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NOTE

WILLS---JOINT AND MUTUAL---CONTRACTS TO DEVISE

One of the most fruitful sources of confusing and perplexing litigation is that presented by joint and mutual wills, due mainly to the failure on the part of courts to distinguish clearly between principles of contracts and wills, and to the loose language in a few cases, which was neither desirable nor harmonious with sound legal principles, but which had been adopted by the courts both in England and in the United States. A joint and mutual will, also known as a "reciprocal," "double," "conjoint," "multi-" or "counter" will, has been defined as one executed jointly by two persons with reciprocal provisions, which shows on its face that the devises are made one in consideration of the other.¹ In legal effect, it is the separate will of each of the persons executing it as makers,² and may be probated on the death of one of the testator's as his will, and unless subsequently revoked, may again be probated on the death of another of the testators as the will of the latter, or if not probated at the death of the first testator, as his will, it may be probated as the wills of both after the death of the other testator.³

Although the validity of joint wills was at one time denied by the courts,⁴ at the present time, however, it is settled beyond question that there is no objection in law or public policy to joint and mutual wills,⁵ at least where the makers are husband and wife, or otherwise occupy relations which imply moral obligations of mutual support,⁶ although it has been suggested that as between strangers, such an arrangement might be held to partake too largely of a mere wager or gambling

¹ *Wright v. Wright*, 215 Ky. 394, 285 S.W. 188 (1926); *Ginn v. Edmundson*, 173 N.C. 85, 91 S.E. 696 (1917); *Bright v. Cox*, 147 Ga. 474, 94 S.E. 572 (1917); *Carle v. Miles*, 89 Kan. 540, 132 Pac. 146, Ann. Cas. 1915A, 363 (1913).

² *Hill v. Godwin*, 120 Miss. 83, 81 So. 790 (1919); *Graham v. Graham*, 297 Mo. 209, 249 S.W. 37 (1923); *Am. Trust & Safe Deposit Co. v. Eckhardt*, 331 Ill. 261, 162 N.E. 843 (1928).

³ *Betts v. Harper*, 39 Ohio St. 639, 48 Am. Rep. 477 (1883); *Williams v. Williams*, 123 Va. 643, 96 S.E. 749 (1918); *Hoffert's Estate*, 65 Pa. Super. Ct. 515 (1917); *Gerbrich v. Freitag*, 213 Ill. 552, 73 N.E. 338, 104 Am. St. Rep. 234, 2 Ann. Cas. 24 (1905); *Mosser v. Mosser*, 32 Ala. 551 (1858); *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573 (1869); *Black v. Richards*, 95 Ind. 184 (1883).

⁴ Sir John Nicholl said in *Hobson v. Blackburn*, 1 Add. 271, that a mutual will is an instrument "unknown to the testamentary law of this state." In *Earl of Darlington v. Pulteney*, 1 Coup. 260, Lord Mansfield said in his opinion, expressed *arguendo*, "Now there can not be a joint will." Following these distinguished and learned judges, Jarman and Williams in their classical treatises accepted the statement of Sir John.

⁵ *Carle v. Miles*, *supra* note 1; *Meador v. Manlove*, 97 Kan. 706, 156 Pac. 731 (1916); *Underwood v. Myer*, 107 W.Va. 57, 146 S.E. 896 (1929); *Lewis v. Lewis*, 104 Kan. 269, 178 Pac. 421 (1919).

⁶ *Anderson v. Anderson*, 181 Iowa 578, 164 N.W. 1042 (1917).

transaction to command judicial approval.⁷ While these wills have received judicial sanction, nevertheless they are "no favorite children of the law."⁸ The fact that two wills are executed at the same time and the provisions show that the testators had a common purpose and were inspired by similar motives will not make the will joint or mutual, but a contract may appear from the terms of the will, by direct reference or inference.⁹

A will is not a contract, yet the terms and benefits of a will may be the subject of contract, and the rights thus lawfully accruing will be protected at law or in equity. Thus, on the death of one of the parties to an agreement for mutual, reciprocal wills, leaving a will in accordance with the agreement, the survivor becomes estopped from making any other or different disposition of his property than that contemplated in such agreement, and his obligations under the agreement become absolutely irrevocable, and enforceable against him, at least where he avails himself of provisions of decedent's will in his favor, or accepts any benefits thereunder.¹⁰

Thus, in *Bower v. Daniel*,¹¹ where a husband and a wife, pursuant to a mutual agreement as to the distribution of their property, made a joint will, whereby each left his or her property to the other for life, and at the death of the survivor, all the property of both was to be distributed among their children, and the husband at the wife's death accepted the provisions of the will in his favor, it was held that he could not thereafter revoke the will, nor make voluntary conveyance of the property contrary to its terms. Again, in *Allen v. Ross*,¹² where

⁷ *Ibid.*

⁸ *Dewee's Estate*, 12 Pa. Dist. & Co. 93, 94 (1922).

⁹ *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216, 27 L.R.A. (N.S.) 509 (1909); *Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763, 33 A.L.R. 733 (1924); *Campbell v. Kunkelberger*, 172 Iowa 385, 153 N.W. 56 (1915); *Wanger v. Marr*, 257 Mo. 482, 165 S.W. 1027 (1914); *Robinson v. Mandell*, 3 Cliff. 169, Fed. Cas. No. 11,959 (1868); *Hale v. Hale*, 90 Va. 728, 19 S.E. 739 (1894); *Mullen v. Johnson*, 157 Ala. 262, 47 So. 584 (1908); *Gould v. Mansfield*, *supra* note 3.

¹⁰ *Underwood v. Myer*, *supra* note 5; *Bower v. Daniel*, 198 Mo. 289, 95 S.W. 347 (1906); *Dufour v. Pereira*, 1 Dick. 419 (1769); *Morgan v. Sanborn*, 225 N.Y. 454, 122 N.E. 696 (1919), 27 L.R.A. (N.S.) 508, 43 A.L.R. 1020; *Brown v. Webster*, 90 Neb. 591, 134 N.W. 185 (1912); 5 *Pomeroy, Equity Jurisprudence* (4th ed. 1919) Sec. 2168; *Jarman, Wills* (6th ed. 1910) 40.

¹¹ *Supra* note 10.

¹² *Allen v. Ross*, 199 Wis. 162, 225 N.W. 831 (1929). In *Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763, 33 A.L.R. 733 (1924), a husband and wife made mutual wills, and by the wife's will certain land was bequeathed to a son, James, and after the death of the husband the wife bequeathed the same land to others, and James, now deceased, had by his will given plaintiff a legacy and made a charitable institution residuary legatee. It was held that plaintiff, who was also assignee of the interest of the charitable institution, could prosecute an action for the specific performance of the contract to make mutual wills, he having become vested with the same rights of action that James, the original devisee, would have had if living. "Equity will enforce specific performance of said oral agreement and prevent the perpetration of fraud which would result from a breach of the agreement on the part of the one accepting the benefits thereof."

two persons pursuant to a mutual agreement between them made mutual and reciprocal wills by which each bequeathed her estate to the other if she survived, it was held that where the survivor accepted the benefits of such a will and such an agreement, equity would enforce the agreement so that the property of the survivor would go to the designated person, and if necessary for that purpose would impress the property with a trust in favor of such designated person.

A joint or mutual will which is not made in accordance with a contract to devise or bequeath can be revoked at any time by either testator in the same manner as other wills.¹³ It is to be remembered that it is the contract and not the will that is irrevocable. The true rule is that a mutual will, like every other will, is, as a testamentary instrument, in its essence and by its very nature, ambulatory and revocable throughout the lifetime of the testator,¹⁴ and it cannot be made irrevocable, or enforceable notwithstanding its revocation as a will. So, no estate vests under the will of the surviving party to an agreement for mutual wills, on the ground of its irrevocability after the death of the first maker;¹⁵ all that vests, if anything, on the death of the first of the testators is a right of action to enforce the contract against the survivor.

When the mutual will is executed pursuant to an oral contract, the Statute of Frauds does not apply to such an oral contract, upon the theory that the first that dies carries his part of the contract into execution, *i.e.*, there has been a performance on the part of the deceased.¹⁶ Upon the death of one party such contract is not only specifically enforceable against the other, but he may be enjoined from conveying any of the lands or chattels included in the instrument.¹⁷ Should the survivor make a new will, it must be accepted for probate but a constructive trust is imposed upon the beneficiary under it.¹⁸

Of the cases denying the validity of such wills perhaps the most elaborately considered by a court in our own country is *Walker v.*

¹³ *Re Edwall*, 75 Wash. 391, 134 Pac. 1041 (1913); *Mullen v. Johnson*, *supra* note 9; *Rhodes' Estate*, 277 Pa. 450, 121 Atl. 327 (1923).

¹⁴ *Doyle v. Fischer*, *supra* note 12; *Houck v. Anderson*, 14 Ariz. 502, 131 Pac. 975 (1913); *In re Roll*, 193 Cal. 594, 226 Pac. 608 (1924); *Summer v. Crane*, 155 Mass. 483, 29 N.E. 1151 (1893); *In re Burke*, 66 Or. 252, 134 Pac. 111 (1913); *Menke v. Duue*, 117 Kan. 207, 230 Pac. 1065 (1924).

¹⁵ *Keasey v. Engles*, 259 Mich. 178, 242 N.W. 878 (1932). Compare *Rossetti v. Benavides* (Tex. Civ. App. 1917) 195 S.W. 208 (holding that a joint and mutual will giving the survivor a life estate, with remainder in fee to designated persons, when adopted and ratified by the survivor after the death of the other testator, vests the property in the remainderman).

¹⁶ *Boyle v. Dudley*, 87 N.H. 282, 179 Atl. 11 (1935); *Schauer v. Schauer*, 89 P. 2d 521 (1939); *Dufour l. Pereira*, *supra* note 10; *Frazier v. Patterson*, *supra* note 9.

¹⁷ *Carmichael v. Carmichael*, 72 Mich. 76, 40 N.W. 173 (1888); *Brown v. Webster*, *supra* note 10; *Schauer v. Schauer*, *supra* note 16.

¹⁸ *Costigan, Constructive Trusts Based on Promises to Secure Bequests, Devises, or Intestate Succession* (1915) 28 HARV. L. REV. 237.

Walker,¹⁹ and yet that case expressly leaves open the question whether the agreement evidenced by such instrument may not be enforced in equity though invalid as a devise. The Ohio court argued that it is of the essence of a will that it be revocable—an irrevocable will is an anomaly, a contradiction in terms—and the sanctioning of joint wills must operate to clog the power of convenient revocability since a joint will is necessarily in the nature of a compact and a compact is, in its nature, irrevocable. This, continues the court, is against public policy which favors revocability and speedy settlement of the estates of deceased persons. “One testator might survive the other for half a century.” Again, the fortunes and wants of the natural objects of the testator’s bounty are subject to constant change, and the testator may want to modify his provisions for them. Furthermore, the power of revocability gives protection to the natural feebleness and dependence of age by commanding that respectful attention which might otherwise be refused.

The argument of the court that the will is irrevocable is the result of confusing the will with the contract.²⁰ Moreover, the doctrine of that case has been since limited by the Supreme Court of Ohio in *Betts v. Harper*²¹ where it was held that where the makers of the will own and hold property in severalty, and none jointly or in common, the devise, though joint in form, may well be treated as the separate and individual devise of each. Then it can be successfully admitted to probate as such. But where the property devised is owned jointly or in common, while the will is admissible to probate as the separate will of each, it is proper to await the death of the survivor, and then admit it as the joint will of both.

In the event that the survivor-husband remarries, some interesting litigation has arisen as to whether the beneficiary’s right under the contract is superior to the widow’s right of dower. The leading case on this proposition is that of *Baker v. Syfrit*²² where a husband and wife owning separate estates made a joint will, reciting that the survivor should hold for life, and after the death of the survivor, specified property should go to a beneficiary. The husband probated the will on the death of the wife, and without objection enjoyed the profits of the property left by the wife. He subsequently remarried

¹⁹ 14 Ohio St. 157, 82 Am. Dec. 474 (1862). A husband and wife, each being the separate owner of property, joined in the execution of an instrument in the form of a will, treating the separate property of each as a joint fund. The court held that a joint will was unknown to the testamentary law of the state and could not be admitted to probate as the joint will of both parties, nor as the separate will of either. Also see *Clayton v. Liverman*, 19 N.C. 532 (1837).

²⁰ *Nelson v. Schoonover*, 89 Kan. 388, 131 Pac. 147 (1913).

²¹ 39 Ohio St. 639, 48 Am. Rep. 477 (1884).

²² 147 Iowa 49, 125 N.W. 998 (1910).

and died. As to his second wife, it was held that the husband acquired only a life estate and his remarriage did not reinvest him with a heritable estate. Therefore, the second wife was not entitled to dower. This decision is consonant with established legal principles. A wife has no right of dower unless the husband has at some time during the marriage owned a heritable estate of some kind, legal or equitable. A stream cannot rise higher than its source. A second marriage could not reinvest the husband with a heritable estate with which he had already irrevocably parted. There arose a vested right in the beneficiary of which he could not be arbitrarily deprived.

A similar decision was reached in the case of *Lewis v. Lewis*.²³ Counsel for the second wife contended that the will was against public policy and in fraud of the rights of the intended spouse.²⁴ The court stated that a disposition of property made long prior to contemplation of marriage, and while another marriage relation existed, could not be in fraud of the rights of the second spouse.²⁵

The case of *In re Arland's Estate*²⁶ apparently seems to hold the contrary view but is reconcilable. There the husband and wife entered into a written contract to execute to each other a deed of their property, the deeds to be delivered in escrow, the proper deed to take effect at the death of either so as to vest the entire property in survivor, and survivor to execute a will leaving all the property to their children. The wife predeceased the husband who then remarried. He died leaving by will one-third of his estate to his second wife, the rest to his children. In a suit to try the wife's rights under the will, the lower court upheld the gift. The children appealed and the court held that the equities of the wife were superior to those of the children. Equity refused to enforce the contract because of the hardship to the unsuspecting second wife, although the decision cannot be sustained on strict legal reasoning since how could the husband by marriage confer on the second wife an interest larger than he himself possessed. But here the wife had no means of knowing what the economic position of the

²³ *Supra* note 5.

²⁴ *Butler v. Butler*, 21 Kan. 521, 30 Am. Rep. 441 (1879).

²⁵ The Wisconsin Supreme Court is in sympathy with this legal proposition, as reflected in the case of *Allen v. Boomer*, 82 Wis. 364, 52 N.W. 426 (1892), wherein a testatrix bequeathed to her husband her entire estate and such further sum as should be necessary for the support of certain minors, according to the mutual agreement between herself and her husband, expressed in his will; and also bequeathed all the residue of her and her husband's estate, to be divided equally between her and his legal heirs. Her husband made his will at the same time in similar terms. The wife died. It was held that the husband only took a life estate. By taking under the will he was bound by its provisions, and, therefore, he held in trust for his and her heirs and the court would enjoin him from wasting his property or dispersing it to the injury of the heirs.

²⁶ 131 Wash. 297, 230 Pac. 157 (1924).

husband was. In the previous cases, the probate of the will gave the wife record notice. *Quaere*, suppose a joint and mutual will is not probated upon the death of the first testator. Will the second wife be accorded the protection that she received in the Washington case?

Joint wills have been the cause of extensive litigation and often of painful failure by the courts to realize the undoubted intentions of the makers. All this uncertainty can be ascribed to the early decisions because the courts failed to distinguish clearly between the law of wills and contracts. That is why joint wills were recognized in England six years before Lord Mansfield said they could not be, in the leading case of *Dufour v. Pereira*.²⁸ However, these wills can be used efficaciously in certain situations. It sometimes happens that a husband and wife desire to make reciprocal provisions that shall provide for sudden, and perhaps simultaneous, death. This can be done by deeds with reservations to the grantors of life estates, but deeds cannot be recalled, whereas wills may be changed, at least until the death of the first of two or more makers. Thus the same effect may be secured more fully and effectually by a joint and mutual will. These wills have passed the experimental stage and are now regulated by well-defined principles that are recognized by courts everywhere. Their value lies in that they enable the one first dying to be certain that later events shall not deprive of benefits those who are the objects of the love and affection of the testator. Lawyers are loath to depart from the old, but there are times when the new is the satisfactory answer, and the lawyers should be equal to the task. These wills deserve better recognition on the part of the profession.

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²⁷ *Supra* note 16.