**26.12 CONTRACT TO MAKE A WILL**

No instruction.

Use Note

A separate instruction is not provided. Instead, the pattern jury instructions on formation of a valid contract, breach of contract, and the defenses thereto should be used.

Comment

The Alaska Supreme Court has held that "[a]n individual may make a valid, binding contract to devise or bequeath property in a specified manner." McBain v. Pratt, 514 P.2d 823, 826 (Alaska 1973). The law of contracts governs the validity of such an agreement. Thomas Edgar Atkinson, Handbook of the Law of Wills § 48 (2d ed. 1953). "If the promisor dies and through his will does not make the agreed testamentary gift, a breach of contract occurs." McBain v. Pratt, 514 P.2d at 826. While "any will is revocable, including one executed in performance of an irrevocable contract," damages can be had for breach of the contract. Id. Further, "where a promisor has agreed to alternative performances, and there has been a breach of contract, the measure of damages is the value of the least onerous alternative." Id. at 826-27. See generally Bertel M. Sparks, Contracts to Make Wills (1956); Thomas Edgar Atkinson, Handbook of the Law of Wills § 48 (2d ed. 1953).

The trial judge should keep in mind that the statute of frauds, AS 09.25.010 (a)(2), requires a writing for enforceability of a "contract to bequeath property or make a testamentary disposition of any kind."