

Joint and Mutual Wills

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JOINT AND MUTUAL WILLS*

THE DEFINITIONAL PROBLEM

Judicial attempts to define joint and mutual wills have produced no uniform definition but rather highly contradictory descriptions. This confusion is probably due, for the most part, to an arbitrary overemphasis on certain physical facts (*e.g.*, that the parties signed the same testamentary instrument or separate instruments containing mutual and reciprocal bequests) in establishing a test. According to some authorities, a single instrument executed by two testators is not to be regarded as "joint" where the will of each party is separately expressed, complete within itself, and separable from the terms of the other's will.¹ It has also been said that a testamentary disposition contained in one writing and disposing of property owned jointly is a "joint will"; whereas, the same document, if it refers to and deals with property held separately, is a "mutual will."² Other courts have called separate documents "twin wills,"³ or have stated that mutual wills usually are in separate instruments, but may be in the same instrument.⁴ Other authority says a "joint will" may be "mutual,"⁵ while some courts hold a joint will is not necessarily mutual.⁶ One court has laid down the rule that a will is neither "joint" nor "mutual" where, although executed by two testators, all of the property was owned by one of them.⁷ There are other courts which have said that it is only a contractual element which produces a "mutual will,"⁸ and there is some authority to the effect that a will may be "mutual" without being contractual.⁹ On a few occasions, joint and mutual wills have been designated "double" or "counter" wills,¹⁰ and earlier cases state the rule that, although executed by two persons, a will is not a "joint" will where by its terms the survivor is to take all the property of the other testator, since in practical effect the will can never operate except as the will of the first to die.¹¹ And finally, a rather extreme view on mutual wills defines them as wills which are "identical" in their pro-

* To be continued in subsequent issue of MARQUETTE LAW REVIEW.

¹ *American Trust & Safe Deposit Co. v. Eckhardt*, 333 Ill. 261, 162 N.E. 80 (1928), noted 27 MICH. L. REV. 356.

² *Hall v. Roberts*, 146 Fla. 444, 1 So.2d 579 (1941).

³ *McGinn v. Gilroy*, 165 P.2d 73 (Ore. 1946).

⁴ *Maurer v. Johansson*, 223 Iowa 1102, 274 N.W. 99 (1937).

⁵ *Hovck v. Anderson*, 14 Ariz. 502, 131 P. 975 (1913); *Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763 (1924); see Notes 43 A.L.R. 1025, 169 A.L.R. 11; *In re Johnson's Will*, 233 Iowa 782, 10 N.W.2d 664 (1943).

⁶ *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909); *In re Cole's Estate*, 171 N.C. 74, 87 S.E. 962 (1916).

⁷ *Graham v. Graham*, 279 Mo. 290, 249 S.W. 37 (1923).

⁸ *Culver v. Hass*, 234 Iowa 877, 14 N.W.2d 692 (1944).

⁹ *Mullen v. Johnson*, 157 Ala. 262, 47 So. 584 (1908).

¹⁰ *Deseumeur v. Rondel*, 76 N.J. Eq. 394, 74 A. 703 (1909).

¹¹ *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am.Rep. 135 (1870).

visions, but executed separately.¹² It seems apparent from these illustrations that there exists a very real definitional problem in this field.

The text writers have been influenced by this same overemphasis on physical facts. For example, American Jurisprudence gives these definitions: "A 'joint' will is best defined as a single testamentary instrument, which contains the wills of two or more persons, is executed jointly by them, and disposes of property owned jointly, in common, or in severalty by them." And "mutual" wills are defined as ". . . wills executed pursuant to an agreement between two or more persons to dispose of their property in a particular manner each in consideration of the other."¹³ This writer obviously emphasizes the physical facts, although there is some stress on the intention factor when separate instruments are involved. Page, in his work on wills, took a somewhat different approach, and classified this type of will in accordance with the substance of its dispositive provisions, as follows:

"a) The will by which the testator dying first leaves his property to the survivor or survivors; or

b) A will in which the testators, in separate clauses, dispose of their several interests in the execution of a common intention; or

c) A will in which the testators jointly devise their joint interests to third persons, or they treat their separate property as a common fund out of which they provide for third persons; and finally

d) The will which is a composite of the foregoing types, that is, which provides in part for third persons, and in part provides for the survivor.

If the common intention is expressed in one instrument, the will may be called a joint will, and if the testators have executed two separate instrument to manifest their common intention, the will may be called a mutual will."¹⁴

Although there is considerable emphasis on physical facts here, Page also speaks of a "common intention" in the testators.

It would seem that the basic distinction between joint and mutual wills on the one hand, and ordinary wills on the other, is the existence in the former of a different type of intention on the part of the testators. This different intention is that one testator acting alone shall not change his or her disposition without the consent of the other. In other words, one party's disposition is made with reference to the disposition made by the other party, and in reliance on the assumption that the latter's disposition will not be changed.¹⁵ The parties have

¹² *Rastetter v. Hoenninger*, 151 App. Div. 853, 136 N.Y.S. 961 (1912).

¹³ 57 AM. JUR., *Wills* §681.

¹⁴ I PAGE *WILLS* §102.

¹⁵ See 57 AM. JUR., *Wills* §40; *In re Krause's Will*, 173 Wash. 1, 21 P.2d 268 (1933).

agreed, either expressly or by implication, that each shall dispose of his or her property in a certain way.

Under this approach the definitional difficulties which plague the courts would be eliminated or at least minimized, and the physical facts would be reduced to their proper role, namely, merely evidence to be used in determining the testators' intentions. Hence, a court should conclude that one or more documents represent a joint and mutual will only (1) where the testators have given sufficient evidence of an agreement between them that each party is disposing of his or her property in a certain way because of a disposition to be made by the other, and (2) each party has agreed not to change his or her disposition without the consent of the other. It seems unwise to arbitrarily assume that any single fact (*e.g.*, the number of wills executed) should be conclusive to show such an agreement.

PROOF OF THE AGREEMENT

How must the agreement necessary for a joint and mutual will be shown? Suppose the testators execute a single instrument as a will. Is this enough? The general rule is that the joint execution of a single will by the testators is not of itself, without reference to the terms of the instruments, sufficient evidence of an enforceable contract to devise between the testators.¹⁶ The Wisconsin Court has said:

"The mere fact that a man and his wife join in the making of a will in which in separate provisions each conveys his or her property to the survivor and upon the death of the survivor it is given to the same beneficiaries, is not a contract even though the property be jointly owned."¹⁷

Clearly, where a single instrument is, in effect, two separate and distinct wills, containing no clauses in common except those prescribing administrative details, the circumstance that it was jointly executed is not in itself proof that it was executed pursuant to a contract.¹⁸

A will jointly executed by two testators, containing no express contractual terms, may disclose so clearly from its testamentary terms and surrounding circumstances that it is the product of a contract between them, that the will may be sufficient evidence to establish the contract.¹⁹ A will which is jointly executed may furnish in itself *prima facie* proof that it was executed pursuant to a common intention between the testators,²⁰ notwithstanding it does not expressly purport to have been made pursuant to a contract, does not contain the word "contract" or "agreement," nor does it include an express

¹⁶ *In re Cawley's Estate*, 136 Pa. 628, 20 A. 567 (1890).

¹⁷ *In re Will of Sechler*, 224 Wis. 613, 272 N.W. 854 (1937).

¹⁸ See cases collected, 169 A.L.R. at 68.

¹⁹ *Beveridge v. Bailey*, 53 S.D. 98, 220 N.W. 462 (1928).

²⁰ *Nye v. Bradford*, 144 Tex. 618, 193 S.W.2d 165 (1946).

promise that the survivor will carry out the dispositions contained in the will.²¹ Thus it would appear that there need not be an express contract evidencing the intent of the parties, at least where the transfer will involve only personalty. The statement in the instrument that it is to be the only will of the persons who execute it, although not controlling, is significant and suggests that the will was executed with such a common intention. Reciprocal provisions, as well as bequests to a third person, in whose welfare the testators have a common interest, in a will executed jointly have been held to be in themselves evidence that the will was the fruition of a contract between the testators.²² The theory is that it is not possible that will of such form could be executed without some previous understanding or agreement between the parties.²³

Of course, if the intention of the parties is to transfer land, there will be Statute of Frauds requirements to be met; and an express contract will be necessary in most cases unless there is sufficient part performance to satisfy the Statute. This occurs where it is the surviving testator who attempts to breach the agreement, and such surviving testator has accepted the benefits of the deceased testator's will.²⁴ There is, however, a Wisconsin Statute which states that the Statute of Frauds does not apply to wills.²⁵ This statute was passed long before the *Doyle Case* was decided and, therefore, it must be assumed that the attorneys and the court were aware of its existence. Since the court looked for a showing of part performance, it can be inferred that Wisconsin follows the general rule despite this statute, unless part performance is established.

Suppose the testators executed separate instruments. What difference does this make so far as the requirements necessary for expressing their intention? The physical fact of execution of separate wills, which are reciprocal in their bequests, is not sufficient in itself to establish the common intention to make a joint and mutual will.²⁶ Neither is the physical fact of separate wills, reciprocal in terms and executed concurrently, sufficient to establish the common intention to

²¹ *Getchell v. Tinker*, 229 Mich. 267, 289 N.W. 156 (1939); *Rastetter v. Hoenninger*, *supra*, note 12.

²² *Frazier v. Patterson*, *supra*, note 6.

²³ *Ibid.*

²⁴ As stated in *Doyle v. Fischer*, *supra*, note 5, at 606: "It seems scarcely necessary to say that even though the agreement rested in parol and was void under the statute of frauds so far as it related to the real estate, there has been such a part performance thereof that equity will enforce its complete performance."

²⁵ WIS. STATS. (1951) §240.07, "Section 240.06 shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament nor to prevent any trust from arising or being extinguished by implication or operation of law."

²⁶ *Re Pennington*, 158 Kan. 495, 148 P.2d 516 (1944).

contract.²⁷ It is apparent that concerted action in the drafting and execution of similar wills is to be distinguished from contractual undertakings. The contractual intention may be proved by matter apparent on the surface of the wills (viewed in the light of surrounding circumstances), manifesting the agreement, such as expressed statements therein that the wills are made pursuant to an agreement, or by a mutuality of intention appearing in each will sufficient to show such an agreement.²⁸ Although it is a rule of good draftsmanship that where separate wills are executed pursuant to a common intention, each will should contain a recital to that effect, the rule is that the absence of such a recital is not conclusive and that such wills may be held to be the product of a contract, if it is made clear by the circumstances surrounding the instruments that they were executed pursuant to a contract.²⁹

Assuming now, that there is compliance with any applicable provisions of the Statute of Frauds, the agreement need not be proved from the wills themselves, unaided by other evidence. It may be established by the testimony of witnesses who have knowledge of the circumstances surrounding the execution of the testamentary instruments, by the admissions and declarations of the parties, by the relation of the parties, and by their conduct, all considered in combination.³⁰ But parol proof offered to establish a contractual intention must be of the most satisfactory character, especially where the enforcement of the agreement will divest the title from the heirs at law of a decedent. Clearly, the court cannot imply an agreement where the circumstances are inconclusive and permit an inference either way. It follows that, in the absence of an express intention, the evidence of the surrounding circumstances must be such as imperatively to compel the conclusion that the testators had such an intention, and that they undertook to bind themselves and their estates irrevocably in the event of the prior death of one, in order to suffice as proof of a contract between them.³¹

It is submitted that the requisite proof to establish a contract for the execution of separate wills with reciprocal provisions is present, where it appears from the evidence that the wills were drawn by the same scrivener, executed in the same office at the same time with both testators present, that they were attested by the same witnesses, that the wills were the same with the exception of the beneficiary, that each

²⁷ *Beveridge v. Bailey*, *supra*, note 19.

²⁸ *Holman v. Lutz*, 132 Ore. 185, 282 P. 241 (1930); *Albery v. Sessions*, 2 Ohio N.P. 237, 3 Ohio 330 (1895).

²⁹ *Auger v. Shideler*, 23 Wash.2d 505, 161 P.2d 200 (1945).

³⁰ See cases collected, 169 A.L.R. at 77.

³¹ *Edson v. Parsons*, 155 N.Y. 555, 50 N.E. 265 (1898); *Laurence v. Ashba*, 115 Ind. App. 485, 59 N.E.2d 568 (1945).

testator had full information as to the terms employed and the disposition made in the will of the other, and that the signing of each will was the inducement to the other to sign.

LEGAL EFFECT OF THIS COMMON INTENTION

Assuming the proper intention is shown, what is the general legal effect of such common intention expressed in a testamentary instrument? The general legal effect is that the will or wills are nevertheless still revocable, and this is the rule in the majority of jurisdictions. The Wisconsin Court, in accord with the majority rule has stated that "It is the contract and not the joint will which is irrevocable".³² This means that a subsequent will should be admitted to probate, and parties injured by the revocation of the prior will are relegated to their contract remedies for breach of the agreed upon intention. According to sound theory, one of two testators who has expressed his intention to make a joint and mutual disposition of his property, may revoke his will even after the death of the other testator and notwithstanding a valid contract forbidding such a revocation.³³ This does not mean that the contractual obligation is avoided by revoking the will.³⁴ It means that on the issue of will or no will, with which the probate court is concerned in deciding whether an instrument should be admitted to probate, a will is to be regarded as revocable notwithstanding it was executed pursuant to a valid contract. The question whether a revocation constitutes a breach of contract for which relief may be had in law or equity is of no concern, strictly speaking, to a probate court when an instrument is offered for probate.

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³² Doyle v. Fischer, *supra*, note 5.

³³ Plak v. Polak, 248 Wis. 425, 22 N.W.2d 153 (1945).

³⁴ *In re Scheffe's Estate*, 261 Wis. 113, 52 N.W.2d 375 (1952).