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If You Expect to Work in Family-Owned Business for Life, Be Sure to Get It in Writing

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Family-owned businesses often employ multiple family members. Even if there is an expectation that employment will continue indefinitely, the company and the family member employees both usually reserve the right, explicitly or implicitly, to terminate the employment "at-will," meaning at any time and for any reason. The terms of such at-will employment need not be set out in writing, though sometimes they are. However, where the parties contemplate the right and obligation of lifetime employment, they should put the employment terms in writing to avoid the potential application of the statute of frauds.

The statute of frauds, generally, bars a party from bringing a claim for breach of an agreement that cannot by its terms be performed within one year, unless the agreement is in writing. In some states, such as Massachusetts, an otherwise enforceable oral agreement for lifetime employment does not fail due to the statute of frauds, because, the courts reason, the agreement could theoretically be fully performed if the employee dies or the company goes out of business within one year of the contract date. In other states, such as Illinois, an oral lifetime employment agreement is *not* enforceable under the statute of frauds, because, as the courts reason, a lifetime employment agreement "anticipates a relationship of a long duration – certainly longer than one year." Courts in those states apply the statute of frauds to such agreements in recognition of the evidentiary concern that memories can and do fade over time and thus become unreliable and in order to protect defendants and the court from "confusion, uncertainty and outright fraud."

> John III claimed that his parents expected him to "continue the family's legacy" and that they told him that the family's real estate holdings would someday all belong to him.

An Appellate Court in Illinois recently applied the statute of frauds when affirming the dismissal of claims of an oral agreement for lifetime employment in a family-owned business in ***Church Yard Commons Ltd. P'ship v. Podmajersky****, Inc.* (March 28, 2017). John Podmajersky, Jr. and Annelies Podmajersky owned and developed substantial real estate holdings in the East Pilsen neighborhood of Chicago. Their son, John Podmajersky III, had worked in the family's business as a child and then for his entire adult life. During most of that time, John III's sister, Lisa, had lived away from

Chicago and had little to do with the family business. John III claimed that his parents expected him to "continue the family's legacy" in the neighborhood and that they told him that the family's real estate holdings would someday all belong to him.

By 2003, John Jr. and Annelies, then ages 81 and 75 respectively, asked John III to take over the entire management and operations of the real estate properties. John III alleged that John Jr. and Annelies orally agreed to make John III an equal partner in all the separate real estate-owning entities and to provide him the right to purchase their interests in the entities upon their deaths at a price determined through a specific formula. In exchange, John III agreed to forego other career opportunities and provided a "commitment of a lifetime of work" to the family's real estate business.

By 2004, John Jr. and Annelies had consulted their estate planning lawyer about implementing the agreement. The lawyer developed a "conceptual plan" for the transfer of the business interests. However, the plan was never implemented or put in writing. John III nonetheless continued to work for the company through 2013 and 2014, when Annelies and John Jr., respectively, died.

> Lisa allegedly caused Annelies and John Jr. to change their wills to cut John III out entirely and instead to transfer of all the real estate holdings to her upon their parents' death.

By 2012, Lisa had returned to Chicago and moved in with Annelies and John Jr. as their health deteriorated. According to John III, Lisa began to isolate their parents from John III and to poison their relationship with him. Lisa also allegedly caused Annelies and John Jr. to change their wills to cut John III out entirely and instead to provide for the transfer of all the real estate holdings to her upon their parents' death. Finally, allegedly at Lisa's urging, Annelies and John Jr. sought to remove John III from the management of the properties and filed a lawsuit against John III for breach of fiduciary duty.

After Annelies and John, Jr. died, Lisa became the substituted plaintiff in the lawsuit as estate representative. John III filed a counterclaim against Lisa seeking declaratory relief arising from their parents' failure to transfer the business interests to him and for breach of contract arising from the 2003 oral agreement. John III also asserted separate claims based on Lisa's alleged tortious interference with John III's business relationship with his parents and interference with his business and inheritance expectancy. Lisa filed a motion to dismiss all of John III's claims arising from the 2003 agreement, based on the Illinois statute of frauds, because there was no writing memorializing that oral agreement. The trial court dismissed all of John III's claims under the 2003 agreement, reasoning that it was "similar in character to a lifetime employment agreement" and thus was not enforceable because it was not in writing.

On appeal, the Appellate Court rejected John III's argument that the statute of frauds did not apply because he technically could have performed all his obligations within one year. The Court instead referred to John III's own allegations that the agreement contemplated a lifetime of work on his behalf and to Illinois law requiring that such lifetime employment agreements be in writing in order to be enforceable.

John III also argued that the statute of frauds nonetheless should not bar enforcement of the oral agreement because he had partially performed his obligations. The Court disagreed, noting that, under Illinois law, partial performance does not prevent application of the statute of frauds unless it

would be “impossible or impractical … to compensate the performing party for the value of his performance.” In this case, the Court determined, John III had been compensated for his prior work through his receipt of management fees during the years he had managed his parents’ properties. Thus, the Court ruled, John III would not be entitled to enforce the oral agreement based on his partial performance. The Court then affirmed the dismissal of all of John III’s claims under the 2003 oral agreement concerning the transfer of his parents’ interests in their real estate entities. As a result of the Appellate Court’s decision, all that remained for trial were John III’s claims against Lisa for interference with John III’s business relationship with his parents and interference with his business and inheritance expectancy.

> Even in states that do not apply the statute of frauds to lifetime employment contracts, it is still better practice to put such agreements in writing.

The *Podmajersky* case serves as a reminder of the importance of documenting all material terms of employment and other agreements between members of family-owned businesses, especially those that cannot be performed within one year. Starting, but not concluding, the drafting process, or simply relying on the memory or good faith of the other party to acknowledge and fulfill the terms of the oral agreement will leave the party looking to enforce the agreement at risk that a court will not afford him or her any relief. Indeed, failure to document a lifetime employment agreement, in particular, may lead to outright rejection of later claims based solely on an alleged oral agreement and thus result in the deprivation of a party’s expectation interest in the benefits arising from such an agreement, as happened in the Illinois Appellate Court. Even in states that do not apply the statute of frauds to lifetime employment contracts, it is still better practice to put such agreements in writing. Doing so will clarify the parties’ rights and responsibilities during the course of their business dealings and will also better allow the parties to advocate their positions to a court in the event of a later dispute.

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