes in his fiduciary capacity the performance of the contract in the same manner that its performance could have been demanded of the lessee.'" (quoting Olson v. Frazer, 118 P.2d 505, 507 (Kan. 1941))); Wilson v. Fieldgrove, 787 N.W.2d 707, 712 (Neb. 2010) ("[T]he death of the landlord or tenant in a year-to-year lease does not terminate the lease."); Estate of Duncan v. Kinsolving, 2003-NMSC-013, ¶ 11, 133 N.M. 821, 70 P.3d 1260 (2003) (landlords "may enter into leases that extend beyond their death"); Volk v. Stowell, 74 N.W. 118, 119 (Wis. 1898) (involving a five-year contract with a farmer to manage and cultivate the farm; upon the death of the property owner, the heir could not obtain possession of the farm because "[a]n ordinary contract of lease is not such a personal

purchasing property,[112] selling property,[113] turning on the utilities in connection with the sale of a home,[114] and paying money.[115] For example, if a patron hired a landscape painter, upon the patron's death, the patron's successors must make the remaining payments to the painter.[116] As discussed in the next section, courts have concluded that many other types of contracts survive death.[117]

c. Disturbing Presumptions Allowing Construction and Certain Other Contracts to Survive

Courts and commentators often indicate that the family or other successor must perform the unfulfilled contracts of a deceased tradesman.

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contract as is extinguished by the death of the lessor or lessee" (citing Lockart v. Forsythe, 49 Mo. App. 654)). *But see* Warnecke v. Estate of Rabenau, 367 S.W.2d 15, 16–17 (Mo. Ct. App. 1963) (observing that "[g]enerally . . . a lease for a term of years is not terminated by the death of . . . the lessee" but concluding that a two-year lease of office space terminated on the death of the tenant when the premises could be used only as an "office for certified public accountants, but for no other purpose," and decedent's widow was not an accountant).

112. *See* Mullen v. Wafer, 480 S.W.2d 332, 334 (Ark. 1972) (involving the sale of office equipment and supplies necessary to an accounting business); Horning v. Ladd, 321 P.2d 795 (Cal. Dist. Ct. App. 1958); Stein v. Bruce, 366 S.W.2d 732 (Mo. Ct. App. 1963) (involving a purchase of real estate); Warner v. Kaplan, 892 N.Y.S.2d 311 (App. Div. 2009). *But see* Browne v. Fairhall, 100 N.E. 556 (Mass. 1913) (concluding that an obligation to purchase terminated at the death of the buyer because the agreement gave the buyer discretion in designating when he would make the payments, and the buyer died before he made the designation).

113. *See* Shutt v. Butner, 303 S.E.2d 399, 401 (N.C. Ct. App. 1983) (holding that agreement to sell home when child attains age eighteen, which was incorporated into divorce settlement and decree, survived wife's death); Davis v. Davis, 266 S.W. 797 (Tex. Civ. App. 1924).

114. Loftus v. Am. Realty Co., 334 N.W.2d 366, 367 (Iowa Ct. App. 1983) (explaining that realty company's agent blew up the house when lighting the gas water heater).

115. *See* CORBIN ON CONTRACTS, *supra* note 19, § 75.1 ("[A]s a general matter, a promise to pay money is not made impossible by the death of either the debtor or the creditor."); *see also, e.g.*, Ulmann v. Sunset-McKee Co., 221 F.2d 128, 133 (9th Cir. 1955) (concluding that a company's obligation to pay pension benefits for three years survived the retiree's death, but noting that "[p]erhaps, a longer term obligation without any additional factor [sic] would tend to indicate an approximation of the employee's life expectancy and that the undertaking was personal to the employee"); Dixie Indus. Co. v. Benson, 79 So. 615 (Ala. 1918); Howard v. Adams, 105 P.2d 971, 974 (Cal. 1940) (concluding that aunt's contractual obligation to support divorced niece for life and educate and care for niece's children until they became self-supporting survived aunt's death and became a binding obligation on the aunt's estates, particularly because the payment of a fixed sum would satisfy the obligation); *In re* Ford's Estate, 238 N.W. 275 (Mich. 1931); Brearton v. De Witt, 170 N.E. 119 (N.Y. 1930) (concerning a doctor's agreement to pay $1,000 per month for the life of a patient injured by the doctor's negligent or intentional act); *Warner*, 892 N.Y.S.2d 311; Hutchings v. Bates, 393 S.W.2d 338, 343 (Tex. Civ. App. 1965) (concluding that a contractual obligation to pay money does not become impossible because of the death of the original debtor). *But see* Clark v. Keller (*In re* Roy's Estate), 270 N.W. 196 (Mich. 1936) (concluding estate need not pay amount due under promissory note decedent signed and delivered before his death for valid consideration; neither party to contract to marry contemplated that prospective husband would die before the wedding day); Hasemann v. Hasemann, 203 N.W.2d 100, 102 (Neb. 1972) (debtor-son's obligation to pay ended upon creditor-father's death because that is what the parties intended).

116. *See* Kelley v. Thompson Land Co., 164 S.E. 667, 668 (W. Va. 1932) (in dictum); FARNSWORTH, *supra* note 44; WILLISTON ON CONTRACTS, *supra* note 21, § 77.76.

117. *See e.g.*, Cates v. Cates, 104 So. 2d 756, 759 (Ala. 1958) (involving hauling milk between two cities; court stated that a contract involves personal services only when "the duty imposed cannot be done as well by others as by the promisor").

(1) Building and Construction Work

A leading treatise provides, "Promises to erect or renovate buildings are enforced after the promisor's death, so long as no one contemplated the decedent's personal work."[118] A related illustration in the Restatement concludes that a promise to backfill (or otherwise level) a valley is not a personal services contract, and the obligation is not discharged upon the death of the obligor.[119]

A court resolved a dispute involving a sewage system using this presumption. Fred Stormer contracted with a local authority to construct a sewage system, but he died seventeen months later when the job was only sixty percent complete.[120] Fred's estate argued the contract was a personal services contract that ended upon Fred's death.[121] In support, the estate asserted the Authority awarded the contract based on Fred's competence and responsibility, and the contract prohibited Fred from delegating his duties. In response, the court stated a general rule that "[b]uilding contracts . . . do not involve . . . peculiar skill or ability."[122] The court found that the Authority awarded the contract to Fred because he offered the lowest price among the qualified bidders. Also, because of the contract's detailed specifications, "[t]he only things left to the decedent were the mechanical details of excavation and construction."[123] The court concluded the contract was not for personal services and became a binding obligation of the estate when Fred died.

Another court used this presumption to resolve a dispute between a widow and her mother-in-law. In *Mackay v. Clark Rig Building Co.*, the decedent was engaged in the rig building business.[124] At his death, the decedent's mother and certain key employees completed many of the decedent's remaining contracts. The widow sued her mother-in-law and the ex-employees arguing that the construction contracts survived her husband's death and were property of his estate. The court stated that as a general rule building contracts are not for personal services[125] and found no reason to deviate from this rule. As a result, the estate had the right to perform the contracts and earn the profits, and the widow could pursue an action for an accounting for the misappropriation of valuable property rights.[126]

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118. WILLISTON ON CONTRACTS, *supra* note 21, § 77:72; *see also* Exch. Nat'l Bank v. Betts' Estate, 176 P. 660, 663 (Kan. 1918) (concluding that a contract to erect a building survives "because upon the [decedent's death] it would not have been difficult to find others equally capable of completing the [YMCA] building according to the plans and specifications"); CORBIN ON CONTRACTS, *supra* note 19, at 129 n.19 ("The work of a building contractor may or may not be personal, depending on the circumstances and type of performance contemplated.").

119. *See* RESTATEMENT (SECOND) OF CONTRACTS § 262, cmt. b, illus. 9 (AM. LAW INST. 1981).

120. *See* Estate of Stormer, 123 A.2d 627, 628 (Pa. 1956).

121. See *id.* at 629. The estate had worked on the job for five months and then defaulted. *See id.* at 628.

122. *Id.* at 629.

123. *Id.*

124. *See* Mackay v. Clark Rig Bldg. Co., 42 P.2d 341, 343 (Cal. Dist. Ct. App. 1935) (explaining that the decedent was the sole owner of the business).

125. *See id.* at 348.

126. *See id.* at 350.

Courts recognize an exception if the "'character, credit and substance of the party' contracted with was an inducement to the contract."[127] For example, in *Buccini v. Paterno Construction Co.*, the contract for work on a dwelling named "Paterno's Castle" specified that the decorative work required artistic skill and "all . . . decorative . . . work shall be done by [Albert] Buccini personally and that only the plain work may be delegated to mechanics."[128] Upon Albert Buccini's death, the court held that his estate had no obligation to perform the decorative work.

These presumptions are echoed in the case of *In re Burke's Estate*.[129] Builder Thomas Francis Burke signed construction contracts to work for the Odd Fellows' Association of Los Banos and the City of Los Banos. Burke made substantial progress on the projects before he died. The administrator of his estate completed the work, but the estate lost money on the contracts, and an unpaid creditor of the estate sued the estate's administrator. The estate's administrator could have been personally liable if the estate was not bound to complete the contracts.[130] At trial, the probate court concluded the administrator acted reasonably. On appeal, in affirming the trial court, the California Supreme Court endorsed the following principles:

Ordinarily, a building contract is not to be brought within that class of contracts which are deemed to have been entered into because of the personal skill or taste of the person who is to perform it. . . . It is otherwise, of course, where . . . the character and kind of work to be performed properly fall within the rule of "personal performance acts."[131]

The court provided only a brief description of the construction work[132] and concluded that the general rule applied so the contracts survived the decedent's death.[133]

(2) Other Contracts

Some courts presume that agreements to farm another's land continue after the farmer's death.[134] For example, in *California Packing Corp. v. Lopez*, Wright Corporation owned 100 acres of farmland and hired copartners John Lopez and John

127. Cent. Contra Costa Sanitary Dist. v. Nat'l Surety Corp., 246 P.2d 150, 154 (Cal. Dist. Ct. App. 1952) (quoting *In re* Burke's Estate, 244 P. 340, 342 (Cal. 1926)) (quoting Humble v. Hunter (1848) 116 Eng. Rep. 885 (Q.B.) 887 (Lord Denman CJ)).

128. Buccini v. Paterno Constr. Co., 170 N.E. 910, 911 (N.Y. 1930) (Cardozo, C.J.).

129. *In re Burke's Estate*, 244 P. 340.

130. *See id.* at 341 ("The law is well settled in this state by numerous authorities that if an administrator or executor, without being authorized to do so, elects or undertakes to carry on the business in which the deceased was engaged, he does so at his peril.").

131. *Id.* at 342.

132. *See id.* at 341 ("The foundations were laid, and the preliminary work had been completed in both instances, and considerable material, steel, and timbers had been cut and placed in preparation for the erection of the superstructure. Contracts for material had been entered into by the [decedent].").

133. *See id.* at 342.

134. *But see In re* Estate of Sauder, 156 P.3d 1204, 1213 (Kan. 2007) ("[T]he majority of jurisdictions have noted that considerable skill and judgment are required in farming and a landlord's confidence in the lessee is personal and not assignable, transferrable, or inheritable.").

Souza to grow asparagus and intercrops under certain terms.[135] The contract provided that the farmers "shall have no right to assign this agreement or sublet . . . without the written consent of the [landowner]."[136] Eventually, the partnership assigned the contract to John Lopez with the written consent of the landowner. When John Lopez was killed two weeks later, his brother, Manuel Lopez, continued to farm the land.[137] Nine months later, the Wright Corporation sold the 100 acres to California Packing Corporation as part of a sale of 5,000 acres. The new property owner sued to evict Manuel Lopez. The court stated as a general rule, "Contracts for the cultivation of the soil are not generally held to be contracts terminable upon death" and that there is a "presumption . . . that a party making such a [farming] contract intends to bind his executors and administrators."[138] In addressing the boilerplate clause prohibiting assignment, the court said it merely prohibited voluntary assignments and had no impact on an assignment by operation of law, such as at death.[139] As a result, the court concluded the farming contract survived John Lopez's death under the presumption, and Manuel Lopez had a contractual right to continue farming the land despite the owner's objections.[140]

Similarly, in *Cox v. Martin*, the court concluded that a farming contract survived the death of the farmer, and the landowner was forced to accept performance from the decedent's son.[141] Again, the court relied upon a presumption "that the parties to a contract intend to bind their personal representatives, even when they are not named in the contract."[142]

Another court found that a farming contract survived the death of a farmer because it was structured as a cash lease.[143] When dealing with farming contracts, some courts have been willing to move beyond the subject matter test and consider other facts and circumstances.[144]

In *National Surety Co. v. George E. Breece Lumber Co*., the court held that a contract to cut and deliver fifty million feet of logs to a lumber company, and to dispose of the refuse, did not involve the performance of "personal services or the

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135. *See* Cal. Packing Corp. v. Lopez, 279 P. 664, 664–65 (Cal. 1929) (stating the farmers would receive fifty-five percent of the net profits from the asparagus crop and seventy-five percent of the net profits from the intercrop).

136. *Id.* at 665.

137. *See id.* Manuel Lopez also was the personal representative of his brother's estate. *See id.*

138. *Id.*

139. *See id.*

140. *See id.*

141. *See* Cox v. Martin, 21 So. 611, 612 (Miss. 1897) (observing that the farmer's son could "fairly and fully execute [the contract] as well as the decedent himself could have done").

142. *Id.*

143. *See* Wilson v. Fieldgrove, 787 N.W.2d 707, 712 (Neb. 2010) (concluding that the agreement was not a personal services contract, and the contract survived the death of the farmer under the general rule that "the death of the landlord or tenant in a year-to-year lease does not terminate the lease").

144. *See, e.g.*, Pope v. Dickerson, 89 So. 24, 24–25 (Ala. 1921) (finding a personal services contract because the property owner hired the sharecropper for his personal skill and competency, and his son and son-in-law "were recognized as being unskilled in farming, if not completely ignorant of its requirements"); *In re* Estate of Sauder, 156 P.3d 1204 (Kan. 2007) (relying upon boilerplate in the contract document); Ames v. Sayler, 642 N.E.2d 1340 (Ill. App. Ct. 1994) (considering the expectations of the parties).

exercise of peculiar skill."[145] As a result, the contract did not terminate upon death.[146] Consistent with this case, the Restatement includes an illustration concluding, "In the absence of special circumstances showing that [the individual's] personal service or supervision is necessary . . . [his or her] duty to cut the timber is not discharged, and [his or her] estate is liable."[147]

2. Approach #2: General Rule that Contracts Survive Death

When courts choose not to rely on a subject matter approach, they sometimes fall back on an old adage that contracts survive death. In a logging case, *Burch v. J.D. Bush and Co.*,[148] the supplier was killed at his sawmill soon after entering into an eighteen-month contract, and the agreement was silent about post-death performance. The estate sued to collect $445.22 for lumber delivered. In response, the surviving party argued the estate breached when it failed to continue to supply lumber under the contract. The surviving party sued to collect the excess $1,126.77 it paid to obtain the lumber from another supplier. The North Carolina Supreme Court stated that when the parties fail to indicate their intent, the general rule is that "death does not excuse performance."[149] The court found nothing to displace this general rule.

Likewise, the U.S. Supreme Court in *United States v. Chain* stated, "It is a presumption of law that the parties to a contract bind not only themselves but their personal representatives."[150] And the New Jersey Supreme Court in *Roccamonte* stated that, as a general rule, contracts should survive a decedent's death.[151] Also, in an interesting attempt to justify this old general rule, one court asserted that silence in the document is a signal that the parties intended the contract to survive death because the parties' obligations were not contingent "upon either party being alive when the time to sell came or anything else."[152]

145. Nat'l Surety Co. v. George E. Breece Lumber Co., 60 F.2d 847, 849 (10th Cir. 1932).

146. *See id.* at 850.

147. RESTATEMENT (SECOND) OF CONTRACTS § 262, cmt. b, illus. 6 (AM. LAW INST. 1981).

148. Burch v. J.D. Bush & Co., 106 S.E. 489 (N.C. 1921).

149. *Id.* at 490.

150. United States *ex rel.* Wilhelm v. Chain, 300 U.S. 31, 35 (1937) (acknowledging, in addition, an exception for "contracts in which personal skill or taste is required").

151. *See* Sopko v. Slackman (*In re* Estate of Roccamonte), 808 A.2d 838, 846 (N.J. 2002), *superseded by statute*, N.J. STAT. ANN. § 25:1-5(h) (West, Westlaw through L.2018, c. 93 and J.R. No. 9); *see also supra* notes 55–66 and accompanying text (providing a more thorough discussion of the *Roccamonte* case); Cox v. Martin, 21 So. 611, 612 (Miss. 1897) (applying the general rule that "the parties to a contract intend to bind their personal representative").

152. Shutt v. Butner, 303 S.E.2d 399, 401 (N.C. Ct. App. 1983). *But see* Ryan v. Sheppard (*In re* Estate of Sheppard), 789 N.W.2d 616, 619 (Wis. Ct. App. 2010) (alteration in original) (appearing to adopt the opposite presumption by stating that when "[n]either party contemplates substitution by another, their relationship is personal and dependent on individuality of the contracting parties" (quoting Dubrow v. Briansky Saratoga Ballet Ctr., Inc., 327 N.Y.S.2d 501, 504 (Civ. Ct. 1971))).

3. Approach #3: Clearly Expressed Intent Situations

Courts routinely assert that they will enforce the parties' clearly expressed intent about contract survival.[153] In 1845, a court forcefully proclaimed the primacy of intent: "[T]he [survival] question, we think, in every case, must turn at least upon the intention of the parties"; "if the parties intended the contract to be personal, no matter what the subject matter might be, it must be so regarded and treated."[154]

While parties could express their intent about death clearly in a written contract,[155] the Ninth Circuit has observed they seldom do.[156] In 2007, the Kansas Supreme Court made a plea that contract drafters specifically address death.[157]

One way to express intent in a written contract, without getting morbid, is to emphasize the necessity of the individual.[158] For example, in *Farnon v. Cole*, legendary singer Nat King Cole hired Brian Farnon as his musical director for one year commencing August 31, 1964 at a minimum salary of $25,000.[159] On December 8, Cole was hospitalized and did not publicly sing again. Farnon provided services under the contract for only one performance thereafter, which was for Cole's replacement singer, Frank Sinatra, at a previously scheduled event.[160] Cole died on February 15, 1965.[161] Cole had paid Farnon approximately $12,000 under the contract, and after Cole's death, Farnon attempted to enforce the contract and sued Cole's estate for the $13,000 balance.[162] The court held for Cole's estate stating, "The wording of the contract explicitly conveys an intent of the parties that the

153. *See, e.g.*, Schultz & Co. v. Johnson's Adm'r, 44 Ky. (5 B. Mon.) 497, 499 (1845) ("Contracts should be so construed as to carry out the intention of the parties. . . . "); Warnecke v. Estate of Rabenau, 367 S.W.2d 15, 18 (Mo. Ct. App. 1963) ("The cardinal rules of construction of contracts . . . of course, are that the intention of the parties must be ascertained and given effect"); Unit Vending Corp. v. Lacas, 190 A.2d 298, 300 (Pa. 1963) ("The intention of the parties is paramount. . . . "); Kelley v. Thompson Land Co., 164 S.E. 667, 669 (W. Va. 1932) ("[T]he intention of the parties should determine whether a contract was personal or impersonal.").

154. *Shultz*, 44 Ky. at 501–02; *see also id.* at 499 ("The rule is well settled, that in the interpretation of contracts, they should be so construed as clearly to carry out the intention of the parties, notwithstanding such construction might be a departure from the strict letter."); *Unit Vending*, 190 A.2d at 300 (treating the "intention[s] of the parties [a]s paramount" regardless of the subject matter and nature of the services provided under the contract).

155. *See Shutt*, 303 S.E.2d at 401 ("Few contracts are terminated by death in the absence of explicit provisions therein to the contrary."); PERILLO, *supra* note 11, § 13.16 (emphasizing that a contract could require performance come "[h]ell or high water" (quoting Colo. Interstate Co. v. CIT Grp./Equip. Fin., Inc., 993 F.2d 743 (10th Cir. 1993))); MURRAY, *supra* note 44.

156. *See* Ulmann v. Sunset-McKee Co., 221 F.2d 128, 133 (9th Cir. 1955) ("The use of words of survivorship generally has gone out of fashion in ordinary contracts.").

157. *See In re* Estate of Sauder, 156 P.3d 1204, 1214 (Kan. 2007) (encouraging "scriveners . . . to include a provision expressing the parties' intent").

158. *See, e.g.*, Buccini v. Paterno Constr. Co., 170 N.E. 910, 911 (N.Y. 1930) (Cardozo, C.J.) (concluding that an agreement specifying that "all the decorative figured work shall be done by [Albert] Buccini personally and that only the plain work may be delegated to mechanics" terminated upon Buccini's death).

159. *See* Farnon v. Cole, 66 Cal. Rptr. 673, 674–75 (Ct. App. 1968).

160. Due to his illness and hospitalization, Cole was unable to perform on December 11th at the dedication of a Music Center in Los Angeles, but Cole arranged for Frank Sinatra to substitute for him. Farnon served as musical director for Sinatra's performance. *Id*. at 676.

161. *Id.* at 675.

162. *Id.*

contract be conditioned upon Cole's continued existence and personal participation."[163] Relevant contract passages stated Farnon would "render services to me"; Farnon's services "shall be exclusive to me"; and the "above compensation is for your services as musical director in connection with my personal appearances."[164] The court found that "Cole's personal appearance or personal recording was an implied condition precedent to [Farnon's] rendition of services as a musical director."[165]

III. A NEW PROCESS EMPHASIZING ASCRIBED INTENT

This Part proposes a new three-step method of analysis for deciding if a contract of the dead survives. The first two steps, which can deal with the easier cases, find substantial support in current case law. The third step could deal with a significant body of close cases and arguably finds a foothold in a couple of existing cases, although neither the existing case law nor commentary endorse this as a general method of analysis.

A. Step One: Searching for Clearly Expressed Intent

In contracts-of-the-dead cases, many courts assert the primacy of intent.[166] This is consistent with fundamental principles. Generally, intent rules in contract law. For example, in interpreting a word or phrase in a contract, the first rule is if the parties agreed on the meaning, that meaning controls even if it is crazy.[167] "[L]ike Humpty Dumpty, [parties] may use words as they please. If they wish the symbols 'one Caterpillar D9G tractor' to mean '500 railroad cars full of watermelons', [sic] that's fine—provided [the] parties share this weird meaning."[168]

The parties' clear expression of intent in the written contract should govern,[169] but often the written contract fails to address death. While the parties' oral

163. *Id.* at 676

164. *Id.* at 674 n.1 (reprinting opening comments and paragraphs 2 and 4d of the letter including the contract terms).

165. *Id*. at 676; *see also* Kelley v. Thompson Land Co., 164 S.E. 667, 669 (W. Va. 1932) (involving an agreement to form a corporation and manage the corporation's mining and sale of coal; the court concluded that the contract terminated upon the manager's death).

166. *See supra* notes 153–155 and accompanying text.

167. *See* RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (AM. LAW INST. 1981) ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.").

168. TKO Equip. Co. v. C & G Coal Co., 863 F.2d 541, 545 (7th Cir. 1988), *quoted in* KNAPP ET AL., *supra* note 9, at 376.

169. It is possible that in certain situations the decedent's clearly expressed intent that successors must perform contractual obligations remaining at death should be unenforceable because it is an excessive attempt at dead-hand control. Contract provisions will be unenforceable if they violate public policy. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981). In *Unit Vending*, the decedent's will encouraged his sons to move from Albania to Philadelphia and manage the father's business, but the court showed no enthusiasm for penalizing the sons for not returning. *See* Unit Vending Corp. v. Lacas, 190 A.2d 298, 299 (Pa. 1963). Thus, if the decedent was attempting to manipulate the heirs' occupational choices, such dead-hand control might be frowned upon. In this area, the American Law Institute's attempt to describe what is "capricious" (in the Restatement of Trusts) may be helpful: "[a] purpose is not capricious . . . provided it satisfies a natural desire which normal people have with

statements might provide evidence of intent, often such evidence will be inadmissible or unpersuasive. Oral statements may be inadmissible under the applicable dead man's statute.[170] Even if admissible,[171] they may be unpersuasive because of the time-honored principle that testimony will be given little weight if the person who could confirm or dispute the testimony is unavailable (such as a decedent).[172]

B. Step Two: Extremely Personal or Extremely Impersonal Contracts

If a court's quest for clearly expressed intent fails, it may be appropriate to decide some extremely personal or extremely impersonal cases with a subject-matter approach. The subject-matter approach can provide an admirable degree of certainty. In two types of cases it likely will be consistent with the new ascribed-intent approach discussed below. One is when the decedent's remaining contractual obligations are merely ministerial, and the successor can perform with the use of the estate's assets.[173] For example, when the contract merely requires the rental of property (now owned by the estate) to a tenant or the payment of money (from the estate's assets), in the absence of indications of contrary intent, it seems appropriate to require the decedent's successor to fulfill those obligations. Because the surviving contract party was looking exclusively to the decedent's property for performance and the successor holds that property, it seems consistent with the intent of reasonable persons that the successor would fulfill the obligations with the remaining assets.

A licensing squabble over the rights to exploit the songs of the deceased music icon known as Prince[174] illustrates this end of the spectrum. In 2014, Prince entered into a licensing contract regarding various songs with Warner Brothers Records.[175] Prince died on April 21, 2016, from an opioid overdose.[176] Seven months after his death, his estate entered into a new licensing contract for some of the same

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respect to the disposition of their property." 1 RESTATEMENT (SECOND) OF TRUSTS § 124, cmt. g (AM. LAW INST. 1959).

170. *See* 81 AM. JUR. 2d *Witnesses* § 553 (2015) (footnotes omitted) ("A dead man's statute embraces verbal transactions and statements, and thus, testimony as to the existence of an oral agreement is inadmissible, absent written evidence to substantiate the alleged agreement. . . .").

171. A court may admit oral testimony about negotiations with the decedent if the estate presents such evidence. *See id.* § 615 ("If a personal representative . . . voluntarily testifies on an issue raised by a party adversely interested concerning an oral communication of the decedent, the interested person is no longer prohibited by the statute from testifying as to that same oral communication.").

172. *See, e.g.*, Marks v. St. Landry Parish, 308 So. 2d 819, 824 (La. Ct. App. 1975) ("It is settled . . . that testimony as to oral statements made by a deceased person is the weakest kind of evidence and is entitled to little weight.").

173. *See supra* notes 109–117 and accompanying text.

174. Prince "identified himself with an unpronounceable symbol because of a legal row with Warner Brothers." Dan Reilly & Dee Lockett, *The Fight Over Prince's Estate Continues to Be a Purple-Tinged Nightmare*, VULTURE (May 17, 2017), http://www.vulture.com/2016/08/prince-estate-will-chaos.html.

175. *See* Associated Press, *Minnesota Judge Cancels Universal Deal with Prince Estate*, MPRNEWS (Jul. 13, 2017), http://www.mprnews.org/story/2017/07/13/prince-estate-judge-voids-universal-music-agreement.

176. *See* Reilly & Lockett, *supra* note 174.

songs with Universal Music Publishing Group, reportedly for $31 million.[177] When challenged, a Minnesota court cancelled the estate's contract with Universal, acknowledging that the Warner Brothers' contract survived Prince's death.[178]

At the other end of the spectrum, when the remaining contractual obligations are truly irreplaceable services, those obligations should be discharged at death based solely on the subject matter. This class of cases could include contracts with artists commissioned for their particular aesthetic, musicians and singers hired for their different sound, and actors employed for their unique star quality or stage or screen presence.[179]

This class of cases is limited, and there could be arguments about when genius is rare and skill is extraordinary. Practitioners may be able to substitute for even creative geniuses in certain circumstances. For example, Virginia C. Andrews "was an internationally known, best-selling author," the creator of a literary genre known as "children in jeopardy," and its "undisputed master."[180] According to her publisher, only [fifty] other authors ever had achieved the level of sales achieved by Andrews, and "[s]he was one of those rare authors who brought millions of readers into the stores within weeks of each new release."[181] Shortly after her death, however, her publisher and her estate joined forces and hired a ghostwriter who wrote at least five commercially successful books in the same genre all published under the name "Virginia C. Andrews."[182] Thus, in at least some situations, apparently an understudy or other replacement can fill-in for even a renowned master without significant financial consequences (although aficionados may still reject the imposter). On the other hand, some ghostwriting attempts fail, and attempts to replace a great painter could end in charges of fraud.[183] When bona-fide contentions exist about whether the obligor was irreplaceable, courts could use the ascribed-intent approach as described in the next section to resolve the dispute.

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177. *See id*.

178. *See* Associated Press, *supra* note 175 (indicating that part of the dispute involved when Warner Brothers' rights to some of the songs would expire under the 2014 contract).

179. *See* Taylor v. Palmer, 31 Cal. 240, 247 (1866) ("All painters do not paint portraits like Sir Joshua Reynolds, nor landscapes like Claude Lorraine, nor do all writers write dramas like Shakespeare or fiction like Dickens. Rare genius and extraordinary skill are not transferable, and contracts for their employment are therefore personal, and cannot be assigned."), *quoted in* PERILLO, *supra* note 11, § 18.28 n.260.

180. Estate of Andrews v. United States, 850 F. Supp. 1279, 1281 (E.D. Va. 1994).

181. *Id.* at 1282 (quoting Jack Romanos, the President of Simon & Schuster's Consumer Group).

182. *Id*. at 1283–84. The ghostwriter was Andrew Niederman, "an obscure author of horror stories." *Id.* at 1283. Before ghostwriting, Niederman "read all of Andrews' previous works, entered the texts of those works into a computer and analyzed Andrews' writing style and her plot, style and character development techniques." *Id*. at 1283.

183. *See* Michael Conaghan, *Books Notes Cover*, BELFAST TELEGRAPH, Aug. 29, 2015, at 26 ("[W]here there is a distinctive authorial voice . . . even a [skilled writer] can't really be anything other than a pale imitation. Some authorial styles are so distinctive that they only way to get round them is pastiche."); *see also, e.g.*, Associated Press, *Several Titians Are Called Forgeries*, BOS. GLOBE, Feb. 27, 1980, 1980 WLNR 51896, at 4 (describing reports of paintings forged in the sixteen century and hanging in the Louvre in Paris and the Metropolitan Museum of Art in New York); Team BT, *Data That Knows Itself*, BUS. TODAY (Dec. 31, 2017), https://www.businesstoday.in/magazine/the-break-out-zone/self-aware-software-machines-robots-artificial-intelligence-skynet/story/265691.html (speculating that computer software may replace art connoisseurs in the important task of spotting forged paintings).

C. Step Three: Proposing an Ascribed-Intent Approach to Deal with All Other Cases

After the first two steps, there will be many contract-of-the-dead cases remaining, and they might be called the closer cases. In these cases, this Article suggests that courts reject the centuries-old presumptions favoring contract survival and use an "ascribed intent" approach based in part upon a couple of cases. Under this ascribed intent approach, courts could consider the realities of modern economic life and all other relevant circumstances in an attempt to determine what reasonable persons in the position of the parties would have intended. This approach could provide great flexibility for a court to achieve a reasonable result and is consistent with the general rule that courts can supply an omitted contract term.[184] The Restatement provides that one reason a court may supply an omitted term is when the parties have "expectations but fail to manifest them."[185] This seems especially appropriate in this area, which society dreads discussing.

This section proposes various factors courts could consider when applying this approach. Among these factors are three major changes to economic life in the last 400 years which indicate the old presumptions require rethinking. Specifically, fewer descendants likely follow in their ancestor's occupational and geographic footsteps; tasks are more complicated so it is less likely that family members are interchangeable; and we have access to more relevant information than in the days of town criers, printed pamphlets, and horses carrying the mail.

1. Identifying This Approach in a Couple of Cases

Although neither the reported cases nor the commentary appear to recognize this as a distinct method, two reported cases support an ascribed-intent approach and provide a modicum of precedent. In *Unit Vending Corp. v. Lacas*, the written contract was silent on post-death duties. The court rejected the subject-matter approach and instead "ascribe[d]"[186] a reasonable intent to the parties. Kole Soter, the sole proprietor of a Philadelphia diner, and Unit Vending Corporation, signed Unit Vending's standard-form contract providing that Soter would allow Unit Vending to operate cigarette vending machines in his diner for five years in exchange for a commission of two cents per pack to Soter.[187] Soter died just nine months after signing the five-year contract. Although his will anticipated his sons moving from Albania to operate the Philadelphia diner, the sons declined, and the estate promptly sold the diner to a third party who refused to assume the obligations under the Unit Vending contract.[188] Unit Vending sued Soter's estate for breach of contract damages

184. *See* RESTATEMENT (SECOND) OF CONTRACTS § 204 (AM. LAW INST. 1981); *see also, e.g.*, Snyder v. Howard Johnson's Motor Lodge, Inc. 412 F. Supp. 724, 728 (S.D. Ill. 1976) (supplying a covenant that the defendant will operate a restaurant consistently with its other restaurants).

185. RESTATEMENT (SECOND) OF CONTRACTS § 204, cmt. b (AM. LAW INST. 1981).

186. *See* Unit Vending Corp. v. Lacas, 190 A.2d 298, 300 (Pa. 1963).

187. *See id*. at 299. The court discussed additional details such as a $1,000 loan to Soter as an advance against future commissions, and refusal by the buyer of the diner to assume the duties under the Unit Vending contract. *See id.*; *see also* CORBIN ON CONTRACTS, *supra* note 19, § 75.1, at 122 (emphasizing these extra facts).

188. *See Unit Vending Corp.*, 190 A.2d at 299.

arguing the contract was not a personal services contract and survived Soter's death.[189]

Despite acknowledging that under a subject-matter approach these contracts would not terminate because only contracts involving "peculiar skills or . . . based on distinctly personal considerations" not present in this case, terminate upon the obligor's death, the court concluded that the estate had no obligation to Unit Vending.[190] In reaching this practical result, the court emphasized that the "intention of the parties is paramount"[191] regardless of the subject matter of the contract. In moving beyond a subject-matter analysis, the court said it "*ascribes* the most reasonable, probable and natural conduct of the parties,"[192] and "a reasonable interpretation . . . leads . . . to the conclusion that it was not intended that the contract extend beyond the death of Soter."[193] Although this approach may make it difficult to predict outcomes, the *Unit Vending* analysis is consistent with traditional contract law notions that a court may imply conditions or supply omitted terms to achieve a just result.[194]

An earlier case perhaps reflecting this idea is *Smith v. Zuckman*.[195] In that case, Smith agreed to provide marketing services for Zuckman's theatre for two years, but Smith died during the term of the contract. The court ignored boilerplate language providing that the contract was with Smith and his "successors."[196] Instead, the court emphasized that Smith's obligations "involve[d] such a relation of personal confidence that it *must have been intended* that the . . . obligation [should be] performed by him alone."[197]

In some cases, it is not entirely clear whether the court ascribed a reasonable intent to the parties, or whether the court found the actual intent of the parties.[198]

2. Proposing Various Factors for Applying the Ascribed-Intent Approach

Under a new "ascribed-intent" approach, courts could consider the realities of modern economic life, the language of the contract, all other relevant facts,

189. *See id.* at 300.

190. *See id.*

191. *Id*.

192. *Id.* (emphasis added).

193. *Id.*

194. *See* PERILLO, *supra* note 11 (discussing "constructive condition[s] . . . imposed by law in the interests of justice").

195. Smith v. Zuckman, 282 N.W. 269 (Minn. 1938), *discussed in* Foster, *supra* note 66, § 8[b].

196. *See id.* at 270.

197. *Id.* at 271 (emphasis added) (quoting Bd. of Comm'rs v. Diebold Safe & Lock Co., 133 U.S. 473, 488 (1890)). A Missouri court used language suggesting an ascribed-intent approach. *See* Warnecke v. Estate of Rabenau, 367 S.W.2d 15, 18 (Mo. Ct. App. 1963) ("Thus, for such offices to be used [solely as offices for CPAs], it must have been contemplated that Rabenau would remain alive. . . . "). But the Missouri court could have simply applied the language of the rental contract which prohibited assignment "voluntarily or by operation of law or otherwise." *Id.* at 16.

198. *See, e.g.*, Ames v. Sayler, 642 N.E.2d 1340, 1343 (Ill. App. Ct. 1994) (relying upon intent in determining that a contract to farm terminated upon the death of the named farmer); Rodgers v. S. Newspapers, Inc., 379 S.W.2d 797, 800 (Tenn. 1964) (discussing intent and enforcing a contract which never became effective because it was contingent on the survival of one party until a specific date; the party died before the date specified).

circumstances, and policies, and then decide what the intent of reasonable parties would have been if they had negotiated death.

a. Significant Factors from Existing Cases

When deciding these cases, existing law primarily relies upon two major factors, namely contract language and the nature of the remaining contractual obligations. Under an ascribed-intent approach, these factors could be important but would not necessarily be dispositive in close cases. Free from rigid rules and one-factor presumptions, courts could analyze and truly balance factors. For example, in considering the language of a contract, courts could maintain a healthy skepticism toward boilerplate and interpret boilerplate in the context of other language in the contract.[199] A court could take an approach used in some contract law cases outside the death area and search for the overall thrust of a contract and interpret any contrary boilerplate narrowly.[200] For example, if the negotiated terms emphasized the importance of the individual,[201] a court might conclude that the contract terminated at death, and the parties included a boilerplate clause making the agreement binding on successors to mean only that a successor could recover (or be liable) in case of a lifetime breach.[202] Also, courts still could consider the nature of the decedent's remaining contractual obligations but would not be forced to classify activities as entirely personal or entirely impersonal.

b. Ability of the Family to Imitate the Decedent

In an effort to determine reasonable expectations, a court could take into account whether, at the time the contract was entered into, the parties reasonably believed the parties' likely successors had the skills and other resources needed to finish the job, if necessary. A court could consider whether the likely heirs had any experience in the area,[203] whether the decedent already purchased or otherwise acquired the materials needed to do the job,[204] and the amount of preparation potentially necessary to fulfill the obligations under the contract. Even when applying the rules and presumptions of the old framework, some courts have mentioned these circumstances. For example, in *Pope v. Dickerson*, the court noted that the decedent's son and son-in-law were not qualified to perform the decedent's farming obligations.[205] Likewise, in *Kowal v. Sportswear by Revere, Inc*., the court observed that the decedent had served as a company salesman for over twenty-two

199. *See supra* notes 31–35 and accompanying text (discussing several cases dealing with boilerplate).

200. *See, e.g.*, Izadi v. Machado (Gus) Ford, Inc., 550 So. 2d 1135, 1138–39 (Fla. Dist. Ct. App. 1989).

201. *See, e.g.*, Farnon v. Cole, 66 Cal. Rptr. 673 (Ct. App. 1968); Buccini v. Paterno Constr. Co., 170 N.E. 910 (N.Y. 1930); Kelley v. Thompson Land Co., 164 S.E. 667 (W. Va. 1932).

202. *See, e.g.*, Smith v. Zuckman, 282 N.W. 269 (Minn. 1938).

203. *See, e.g.*, Thomas Yates & Co. v. Am. Legion Dep't of Miss., 370 So .2d 700 (Miss. 1979) (concluding that a contract to sell group insurance to American Legion members terminated upon the father's death even though the son provided the insurance services under the contract for eight years after his father's death).

204. *See, e.g.*, *In re* Burke's Estate, 244 P. 340, 341 (Cal. 1926) ("[C]onsiderable material, steel, and timbers had been cut and placed in preparation for the erection of the superstructure.").

205. *See* Pope v. Dickerson, 89 So. 24 (Ala. 1921).

years and his likely heirs would not be able to perform his obligations.[206] On the other hand, in *Cox v. Martin,* the court emphasized that the son could perform the father's remaining obligations under the contract.[207] In attempting to apply this factor, courts may recognize the "commercial senselessness of requiring performance [in certain situations and then make an] equitable allocation [of the risk]."[208]

c. Other Factors Worth Considering

Courts ascribing intent could consider other factors which in isolation would rarely be dispositive but could be relevant. First, if the contract involved a confidential relationship or the disclosure of confidential information, reasonable people might think it more likely that death should terminate the contract. Second, if a court could not grant a reasonable remedy if the contract survived death and then the successor breached, reasonable persons might favor contract death.[209]

Third, course of performance or course of dealing could be relevant.[210] Perhaps before death, the decedent had been ill, injured, or otherwise unable to perform contractual obligations. If the parties suspended performance for an extended period on those occasions, it might indicate the reasonableness of terminating the contract at death.[211] Fourth, if at the time the parties entered into the contract the decedent was advanced in age, or was known to have serious medical problems, a failure to include a clause in the written contract stating that the arrangement should terminate at death might signal that the contract should continue.

Fifth, in situations when one party clearly was trying to hedge against a future price increase or other contingency and neither party likely contemplated death, reasonable persons might anticipate that the contract should survive death.[212] In hedging, commodities, and other similar transactions, the primary purpose may

206. *See* Kowal v. Sportswear by Revere, Inc., 222 N.E.2d 778, 781 (Mass. 1967).

207. *See* Cox v. Martin, 21 So. 611, 612 (Miss. 1897) ("[T]he personal representative can fairly and fully execute [the contractual obligations] as well as the deceased himself could have done."); *see also* Cates v. Cates, 104 So. 2d 756, 759 (Ala. 1958) (involving contracts to haul milk between two cities; court stated that a contract involves personal services only when "the duty imposed can not be done as well by others as by the promisor").

208. PERILLO, *supra* note 11.

209. *See, e.g.*, De Witt v. Brearton, 170 N.E. 119, 120 (N.Y. 1930) (refusing to enforce an agreement to provide or supervise medical treatment because the "law . . . has no substitute for the special personal element contracted for").

210. "Course of performance" generally refers to "a sequence of conduct between the parties to a particular [contract] that exists if: the [contract] . . . involves repeated occasions for performance by a party." U.C.C. § 1-303(a) (AM. LAW INST. & UNIF. LAW COMM'N 2012). "Course of dealing" generally refers to "a sequence of conduct concerning previous [contracts] between the parties . . . that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." U.C.C. § 1-303(b) (AM. LAW INST. & UNIF. LAW COMM'N 2012).

211. On the other hand, if a substitute successfully performed when the contracting party was unable to perform, this may indicate that the contract should survive. *See, e.g.*, Ames v. Sayler, 642 N.E.2d 1340 (Ill. App. Ct. 1994) (concluding that a farming contract survived farmer Ames' death after noting that his son farmed the property for a year while his father was ill, and that a hired individual farmed the land for some time before Whitney Ames died).

212. *See, e.g.*, Wentworth v. Cock (1839) 113 Eng. Rep. 17; 10 AD. & E. 42 (involving a contract to purchase tons of slate blocks on a monthly basis at a fixed price).

be fixing a price or other variable to protect from future market fluctuations, and that protection may be at the heart of the bargain.[213] In contrast, if hedging against market fluctuation was not a significant motive for the parties and each side contemplated a fair return or bargain absent unforeseen circumstances, reasonable persons might be more inclined to discharge the remaining contract obligations at death.

d. Some Economic Factors Reflecting Changes Over the Past 400 Years

The centuries-old rules and presumptions seem to presuppose occupational and geographic immobility. These include the presumptions that farming, construction, and logging contracts survive and bind a decedent's successors,[214] and, even more so, the general presumption that all contracts of the dead survive unless the successor proves an exception. Creating judicial rules and presumptions based on an economic assumption of occupational and geographic immobility may have been appropriate 400 years ago in largely agrarian England,[215] when "[o]ccupations were usually inherited, and children began participating in agricultural work at a young age."[216] But, economic life has changed. Younger generations are less likely to automatically adopt the same occupational and geographic choices that their ancestors made.

In addition, increased task specialization makes contract survival dubious in many situations. In olden times, when most tasks were simpler, rules and presumptions treating family members as interchangeable may have made more economic sense. In a nation, the complexity of tasks in general "is closely associated with the growth of total output and trade, the rise of capitalism, and of the complexity of industrial processes."[217] Complexity and labor specialization also are related to education. Historically, as industrial processes became more complex, the population needed increased education, and increased education made it possible for the workforce to become more specialized and perform more complex tasks. Increased specialization and complexity likely decrease the odds that a successor can perform the decedent's duties or have the specialized knowledge needed to effectively delegate those duties. A leading contract law commentator refers to "the commercial senselessness of requiring performance [in certain situations by a decedent's successors]."[218]

During the twentieth century, the forces of occupational mobility, industrialization, complexity, and technological development contributed to drastic

213. *See* KNAPP ET AL., *supra* note 9, at 72 (asserting that courts typically award an innocent party damages based on the party's expectations when the other party breaches).

214. *See supra* Section II.C.1.c.

215. *See* Wisman & Reksten, *supra* note 15, at 7 ("[P]remodern agricultural societies . . . [in which] [o]ccupations were usually inherited, and children began participating in agricultural work at a young age."); KNAPP ET AL, *supra* note 9, at 31 ("[I]n England in the seventeenth century, land was the basis of the English economy.")1.

216. Wisman & Reksten, *supra* note 15, at 7 (referring generally to "premodern agricultural societies" with "low levels of technology and specialization").

217. *Division of Labor*, WIKIQUOTE, https://en.wikiquote.org/wiki/Division_of_labor (last visited Sept. 9, 2018).

218. PERILLO, *supra* note 11 (quoting Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966)).

changes.[219] "Between 1910 and 2000, the employment of professional, technical, and kindred workers increased more than fourfold as a proportion of total employment, from 4.4 percent to 23.3 percent."[220] "Professional, managerial, clerical, sales, and service workers . . . grew from one-quarter to three-quarters of total employment between 1910 and 2000. . . . "[221] At the same time, farmers and farm laborers "declined 96 percent as a proportion of total employment between 1910 and 2000."[222] The increase in occupational complexity and specialization, along with the other economic factors discussed above, all raise questions about the relevance of the 400-year-old legal foundation for dealing with contracts of the dead.

e. Communication Factor: From Town Criers to the Internet

"The history of communication is mankind's search for ways to improve shouting."[223] In olden times, even if the decedent's family could not perform the decedent's remaining contracts, perhaps they would have superior information about who could finish the job. In those situations, they might have been able to competently assign and delegate the remaining tasks. This might have been beneficial when the surviving contract party did not have, and could not obtain, the information necessary to choose a suitable replacement. When English courts established the legal framework for contracts of the dead in the sixteenth century, methods of communication ranged from town criers (for the particular benefit of the illiterate) to mail deliveries on horseback.[224] As an indication of the communication difficulties even 200 years after the establishment of the foundational rules for contracts of the dead, troops fought the Battle of New Orleans on January 8, 1815, even though the U.S. and England signed the peace treaty ending the war in Ghent, Belgium on December 24, 1814; nearly 2,000 soldiers were killed, wounded, or missing because the news traveled slowly.[225] A story about the inspiration of Samuel Morse, inventor of the telegram, demonstrates the difficulty of communicating as late as the 1820s: "While Morse was working on a portrait of General Lafayette in

219. *See* Ian D. Wyatt & Daniel E. Hecker, *Occupational Changes During the 20th Century*, MONTHLY LAB. REV., Mar. 2006, at 35, 38.

220. *Id.*

221. *Id.* at 35.

222. *Id.* at 55 (dropping from thirty-three percent of the workforce to 1.2 percent of the workforce, even though agricultural output grew).

223. *History of Communication*, HIST. WORLD, http://www.historyworld.net/wrldhis/PlainTextHistories.asp?groupid=929&HistoryID=aa93 (last visited Sept. 9, 2018).

224. *See* Andrew Parker, *The Surprising History and Influence of Town Criers*, HIST. AN HOUR (Jan. 8, 2014), http://www.historyinanhour.com/2014/01/08/history-of-town-criers/ (listing Royal proclamations, market day announcements, local government bylaws, and adverts among the information town criers communicated). In regard to communicating by mail, "in 1633 Charles I commission[ed] Thomas Witherings to improve postal communication[]," and he achieved a speed of 120 miles a day, so that "a letter [could] be sent and an answer received between London and Edinburgh within a week." *History of Communication*, *supra* note 223.

225. *The Battle of New Orleans*, HIST. (2010), http://www.history.com/this-day-in-history/the-battle-of-new-orleans ("Although the peace agreement was signed on December 24 [1814], word did not reach the British forces assailing the Gulf coast in time to halt a major attack.").

Washington, his wife, who lived about [320 miles] away, grew ill and died. But it took seven days for the news to reach him."[226]

In contrast, today with the aid of computers and other devices, and the internet, the dissemination of information is fast, cheap, and often overwhelming. "The internet has revolutionized the . . . communications world like nothing before. . . . [It is] a mechanism for information dissemination . . . without regard for geographic location."[227] "[T]oday we live with a desperate rate of speed for communication . . . information is catapulted in front of us. It is unfathomable to consider the speed at which we can find and share content, communicate a message . . . find an answer to a burning question, and become educated."[228]

If a contracting party dies in the modern information age, is it accurate to presume that the decedent's successors have knowledge that is not available to the surviving contract party? And is it best to force the surviving contract party to accept performance from the successor's choice? The surviving contract party may have a better understanding of what it wants and may have no difficulty finding a replacement thanks to the internet and the global marketplace.

D. Moving Beyond the Old Rules and Using Flexible Contract Doctrines

Flexibility is at the core of several contract doctrines, but courts may overlook an opportunity to reach a reasonable result if they focus exclusively on the old contract-of-the-dead rules and presumptions. For example, in *Warner v. Kaplan*, as described in the introduction,[229] Glen Altman signed a contract to purchase a co-op apartment for herself and her two dogs for $2.3 million shortly before her death. Although she died before the closing and before moving in, the court held her family liable for $230,000 in damages for failing to promptly pay the full purchase price in cash after she died. An interesting feature in the *Warner* case was that the court summarily recited a clause in the contract setting damages for breach for failure to promptly close on the purchase at $230,000.[230] The court's opinion fails to discuss the important question whether the $230,000 figure was a reasonable approximation of the damages the seller likely would incur. A tenet of contract law is that a liquidated damages clause will not be enforceable if it is a penalty.[231]

Likewise, in *Brearton v. De Witt,* discussed in the introduction,[232] the court applied the old framework in deciding whether a promise survived the obligor's death without considering the flexibility available under general contract doctrine when interpreting words or clauses in a contract. In that case, the court described

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226. Mr. Al Gore, U.S. Vice President, Inauguration of the First World Telecommunication Development Conference 8 (Mar. 21, 1994).

227. Barry M. Leiner, et al., *A Brief History of the Internet*, ACM SIGCOMM COMPUTER COMM. REV., Oct. 2009, at 22, 22.

228. Rita Jackson, *Was 171 Century Communication Simpler?*, HRMARKETER (Sept. 11, 2012), http://www.hrmarketer.com/blog/2012/09/was-17th-century-communication-simpler/.

229. *See supra* notes 7–8 and accompanying text.

230. *See* Warner v. Kaplan, 892 N.Y.S.2d 311, 313 (1App. Div. 2009).

231. *See* RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (AM. LAW INST. 1981) ("A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."); KNAPP ET AL., *supra* note 9, at 1037, 1047–52.

232. *See supra* notes 2–4 and accompanying text.

Doctor DeWitt's promise to render or arrange medical care to his victim as a result of his negligence, and, in return, his victim promised "to give up, and isolate herself from her friends, to give up the position that she then had, abandon her occupation and all other callings and forms of livelihood."[233] The court did not discuss whether the parties' settlement could be interpreted to require that Doctor DeWitt and his successors be responsible for the cost of the victim's medical care for as long as necessary. This interpretation is particularly appealing given the important promises she made, such as abandoning her occupation,[234] agreeing not to work, and isolating herself from her friends—did she really intend to fulfill all those promises if she would receive no medical care in return if Doctor DeWitt died shortly after she severed all her connections? A basic principle of contract law is that, "The courts always avoid, if possible, any construction of a contract that is unreasonable or inequitable. . . . "[235] One court has stated, "[I]n determining . . . whether the [estate] is bound . . . the facts and circumstances of each particular case are necessarily to be taken into account."[236] Perhaps a more reasonable interpretation would have been that Doctor DeWitt promised to provide or arrange for medical care for as long as necessary.

A court could also observe that in the settlement, Doctor DeWitt expressly reserved the right to delegate his duty to provide medical care to others as long as he provided some level of "supervision and direction."[237] The Restatement (Second) of Contracts suggests that a contract should not be treated as a personal services contract if the party retains the right to assign or delegate the duties.[238]

CONCLUSION

When should a deceased person's deals live on with a new host? When should a person's obligations be discharged at death?[239] The cases present challenging questions.

An English court in Shakespeare's time created a general rule favoring contract survival beyond the grave. Perhaps in those largely agrarian days, when children were more likely to stay in the same locale as their parents and follow their ancestors into the family business, contract transmigration was consistent with most parties' expectations. Furthermore, even if the successors could not perform and

233. Brearton v. De Witt, 234 N.Y.S. 716, 717 (App. Div. 1929), *rev'd*, 170 N.E. 119 (N.Y. 1930).

234. *Brearton*, 170 N.E. at 120 (stating that Mae Brearton was a sales person in New York City, and she also operated a rooming house).

235. Fort M Dev. Corp, v. Inland Credit Corp., 388 N.Y.S.2d 603, 605 (App. Div. 1976) (Nunez, J., dissenting) (quoting Simon v. Etgen, 107 N.E. 1066, 1068 (N.Y. 1915)).

236. McDaniel v. Rose, 153 S.W.2d 828, 830 (Mo. Ct. App. 1941).

237. *Brearton*, 234 N.Y.S. at 717.

238. RESTATEMENT (SECOND) OF CONTRACTS § 262 cmt. b (AM. LAW INST. 1981) (citation omitted) ("The question whether a duty requires performance by a particular person is essentially the same question that arises where a party seeks to delegate performance of his duty to another and is to be determined by the same criteria. If an obligor can discharge his duty by the performance of another, his own disability will not discharge him.")

239. *See* WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2. ("The evil that men do lives after them; The good is often interred with their bones. . . .").

would need to assign and delegate their duties, perhaps they were better equipped to find a substitute than the surviving contract party.

Times have changed. Younger generations exercise greater occupational and geographic mobility.[240] Families often must employ a team of experts to sell or otherwise transition a family business upon an ancestor's death because the younger generation has moved on and made their own lives.[241] If, in modern times, it is unusual that the decedent's successors will continue the decedent's occupation, is it really necessary for the decedent's successors to perform the tasks or choose a substitute? In our information age, the surviving contract party may know what they need and can find the resources to finish the job. This Article suggests tipping the scale to allow the decedent's deals to terminate in close cases.

240. *See supra* Section III.C.2.d.

241. *See* Steven A. Benefield, *No Plan for the Succession of Your Business? Plan for the Business to Fail*, 2009 WL 2029276, at *12, *in* FAMILY AND BUSINESS SUCCESSION PLANNING STRATEGIES (2009) ("A successful plan requires the input and continued attention of attorneys, accountants, business consultants, and counselors or psychologists for the relationship structure and maintenance.").