Trusts and Estates Law: Contracts to Make Joint or Mutual Wills

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COMMENTS

CONTRACTS TO MAKE JOINT OR MUTUAL WILLS

I. INTRODUCTION

Notwithstanding averments of nonexistence, 1 admonitions concerning their use, 2 and a surrounding climate of confusion, 3 contractual “joint and mutual” wills abound. 4 Acknowledging this often lamentable, but calculable, circumstance, it is the purpose of this comment to explore the effect of the relationship of a contract and a will with regard to contractual joint or mutual wills. 5 Specifically investigated will be the moment the contract is created, binding the hands of the agreeing parties and precluding effective unilateral deviation. 6

An illustration of the scope of this inquiry is found in Estate of Chayka, 7 the most significant recent Wisconsin pronouncement on the subject of “joint and mutual wills.” In Chayka, the supreme court was faced with property and money transfers, both inter vivos and testamentary, by a widow to her second husband. The difficulty with these transfers lay in their contravention of a prior agreement made between the widow and her first husband, who, executing a joint will, had formally contracted not to vary their mutually agreeable dispositive scheme. The supreme court, while recognizing the inherently ambulatory nature of a will, refused to allow the later

1. Sparks, A Draftsman’s View of Joint and Mutual Wills, 4 Institute on Estate Planning 70.300, 70.301 (1970): “Strictly speaking, there is no such thing as a joint will. Lord Mansfield’s dictum nearly two centuries ago that ‘there cannot be a joint will’ was true then, and it is equally true at the present time.” Cf. Earl of Darlington v. Pulteney, 98 Eng. Rep. 1075, 1079 (K.B. 1775).
5. For an appreciation of the breadth of this area see B. Sparks, Contracts to Make Wills (1956).

(2) This section applies to a joint will (except if one of the testators has died prior to April 1, 1971) as well as to any other will; there is no presumption that the testators of a joint will have contracted not to revoke it.
7. 47 Wis. 2d 102, 176 N.W.2d 561 (1970). This passage has been favorably quoted very recently in Estate of Schultz, 53 Wis. 2d 643, 646, _ N.W.2d _, _ (1972).
transfers to stand. Absent a contractual provision to the contrary, once the survivor of the will-contract arrangement received the consideration contemplated in the contract, that survivor lost his ability to modify the contract.

Thus upholding the sanctity of contract, the court pinpointed the temporal moment from which there could be no return:

Such contract becomes partially executed upon the death of one of the parties to the agreement and the acceptance by the survivor of properties devised or bequeathed under the will and pursuant to the [contract].

Thusly stated, partial execution of the contract—consideration sufficient to bind the parties to the agreement—includes two elements. Not only must one of the parties to the agreement die, but the survivor must also accept the property devised by the deceased pursuant to the contract.

This proposition’s forceful clarity is undermined for two reasons. The first involves Chayka’s reliance upon Kessler v. Olen as authority for the dual requirement of “partial execution.” Kessler stood for the proposition that the critical moment after which unilateral deviation from a contractual will could not occur, and specific performance of the contract would lie, was the moment the first of the contracting parties died, leaving the mutually agreed-upon will in force. Since this moment does not involve the survivor’s acceptance of the property conferred by the deceased’s will, it is a much different moment than that suggested in Estate of Chayka.

Also undermining the clarity of the Chayka proposition is its apparent disregard of preceding Wisconsin case law which has, from time to time, adopted other temporal moments in determining when rights and obligations pursuant to contractual wills arise. Thus, for example, earlier cases have held contract rights and obligations to exist during the lives of the parties, or, as suggested above in Kessler, from the death of the first of the contracting parties. If Chayka is considered the last word on the subject of

8. 47 Wis. 2d at 106, 176 N.W.2d at 563-64 (emphasis added).
9. 228 Wis. 662, 280 N.W. 352 (1938).
10. Id. at 669, 280 N.W. at 355-56.
11. See notes 57 and 100 and accompanying text infra.
when contract rights and obligations pursuant to contractual joint or mutual wills are created, validly questioned is whether these prior cases have been overruled sub silentio?

The *Chayka* decision thereby serves to bring into focus the parameters of this discussion. Precisely when is a contract connected either with a joint will or mutual wills binding upon the parties to that contract?

II. Demythologizing

Nowhere in the law as in the law of "joint and mutual wills" is an Archimedean departure point so acutely needed. 14 Serving as that point is a discussion of the various myths 15 which have traditionally plagued the area of contracts connected with joint or mutual wills. The causes of the confusion are two. Primarily, there has been a blurring of the lines between the separate and distinct concepts of contracts and wills. As well, the terminology used has suffered from a fundamental lack of clarity.

A. Contracts v. Wills

A large part of the confusion surrounding contracts to make wills has resulted from a failure to recognize their dual nature. 16 Courts have often either denied the existence of the contract, 17 or treated the will as a contract by refusing to recognize its inherently ambulatory nature. 18 The law has no concept of "will made in pursuance of a contract." 19 While contracts and wills are often used conjointly, the will must be treated as a will and the contract as a contract. 20

The will, because of its gratis nature, is always revocable. 21 This

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14. Archimedes (c. 287-212 B.C.), a Greek mathematician and inventor was reported to have said: "Give me a place to stand and I [will] move the earth."

15. Sparks, *supra* note 1, at 70.300; see also B. Sparks, *Contracts to Make Wills* 122 (1956).


20. *Id.*

21. There is one exception provided in the Wisconsin probate code. Where the testator becomes incapacitated subsequent to the will's execution, *Wis. Stat.* § 853.01 (1969) precludes his effective revocation.
is true regardless of its execution pursuant to a contract. Given the
proper formalities, a later will is entitled to be probated. The
contract, on the other hand, is a conscious assumption of legal
relations separate from the will. When the formalities of contract
law are complied with, mutual consent is requisite to any
deviation.

Recognizing this fundamental dichotomy, certain results can be
seen to flow therefrom. First, the formalities of execution vary. Second,
consideration or its equivalent, while necessary in the con-
tract, is unnecessary in the will. Third, the forum for litigation is
entirely different. Although varying from jurisdiction to jurisdic-
tion, wills are usually handled in probate courts while contracts are
litigated in courts of law or equity.

B. Lack of Clarity

The "[h]istorical subservience of the contract problem to the
will problem" in the law of "joint and mutual wills" is mani-
fested throughout the reports in a studied impreciseness of language
usage. As the following examples indicate, needed is a more cau-
tious use of the tools of communication.

1. Joint v. Mutual

Often, courts have equated the terms "joint" and "mutual." While
frequently coincidental in their legal ramifications, they simply
do not mean the same thing. A "joint" will has traditionally
been held to connote a single document serving as the separate wills

113, 52 N.W.2d 375 (1952).
23. Sparks, supra note 1, at 70.306.
between the parties, which cannot be rescinded, but by consent of both."
25. See, e.g., Note, Joint or Mutual Wills, 61 HARV. L. REV. 675, 681 (1948).
26. 1 W. BOWE & D. PARKER, supra note 4, at § 10.6: "[W]ithout consideration a
promise to make a will cannot be enforced."
27. In re Rolls, 193 Cal. 594, 226 P. 608 (1924). An exception to this general rule
prevails in Wisconsin. According to Wis. STAT. § 859.33(2) (1969), any contested claim is
taken care of by the probate court. Presumably this would include a disputed contract claim
as well.
28. Eagleton, Joint and Mutual Wills: Mutual Promises to Devise as a Means of
Conveyancing, 15 CORNELL L.Q. 358 (1930).
29. Maurer v. Johansson, 223 Iowa 1102, 274 N.W. 99 (1937); Estate of Chayka, 47
Wis. 2d 102, 105, 176 N.W.2d 561, 563 (1970): "We deal here with a joint, mutual and
reciprocal will . . ." But see Estate of Randall v. McKibben, ___ Iowa ____ , 191
N.W.2d 693, 699 (1971) which notes the distinction between joint wills and joint wills which
are also mutual (reciprocal).
of two persons.  A "mutual" will has usually been held to be the separate wills of two persons on separate documents. One author notes the emphasis placed upon the physical fact of one, rather than two, documents. Another regards the determining factor one of intent. Yet another suggests that there can be no such thing as a "joint" will. While this impreciseness presents no insurmountable obstacle, as a joint will and mutual wills are usually treated alike when executed pursuant to a contract, it should be noted that, technically, there is no such legal entity as a "joint and mutual will"—a term so often found in the reports and commentary. To be such, a purported will would have to be (a) both one document and two, or (b) intended by the parties to be both a single will and a double will at the same time. Regardless of the definition one chooses, a "joint and mutual will" is a semantical impossibility.

2. Rescission v. Revocation

Again illustrating the lack of clarity so prevalent in the law of contractual wills is the interchangeable usage of the terms "revocation" and "rescission." Often found are statements to the effect that "[a]t this point the contract becomes irrevocable" and that the will has, by virtue of the contract, lost its capacity to be revoked. Succinctly stated, the terms "revocation" and "rescission" are not synonymous. Revocation refers to the unilateral act of withdrawing some power, authority, or thing granted. Rescission, on the other hand, bears a more restricted connotation. At its heart lies a...

33. 1 W. BowE & D. PARKER, supra note 4, at § 11.1.
34. Sparks, supra note 1, at 70.300.
36. 1 W. BowE & D. PARKER, supra note 4, § 11.1, at 553: "[I]t is improper to speak of an instrument as being a 'joint and mutual' will, for it can only be one or the other and not both." It should be noted, however, that a number of jurisdictions do give a separate connotation to a "joint and mutual" will. Thus, for example, in Nye v. Bradford, 189 S.W.2d 889 (Tex. Civ. App. 1945), aff'd, 144 Tex. 618, 193 S.W.2d 165 (1946), the Texas Court of Appeals defined a "joint and mutual" will as a single testamentary instrument with reciprocal provisions. See also Comment, The Joint and Mutual Will, 16 BAYLOR L. REV. 167 (1964).
37. See, e.g., Estate of Chayka, 47 Wis. 2d 102, 106, 176 N.W.2d 561, 563 (1970).
38. 1 J. Schouler, Wills, Executors and Administrators § 452, at 566 (5th ed. 1915): "[W]e answer that such a will loses in effect its revocable character . . . ." See also Goddard, Mutual Wills, 17 Mich. L. Rev. 677 (1919).
mutual agreement or undertaking, and "[i]t should be restricted to the cancellation of contracts and grants involving mutual obligations."\textsuperscript{40}

3. Contracts to Make Wills v. Contracts Not to Revoke Wills

Also often interchangeably used are the terms "contract to make a will" and "contract not to revoke a will."\textsuperscript{41} A moment's thought indicates the separate connotation of these terms. In order to contract not to revoke a will, the will must already be in existence. Contracting to make a will, on the other hand, implies the present nonexistence of a mutually agreeable will. This is not to suggest that different principles apply to each, for they do not.\textsuperscript{42} However, the time at which each might become incapable of unilateral deviation, as will be later discussed,\textsuperscript{43} may vary.

III. CONTRACTUAL RIGHTS AND OBLIGATIONS: WHEN CREATED?

The key to understanding joint or mutual wills lies in recognizing the importance of the contract—the bilateral agreement to either execute an agreed-upon will or refrain from revoking an existing will. The contract, as shall be discussed, involves a host of substantive rights and obligations distinct from those rights and obligations attendant upon the will. Happily, the functions and effects of these separate legal entities are frequently coincidental in this unique relationship. Often, however, the functions and effects of the contract diverge from those of the will. It is at this point, the point of divergence of the respective functions and effects of the contract and the will, that confusion arises.

As important to the understanding and effective use of the contractual will is the critical recognition of the differing points in time various jurisdictions have chosen as the moment contract rights and obligations are created. It is the fundamental tenet of this analysis that the temporal moment recognized as the moment contract rights and obligations pursuant to a contractual will arise and become binding affects the wisdom of employing the contractual will as an estate planner's tool. While this proposition is true in all

\textsuperscript{40} I H. Black, Rescission of Contracts and Cancellation of Written Instruments § 3, at 6 (2d ed. 1929). Accord, I A. Corbin, Contracts § 1236, at 389 (one vol. ed. 1952).

\textsuperscript{41} See, e.g., Downey v. Guifoile, 96 Conn. 383, 114 A. 73 (1921).

\textsuperscript{42} Patterson v. Bixby, 58 Wash. 454, 364 P.2d 10 (1961); accord, Robinson v. Williams, 231 Ark. 166, 328 S.W.2d 494 (1959).

\textsuperscript{43} See note 65 and accompanying text infra.
contractual wills, it is especially relevant in joint or mutual wills, where the contract is often assumed or conclusively presumed, even to the chagrin of the parties. For this reason, joint or mutual wills executed pursuant to an agreement ably serve to illustrate the impact of the contract upon the will-contract relationship.

The contract half of contractual joint or mutual wills has generally been held to create enforceable rights and obligations at three distinct times:  

1. During the lives of the agreeing parties, either at the execution of the wills pursuant to the contract or when the contract is executed; or  
2. At the death of one of the parties to the contract with his mutually agreeable will in force; or  
3. At the acceptance, by the survivor, of the benefits conferred by the will pursuant to the contract.

A. During the Lives of the Parties

Not infrequently, jurisdictions have recognized contract rights and obligations incident to a contractual will to exist during the lives of the parties to the agreement. Stewart v. Todd, an elderly mutual-will decision, presents a succinct statement of this position:

Inasmuch as their original contract rested on the mutual promise of the contracting parties, carried out and recognized by the making of reciprocal wills, it cannot be rescinded except by the consent of both. As it takes the mutual consent of both to make a contract, so it takes the mutual consent of both to rescind or destroy the contract.

The premise upon which this and like decisions rest is that an agreement between two persons relating to the nature of their dispositive scheme, as evidenced by the execution of mutually agreeable wills, constitutes a valid offer and acceptance at that

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44. But see Mitchell, Some aspects of Mutual Wills, 14 MODERN L. REV. 136 (1951), wherein the author argues for a fourth moment in England.
45. Stewart v. Todd, 190 Iowa 283, 173 N.W. 619 (1919), modified on rehearing, 190 Iowa 296, 180 N.W. 146 (1920).
49. Conceptually it would appear that the contractual rights and obligations arise when such agreement is executed. The cases, however, invariably add the necessity of the execution of the will or wills, evidencing the agreement, as prerequisite to the creation of contract rights and obligations. The answer probably lies in the recognition that, in nearly every case, the wills are the only evidence of the agreement and there is no separately written document.
moment.50 The consideration, as might be expected, is the promise by each either to make a will or to forego revoking an existing will.51 It is thus felt that the contractual provisions are binding upon both parties during their lives unless mutually rescinded or modified.52

It must be acknowledged, perhaps explaining the relatively small number of jurisdictions entertaining this position, that many courts have difficulty finding a true breach of the contract to will until the death of one of the parties. The reason lies in the fact that a will is only effective from the date of the testator’s death. A contract to will is, therefore, only enforceable from that date as well.53 Largely disregarding this logical dilemma, cases positing the existence of contractual rights and obligations during the lives of the parties have emphasized a sufficient performance of the agreement by one of the parties as constituting grounds for specifically enforcing the balance of the agreement. Thus, for example, in Stewart v. Todd, the execution of an agreed-upon will by a husband coupled with his working his wife’s farm for several years was held to be a sufficient performance of the agreement to justify specific performance during their lives.54 Care and maintenance of an aged parent for several years has also been deemed a sufficient performance to warrant specific performance of the agreement.55

   If the mutual agreement itself, followed by execution of the wills, is a consideration
   sufficient to satisfy the law, it should be irrevocable without reference to any notice
   that may be given by the party that wishes to revoke.
   591, 134 N.W. 185 (1912).
52. 1 J. Schooler, supra note 38, § 458(a), at 577: “[I]n equity, at all events, a
   subsequent revocation which was not mutual cannot destroy the trust or compact created
   thereby.”
   [A]s this court has repeatedly held, a will speaks from the date of testator’s death,
   the rights of any party thereunder accruing at that time. . . . This means, in event
   the 1921 joint will . . . was also mutual [contractual], all rights thereunder vested
   upon the death of William G. Randall.
But is there not a distinction between a contract to will and a contract to execute a will? Whereas the contract to will cannot, technically, be performed or breached until the will is effective (at death), the contract to execute a will must be breached or fulfilled before death. This is primarily due to the difficulty of doing anything after one is dead. It should also be recalled that there is a distinction between contracts to execute a will or to will and contracts not to revoke a will. Obviously, a contract not to revoke, implying the present existence of a will, can be breached during the lives of the parties. See Estate of Opal v. Commissioner, 450 F.2d 1083, 1086 (2d Cir. 1971).
1. Wisconsin Approach

Wisconsin, from time to time, has concurred, at least impliedly, in recognizing a valid bilateral contract during the lives of the parties, either at the moment the contract is executed or at the moment the parties execute their wills, evidencing the agreement. While some of these cases do not specifically involve joint or mutual wills, they do involve contracts to make or refrain from revoking wills. The principles being similar, they serve to illustrate a willingness on the part of the Wisconsin court to find in existence during the lives of the parties a bilateral contract to will.

In Estate of Jacobus, for example, a valid bilateral contract was found in an accepted application for placement in a home for the elderly. The application contained a provision whereby the applicant agreed to bequeath to the home any property she owned. At that moment, the rights of the parties to the contract became fixed and absolute. The court went on to say that the applicant's subsequent discharge or withdrawal from the home would not vary her contractual obligation. Although the applicant might be entitled to a rebate, the trustees of the home retained the contractual right to enforce the agreement.

Likewise, in Estate of Soles, the court held that a bilateral contract was formed when the decedent's letter offering a devise by will in exchange for care and housekeeping services was accepted by a letter promising to come from Ireland at once to begin her duties. At this moment, according to the court, "[t]he agreement having been made, the deceased could not abrogate or disregard it, or terminate it without the consent of the claimant. . . ." 

In yet another case, the Wisconsin court evidenced a tendency to recognize a bilateral contract to make a will when the will is made pursuant to the contract. In Estate of McLean, it was held that a promise to forbear from prosecuting a civil suit in exchange for a promise by the decedent to devise in a particular manner gave rise to a valid contract at the time the will was executed. The execution of the will pursuant to the agreement created a trust in the property promised, such trust arising when the agreed-upon will was executed.

57. 214 Wis. 143, 252 N.W. 583 (1934).
58. 215 Wis. 129, 253 N.W. 801 (1934).
59. Id. at 133, 253 N.W. at 803.
60. 219 Wis. 222, 262 N.W. 707 (1935).
61. Id. at 227, 262 N.W. at 710-11.
These cases serve to indicate a willingness on the part of the Wisconsin court to find a valid bilateral contract to devise during the lives of the contracting parties. Often, this contract is deemed to exist from the moment of execution of the wills; however, where there has been found a written agreement, apart from the wills, the moment of execution of that agreement has also sufficed.

While ultimately holding the reverse, two recent Wisconsin cases strongly argue in favor of finding the existence of a bilateral contract to make joint or mutual wills during the lives of the parties. In Pederson v. First Nat'l Bank, a case involving mutual wills of a husband and wife, the contract was held "irrevocable" after the death of the first party to the contract. However, the court, in denying any necessity for a reaffirmation of the agreement, pointed out that once a contract is entered into, it remains in effect until it is either discharged or abandoned by mutual consent. Cryptically, the court concluded: "Where wills are made in accordance with such an agreement, the agreement will be specifically enforced." Too, in Estate of Hoeppner, while pointing to the death of one of the parties to the agreement as the moment at which the rights of the parties become fixed, the court suggested that the contract is created by the parties when they either execute wills which are mutually agreeable or revoke existing wills for the same purpose. If the contract exists at the moment the joint will is executed, withholding the right to sue upon it until the death of one of the parties seems logically inconsistent. At the very least, these cases are a bit ambiguous.

2. Advantages and Disadvantages of Finding a Valid Contract During the Lives of the Parties

There is at least one advantage in finding a valid bilateral contract, incapable of unilateral deviation, during the lives of the agreeing parties. Whether the critical moment is that at which the contract is entered into or the moment the wills are made pursuant to the contract, a degree of certitude can be had by the parties to the agreement and their beneficiaries. That is, the contracting par-

62. 31 Wis. 2d 648, 143 N.W.2d 425 (1966).
63. Id. at 655, 143 N.W.2d at 428 (emphasis added).
64. 32 Wis. 2d 339, 145 N.W.2d 754 (1966).
65. Id. at 344, 145 N.W.2d at 758.
66. See, e.g., Estate of Soles, 215 Wis. 129, 133, 253 N.W. 801, 802 (1934).
ties have the assurance that their mutual consent is needed in order to effect any changes in their dispositive scheme.

This, of course, is not to say the parties to the agreement are foreclosed from revoking, in whole or in part, their contractual wills. That they may do so is well established. However, the above-mentioned certitude afforded the parties derives from the execution, during their lives, of a valid agreement which may only be rescinded mutually and from the fact that an action upon that contract arises should the will be unilaterally varied or revoked. This judicial recognition of a valid and binding contract existing during the lives of the parties counters the obvious uncertainties as to the solidarity of a testamentary contract in those jurisdictions which uphold rescission of the contract upon mere notice to the other party. Ultimately, the question may be asked as to what contract theory allows rescission merely because one party notifies another of his intent to do so.

Despite the certitude afforded, judicial recognition of a bilateral contract existing during the lives of the agreeing parties presents a number of difficulties. Foremost, such a contract, binding upon the parties except where mutually rescinded or modified, results in a high degree of testamentary inflexibility. Two of the principal characteristics of wills are that they are revocable and ambulatory during the life of the testator. As noted above, a will's execution pursuant to a contract does not affect these twin characteristics—technically. However, the contract, once executed and in force, is neither revocable nor ambulatory except insofar as both parties agree to rescind or modify it. Thus, while it is able to be maintained that joint or mutual wills executed pursuant to a contract are yet revocable and ambulatory, judicial recognition of a breach of contract action where the wills are not executed as prescribed by the agreement makes such statements mere form without substance. In effect, the wills lose their capacity to be altered at whim.

This testamentary rigidity, resulting from judicial cognizance of

68. See, e.g., Doyle v. Fischer, 183 Wis. 599, 606, 198 N.W. 763, 765 (1924): “It should be borne in mind that it is the contract and not the will that is irrevocable.”
69. Frazier v. Patterson, 243 Ill. 80, 90 N.E. 216 (1909); Estate of Ramthun, 249 Iowa 790, 89 N.W.2d 337 (1958); Campbell v. Dunkelberger, 172 Iowa 385, 153 N.W. 56 (1915).
70. Note, Joint or Mutual Wills, 61 HARV. L. REV. 675, 682 (1948); 50 MARQ. L. REV. 549, 553 (1967).
71. T. ATKINSON, supra note 19, § 48, at 210.
72. Sparks, supra note 1, at 70.302.
a binding bilateral contract during the lives of the parties, is illustrated by cases applying the doctrine of anticipatory breach of contract. Courts have shown little reluctance in granting specific performance, money damages, imposition of liens, or recovery in quantum meruit. As well, a constructive trust theory has often been used to prevent wrongful deviation from a contractual will. It ought be noted that most of the cases applying these remedies, with perhaps an exception for those involving the remedy of specific performance, were instituted after the death of one of the parties. When the action is commenced at this time, the problems involved in computing a projected estate at one's death are usually alleviated.

In the course of a lifetime, any of a myriad of different occurrences might tend to affect one's testamentary scheme. Being the result of a unilateral act, a will, standing alone, is flexible enough to encompass these events. A contract-will combination of a bilateral nature, however, cannot reflect life's vicissitudes except as both parties concur. Thus, where parties execute wills pursuant to a contract early in their lives, the contract might conceivably foreclose an effective testamentary change. In one recent contractual will situation, a man and his wife jointly executed a will in 1929. In 1968, a total of 39 years later, the survivor died. Can it be imagined that either of the parties to the contractual will never felt the need for an alteration of the 1929 arrangement? To be effectuated, as has been noted, the feeling had to be mutual.

The primary question incident to judicial recognition of a binding inter vivos contract of testamentary transfer involves the quality of title the parties unilaterally retain. That is, what may the parties to a joint or mutual will executed pursuant to a contract do

73. T. Atkinson, supra note 19, § 48, at 216.
77. Kessler v. Olen, 228 Wis. 662, 280 N.W. 352 (1938).
with their individually owned property? It has been held in *Tontz v. Heath*, a case representative of judicial opinion in this area, that what was formerly a title in fee to such property converts, in effect, to a mere life estate. While this case involved a deviation from the contractual joint will by the survivor, it is submitted that the same result obtains when a binding contract is recognized during the lives of the parties. Thus, in order to "reconvert" title to the subject matter of the contract back into a fee, both of the parties to the agreement must concur in the conveyance or testamentary deviation. What was formerly individually owned property has become, by virtue of the agreement, mutually owned property. An attempted conveyance or testamentary deviation unilaterally undertaken may immediately result in a breach of contract action and the entrance of a whole gamut of equitable considerations such as good faith, necessity for maintenance, the reasonableness of gifts, and the like.

In Wisconsin, the chief illustration of testamentary inflexibility involves our third-party-beneficiary rule. It has been long established, absent express reservation, that parties to a contract providing benefits to a third party may not alter those benefits without the consent of the third party. Judicial recognition of a contract to make a joint or mutual will existing during the lives of the parties, as can be seen, results in a compounded testamentary rigidity. Not only must the parties, themselves, concur to the change, but, absent express reservation of the right to modify, the third-party beneficiaries of the will-contract arrangement must also concur to any deviation or modification affecting their rights under the original agreement.

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81. 20 Ill. 2d 286, 170 N.E.2d 153 (1960). *See also* Chadwick v. Bristow, 146 Tex. 481, 208 S.W.2d 888 (1948).

82. Fourth Nat'l Bank v. First Presbyterian Church, 134 Kan. 643, 648-49, 7 P.2d 81, 84 (1932); Bower v. Daniel, 198 Mo. 289, 95 S.W. 347 (1906).


85. Tweeddale v. Tweeddale, 116 Wis. 517, 526, 93 N.W. 440, 443 (1903); [The liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one nor both of such parties can thereafter change the situation as regards the third person without his consent.

86. Estate of Hoeppner, 32 Wis. 2d 339, 145 N.W.2d 754 (1966); Estate of Cochrane, 13 Wis. 2d 398, 108 N.W.2d 529 (1961).
Peculiar to Wisconsin, in light of the rights of third-party beneficiaries under a contract, the certitude incident to a contracted joint or mutual will is heavily countered by an inordinately high degree of testamentary inflexibility. Should the existence of a contract be recognized during the mutual lives of the parties, it would result in a virtual inability, even if both parties concurred, to alter their will, at least insofar as the change affects the interests of third-party beneficiaries.

B. At the Death of One of the Parties

Second in temporal sequence, though certainly not so in popularity, a contract in conjunction with a joint or mutual will has been held to be binding and enforceable only at the death of one of the parties to the agreement. The earliest statement of this proposition is found in Dufour v. Pereira, wherein the English Court laid to rest the doubt, in English law, as to the validity of such arrangements. After one of the parties has died, stated the Dufour court, leaving his mutually agreed-upon will in force, the survivor shall not be allowed to rescind the contract. American courts, without any clear departure from the early English cases denying the validity of the contract to make joint or mutual wills, gradually adopted the position of Dufour. Cogently stated:

If the contract is one to make a joint and mutual or reciprocal will and the promise of each is consideration for the promise of the other. . . . On the death of one party, leaving in effect a will which contains the provisions prescribed by the contract, the transaction is said to become an irrevocable contract as to the survivor.

The reasons traditionally offered for not recognizing the existence of a bilateral contract until the death of one of the parties to the agreement are two. First, it has been felt that not until the
moment of death can it be confidently stated that the parties will fail to comply with the agreement by leaving in force a mutually agreeable will.\textsuperscript{92} The situation is analogous where the agreement is to refrain from revoking an existing will. In both instances a true breach cannot be effected, absent contractual provisions to the contrary, until death.\textsuperscript{93} The second reason often cited for adopting this position is that it would be unfair to allow a survivor of a will-contract arrangement to alter his will when the deceased can neither consent to such alteration nor change his own will in response.\textsuperscript{94} These courts note that up until the moment of death either party can change his will and thereby not be prejudiced by the other’s change. It is, thus, at this moment that the rights and obligations of the parties become fixed.

These reasons represent the surface logic of the majority of courts which opt for a contract judicially enforceable only at the death of one of the parties to the contract-will arrangement. It is submitted that underlying these reasons are considerations which more adequately explain this position.

At least one author describes a contractual joint or mutual will enforceable at the death of one of the parties as “a present contract capable of future enforcement.”\textsuperscript{95} Analogous to contracts to sell and convey at a future date, these testamentary agreements give the parties a present equitable right to demand contractual compliance at a given future date or upon the happening of a stated event. These agreements, however, do not create present legal rights in the subject matter of the agreement. Rather, created is an equitable right on the part of the promisee’s executor to demand compliance at the death of the promisor. The promisee, as is evident, is the party who dies with his mutually agreeable will in force. The promisor, on the other hand, is the survivor of the parties who has promised his own compliance upon the compliance of the deceased. A breach of contract action lies should the survivor of a valid agreement to devise die without his mutually agreeable will in existence.\textsuperscript{96}

Another explanation of the theory that a contractual joint or

\textsuperscript{93} Robinson v. Williams, 231 Ark. 166, 328 S.W.2d 494 (1959); Patterson v. Bixby, 58 Wash. 454, 364 P.2d 10 (1961).
\textsuperscript{94} Estate of Hoeppner, 32 Wis. 2d 339, 145 N.W.2d 754 (1966); Schwartz v. Schwartz, 273 Wis. 404, 78 N.W.2d 912 (1956).
\textsuperscript{95} B. Sparks, Contracts to Make Wills 109 (1956).
\textsuperscript{96} 1 W. Bowe & D. Parker, supra note 4, at § 10.27.
mutual will creates no judicially enforceable rights or obligations until the death of one of the parties posits these arrangements as mere unilateral offers to make a contract, rather than a contract itself. That is, until one of the parties dies with his mutually agreeable will in effect, the parties have only unilaterally offered to contract. This looks to be the familiar contractual theory of acceptance consisting of the rendition of an act in exchange for an offeror's promise. Thus, only when the offer is accepted by one party's dying with his mutually agreeable will in effect are the rights and obligations fixed. As one writer explained this proposition:

What on the surface appears to be a qualified acceptance . . . may in reality be merely an advance announcement of an unqualified acceptance which is to take effect at some future date or on the happening of some future event.

This theory of unilateral offers serves to best explain cases holding a "contract" able to be unilaterally rescinded merely upon notice by one party to another. Revoked by such notice is merely a unilateral offer and not a bilateral contract.

1. Wisconsin Approach

In several cases, the Wisconsin court has favorably viewed a testamentary contract as existing and binding only at the death of one of the parties to the agreement. Illustrative, though not involving a joint or mutual will, is Kessler v. Olen. In Kessler, a father orally promised to will his property to his daughter in exchange for her services of caring for him. At the commencement of the daughter's services, the father executed the agreed-upon will. After some months, the father expelled his daughter from his home and revised his will. While noting that quantum meruit was the preferable theory of recovery, the court suggested that one party's dying and leaving the mutually agreeable will in effect at his death constituted sufficient performance to justify enforcement of an agreement, written or oral.

This position has been restated in three recent cases. In

97. B. Sparks, supra note 95, at 116; Lally v. Cronen, 247 N.Y. 58, 159 N.E. 728 (1928).
99. See, e.g., Estate of Ramthun, 249 Iowa 790, 89 N.W.2d 377 (1958).
100. 228 Wis. 662, 280 N.W. 352 (1938).
101. Id. at 669, 280 N.W. at 355-56.
Pederson v. First National Bank,¹⁰² the mutual wills of a husband and wife were executed along with an agreement not to alter them. Although the agreement was lost, the supreme court, in reversing the trial court, felt that the agreement was sufficiently proven. The plain intent of the parties, according to the court, was that only by mutual consent could the mutual wills be varied. As to when this contractual, mutual will was enforceable, the court stated:

[T]hough it is clear that the will of the survivor may be subsequently revoked or changed, the contract, after the death of the first party to the contract, is irrevocable and will be enforced in equity.¹⁰³

In its discussion of the joint will of Emil and Elsie Hoeppner, the court, in Estate of Hoeppner,¹⁰⁴ elaborated upon the benefit-of-the-bargain theory—a consideration concept long familiar to the law of contracts. At the moment of Elsie’s death with the agreed-upon will in existence, concluded the supreme court, the rights and obligations of the parties solidified.¹⁰⁵ At this moment, the survivor, Emil, received what he had bargained for—the will ‘of Elsie in conformance with their agreement. As a result, at her death, alternative dispositions by Emil were foreclosed. Lastly, in Sipple v. Zimmerman,¹⁰⁶ the contractual, mutual wills of William and Lena Kraft were held incapable of effective unilateral deviation at the death of William with his agreeable will in effect. At this moment, said the court, Lena Kraft received what she had bargained for, a good and sufficient consideration.¹⁰⁷ These cases serve to indicate the favorable position taken by the Wisconsin Supreme Court with respect to recognizing contractual joint or mutual wills binding at the death of the first of the contracting parties.¹⁰⁸

2. Advantages and Disadvantages of Finding a Valid Contract at the Death of One of the Parties

Judicial recognition of the creation of a contract at the death of one of the parties with his agreed-upon will in force offers a

¹⁰². 31 Wis. 2d 648, 143 N.W.2d 425 (1966).
¹⁰³. Id. at 656, 143 N.W.2d at 428 (emphasis added).
¹⁰⁴. 32 Wis. 2d 339, 145 N.W.2d 754 (1966).
¹⁰⁵. Id. at 346, 145 N.W.2d at 757-58.
¹⁰⁶. 39 Wis. 2d 481, 159 N.W.2d 706 (1968).
¹⁰⁷. See also Olson v. Reisimer, 170 F. Supp. 541 (E.D. Wis. 1959), rev’d on other grounds, 271 F.2d 623 (7th Cir. 1959).
¹⁰⁸. Quaere: Has Estate of Chayka, 47 Wis. 2d 102, 176 N.W.2d 561 (1970) overruled this line of cases sub silentio? See note 161 and accompanying text infra.
number of advantages. Among those fully cognizant of the implications of a contractual will, the creation of contractual rights and obligations at the death of one of the parties is probably most in accord with their intent. This was recently noted in the Hoeppner decision. Interpreting the contractual joint will of a man and wife, the court felt that what was contemplated by the parties in the agreement was the other's leaving, at death, the agreeable will in effect. This was what they had bargained for, and, hence, at this moment, the rights and obligations crystalized under the judicially enforceable contract. This interpretation is in accord with the preponderance of decisions which have discussed the intent of the parties.

As well, a fair reading of the suggested contractual will form presents a strong inference of the creation of contractual rights and obligations only at the death of one of the parties to the agreement. It is this type of a will which is read and signed by the testators—a will which implies that at the moment of the death of the first with the contractual will operative, the other is bound to comply. Mentioned not, even inferentially, are contract rights arising during the lives of the parties, or only after the other chooses to accept benefits conferred by the will. Judicial recognition of the moment of death as the moment contractual rights and obligations arise would thus conform to the probable expectation of the parties.

Also an advantage incident to judicial recognition of a bilateral

109. See Editorial Comment, 169 A.L.R. 9, 94-95 (1947) for a discussion of how few laymen realize fully the implications and effect of a contract connected with a joint or mutual will.
111. Estate of Hoeppner, 32 Wis. 2d 339, 145 N.W.2d 754 (1966); accord, Sipple v. Zimmerman, 39 Wis. 2d 481, 159 N.W.2d 706 (1968).

By the joint will, Martin Childers impliedly agreed that whatever property he may die seized of shall pass under that will to the seven children named . . . . He did not bind himself not to alienate or dispose of any of his property during his life as his own wants, needs, or convenience might require . . . . [H]e did not thereby intend to disable himself to exercise dominion over his own property.

113. 1 CALLAGHAN'S WISCONSIN PROBATE LAW AND PRACTICE § 4.540, at 161 (6th ed. 1959):
The said A.B. hereby gives, devises and bequeaths unto the said C.D. all property of every kind or nature, real, personal or mixed of which he, the said A.B., may die seized or possessed, if the said C.D. survives him . . . . (Emphasis added.)

114. See note 48 and accompanying text supra.
115. See note 150 and accompanying text infra.
contract's existence only at the death of one of the parties is an enhanced testamentary flexibility. As has been noted, as a result of Wisconsin's peculiar third-party beneficiary rule, a contractual will could involve a high degree of testamentary inflexibility. Once the existence of a contract is acknowledged, not only must the parties themselves concur to a deviation, third parties whose interests under the original contract are affected must also concur. Thus, if the existence of a binding contract is recognized during the lives of the parties, balking third parties might conceivably hinder any change. This was noted recently in Estate of Hoeppner, wherein the Wisconsin third-party beneficiary rule was extensively discussed. The court concluded that since a contract to make a will in some agreeable manner is only effective upon the death of one of the parties with that will in force, thereby binding the other to the agreed-upon disposition, no rights are conferred upon third parties until that moment either. This judicial recognition of contracts to make joint or mutual wills, held to be effective at the death of the first, rather than during the lives of the parties, offers an enhanced testamentary flexibility.

The chief disadvantage indigenous to judicial recognition of contractual rights and obligations at the death of one of the parties involves the confusion surrounding after-acquired property. The question is whether the contract, effective as of the death of the first to die, applies to property conceivably acquired by the survivor many years later. Logically, the solution depends upon the intent of the parties. Where that intent is not readily apparent, however, the interpretations have been quite inconsistent. Illustrative of this confusion are two conflicting cases in the same jurisdiction. In Murphy v. Slaton, the Texas court interpreted an ambiguous

116. See note 85 and accompanying text supra.
117. Estate of Cochrane, 13 Wis. 2d 398, 108 N.W.2d 529 (1961); Tweeddale v. Tweeddale, 116 Wis. 517, 93 N.W. 440 (1903).
118. 32 Wis. 2d 339, 145 N.W.2d 754 (1966).
119. Id. at 347, 145 N.W.2d at 759:
   It is obvious that no rights vest in the claimants upon the making of that agreement. The rights of the claimants arise from the will of 1949 and only become fixed and irrevocable (the [contract] rights, not the will) upon the death of Elsie Hoeppner. It is this last mutually agreeable will that binds the hand of Emil Hoeppner and determines the disposition of the estate of Emil Hoeppner in a court of equity.
121. 154 Tex. 35, 273 S.W.2d 588 (1954). The will provided in part:
   It is our will and desire that the survivor of us . . . shall . . . have all the estate of every description, real, personal, or mixed, which either or both of us may own at
contractual will provision as applying only to that property owned by the parties at the death of the first. In order to include property acquired after the contractual rights arose, the court suggested that the parties would have to expressly so provide. In *Weidner v. Crowther*, on the other hand, involving testamentary language as ambiguous as the *Murphy* will, it was held that property acquired by the survivor after the death of the first to die was within the purview of the contract.

The Wisconsin court has also vacillated in its determinations regarding after-acquired property. In *Allen v. Ross*, for example, the court, in interpreting a contractual mutual will, indicated, at least impliedly, that after-acquired property might be included within the contract:

> If it be necessary in order to give effect to such agreement, equity will impress the property of the survivor with a trust in favor of the person who is entitled to the property under such mutual agreement.

In *Estate of Schefe*, on the other hand, a contractual joint will was interpreted as applying only to property owned by the parties jointly. Since property acquired after the death of the first decedent could no longer be jointly owned, the contractual will provisions did not apply to property acquired by the survivor. The dissent, however, after extensive analysis, concluded that after-acquired

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122. 157 Tex. 240, 301 S.W.2d 621 (1957). The will provided in part:

*Second:* We mutually will, direct and devise, that after the death of either of us, all our property and estate, real, personal or mixed, and wether [sic] deemed common or separate estate, shall be inherited by and shall at once pass into the unrestricted possession of the last survivor of either of us in fee simple.

*Third:* We hereby further will and direct that after the death of the last survivor of us all our property and estate, real, personal or mixed, common or separate, shall be inherited and divided equally, share and share alike . . . .

*Id.* at 301 S.W.2d at 673.

123. 199 Wis. 162, 225 N.W. 831 (1929).

124. *Id.* at 164, 225 N.W. at 832 (emphasis added).

125. 261 Wis. 113, 52 N.W.2d 375 (1952). The Schefe will provided in part:

Whereas . . . the parties also hold and have agreed to hold as joint owners all other property which they now own or may hereafter acquire while both parties are living, so that upon the death of one their entire estate becomes the sole and exclusive property of the survivor . . . .

*Id.* at 115, 52 N.W.2d at 376.
personalty was included under the contractual will. The basis for the distinction, according to the dissent, was that while the legislature had changed the common law relating to after-acquired real property, it had not done so with regard to after-acquired personalty. As such, the common law yet applies to personalty and operates to pass that personalty under the residuary clause, unless a contrary intent clearly appears.

While Schefe may have represented somewhat of a definitive statement concerning after-acquired property, it has been virtually ignored in recent cases, which have inarticulately placed reliance upon "equitable considerations" in order to achieve a just result. Thus, for example, in Estate of Chayka, the court held invalid as violative of the agreement certain inter vivos gifts "of a substantial portion of the property received under the joint will." Mentioned not was a situation where the only property transferred in violation of the agreement is property acquired after the death of the first decedent. Clearly, what to do with after-acquired property has not been consistently determined in Wisconsin.

Along with the difficulties concerning after-acquired property, recognition of rights and obligations at the death of one of the parties to a contractual joint or mutual will may pose marital tax deduction difficulties. Questionable is whether the surviving spouse to a contractual joint or mutual will has received a sufficiently absolute interest to qualify for the marital deduction. Until recently, all of the reported cases allowed the marital deduction despite the restrictiveness of the survivor's interest. It was left to the commentators to discuss this aspect of contractual joint or mutual wills. As of this date, however, at least three cases have disallowed the marital tax deduction on the basis of the survivor's insuf-

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126. Wis. Stat. § 238.03 (1969): Any estate, right or interest in lands acquired by the testator after the making of his will shall pass thereby in like manner as if possessed at the time of making the will if such shall manifestly appear by the will to have been the intention of the testator.


128. 47 Wis. 2d 102, 106, 176 N.W.2d 561, 563 (1970).


ficient interest. These cases aside, it is worth noting that there is an apparent conflict of purpose in attempting to qualify for the marital tax deduction and, yet, making use of a testamentary contract. The marital tax deduction, on the one hand, contemplates a degree of freedom on the part of the survivor. The purpose underlying the contractual will, on the other, is to assure a certain dispositive scheme. The use of both is conceivably irreconcilable.

C. At the Survivor's Acceptance of the Benefits Conferred Under the Contractual Will

A contract incident to a joint or mutual will has been widely held incapable of unilateral variation only after the survivor to that agreement has accepted the benefits conferred under the other's will. It is generally felt by courts adopting this position that when one party to a contractual will has performed, whether such performance be termed partial or full, by dying with the mutually agreeable will operative, the survivor who has accepted the benefits conferred under the will should not be permitted to modify the agreement. This, of course, is not to say that the survivor is foreclosed from revoking his will in whole or in part. The will, as has been noted, is always revocable regardless of contractual obligations. The contract, however, once formulated, is incapable of unilateral variation and creates judicially enforceable rights and obligations. This position has been ably stated:

If two testators who have united in the execution of a mutual will have devised their property to each other so that the devises form a mutual consideration, neither, after the death of the other and the probate of the will as to his property, is at liberty, after accepting the benefit conferred, to repudiate the contract to the

133. Estate of Awtry v. Commissioner, 221 F.2d 749 (8th Cir. 1955).
134. B. Sparks, supra note 95, at 187-200.
136. This distinction is noted in Kessler v. Olen, 228 Wis. 662, 669-70, 280 N.W. 352, 355-56 (1938).
137. 1 W. Bowe & D. Parker, supra note 4, at § 10.2.
injury of the heirs, or next of kin of the testator who predeceased him.\textsuperscript{139}

Submerged in cases articulating theories of fraud,\textsuperscript{140} estoppel,\textsuperscript{141} part performance,\textsuperscript{142} equitable considerations,\textsuperscript{143} and the like as justification for holding contractual rights and obligations to arise only at the acceptance of benefits, there exist two closely related, but distinct, explanations of this proposition. For convenience, the first may be termed an “election-to-accept” theory. Not to be confused with traditional concepts of election against a spouse’s will, this “election-to-accept” theory has at its heart fundamental contract principles of offer and acceptance.\textsuperscript{144} Courts opting for the moment of acceptance of the benefits as the moment contractual rights arise do not feel a valid contract exists merely because one of the parties has died with an agreeable joint or mutual will in effect.\textsuperscript{145} Such an act by a decedent only constitutes an offer of contract. Needed yet is an unequivocal acceptance of that offer by the survivor. The survivor who “elects” to take the benefits conferred under the decedent’s joint or mutual will thereby elects to accept the decedent’s offer of contract.\textsuperscript{146} At this moment, the contract being, thus, in existence, unilateral modification by the survivor is foreclosed. Synonymous in these decisions, at least inferentially, are “acceptance of the benefits” and acceptance of the decedent’s offer of contract.\textsuperscript{147}

Illustrative is Sherman \textit{v.} Goodson’s Heirs,\textsuperscript{148} an often-cited Texas decision. The court, interpreting the contractual joint will of two sisters, went so far as to suggest that the mutual compact could have been avoided by the survivor had she not accepted the benefits conferred under her deceased sister’s will. Pinpointing the moment

\begin{footnotesize}
\begin{enumerate}
\item[139.] H. UNDERHILL, THE LAW OF WILLS § 13, at 20 (1900).
\item[140.] Schramm v. Burkhart, 137 Ore. 208, 2 P.2d 14 (1931).
\item[142.] McDowell v. Ritter, 153 Fla. 50, 13 So. 2d 612 (1943); Burke’s Estate, 66 Ore. 252, 134 P. 11 (1913).
\item[143.] Ankeny v. Lieuallen, 169 Ore. 206, 113 P.2d 1113 (1941), aff’d on rehearing, 169 Ore. 222, 127 P.2d 735 (1942).
\item[144.] A case which apparently combines these “elections” is Nye v. Bradford, 144 Tex. 618, 193 S.W.2d 165 (1946).
\item[145.] DeJong v. Huyser, 233 Iowa 1315, 11 N.W.2d 566 (1943); Tooker v. Vreeland, 92 N.J. Eq. 340, 112 Atl. 665 (Ch. 1921).
\item[146.] Chadwick v. Bristow, 204 S.W.2d 65 (Tex. Civ. App. 1947).
\end{enumerate}
\end{footnotesize}
the rights and obligations arise, the court stated: "[U]pon principle and authority we think it became irrevocable after the survivor ratified the will by having it probated, and then accepted and enjoyed the benefits derived from its provisions." Reasonable interpretation of "ratification" suggests the court’s meaning as an acceptance of the deceased’s offer of contract. It is, thus, arguable that the acceptance-of-the-benefits theory is partially explainable in terms of contract rights and obligations not arising until the survivor of a contractual joint or mutual will unequivocally accepts the decedent’s offer of contract.

A second explanation of the proposition that contractual rights and obligations arise only when the survivor accepts the benefits conferred under the decedent’s will involves the traditional problems of proof of the agreement, peculiar to a joint or mutual will. Contracts incident to a joint or mutual will have often been only obliquely apparent. As a result, courts have been forced to exercise their gymnastic abilities in order to find the contract. One technique has been that of recognizing the performance of the agreement as sufficient evidence of its existence. As noted earlier, a number of jurisdictions recognize the death of one of the parties with his agreeable will in effect as a sufficient performance to evidence the contract. In other jurisdictions, however, this is not a sufficient performance to support an oral or obliquely written agreement. Thus, for example, in a case representative of this position, Carmichael v. Carmichael, the act of a father in leaving the agreeable will in effect at his death and that of the mother in accepting the benefits conferred thereunder were deemed sufficient to remove the arrangement from the baleful purview of the statute of frauds. This added evidentiary requirement of acceptance of the benefits can be summed up to the effect that

[s]uch an agreement is valid if performed by the making of such wills and the acceptance by the surviving party of the fruits of the agreement, but it is valid only as a contract, the performance of

149. Id. at 841.
150. See, e.g., Tooker v. Vreeland, 92 N.J. Eq. 340, 112 A. 665, 668 (Ch. 1921): [T]hey, in consideration of reciprocal bequests to themselves and those of their choice, bound themselves to abide the provisions of the mutual wills, and Mrs. Tooker, having accepted the benefit of her husband's gift, became legally, and in conscience, bound to carry out the obligations she undertook. (Emphasis added.)
152. See note 89 and accompanying text supra.
153. 72 Mich. 76, 40 N.W. 173, 176-77 (1888).
which by one party and the acceptance by the other has taken it out of the statute of frauds.\textsuperscript{154}

It is submitted that these essentially contract considerations more adequately explain why many jurisdictions opt for recognition of contract rights and obligations only at the survivor’s acceptance of benefits conferred under the decedent’s joint or mutual will. It cannot be overemphasized that contract law has prevailed with regard to contractual wills.

1. Wisconsin Approach

Wisconsin very early positioned itself with regard to contractual joint or mutual wills. In \textit{Allen v. Boomer},\textsuperscript{155} the surviving husband of a contractual mutual will was held to have bound himself to the provisions of the instrument upon his election to accept the benefits conferred by his wife’s will. Although the court did not clearly distinguish the will from the contract, it enforced the latter by allowing the husband to receive only a life estate, giving the remainder over to persons designated in the wife’s will.

This recognition of the acceptance, by the survivor, of the benefits conferred under a contractual will as the moment enforceable rights and obligations arise has been reiterated often in Wisconsin cases. In the classic \textit{Doyle v. Fischer}\textsuperscript{156} decision, an oral contract in conjunction with a joint will was held sufficiently proven under the contract part-performance doctrine when the wife accepted the benefits conferred under her husband’s will. Granting specific performance, the court found unilateral modification impossible

\textit{where mutual and reciprocal wills are made in accordance with [the] agreement, and where, after the death of one of the agreeing parties, the other takes under the will and accepts the benefits of said agreement.}\textsuperscript{157}

This doctrine has been apparently reaffirmed in \textit{Schwartz v. Schwartz},\textsuperscript{158} a significant decision, if only because it serves as authority for totally inconsistent propositions. Early in the opinion, the court suggested that relief could be had in equity where the

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  \item 154. \textit{In re Burke's Estate}, 66 Ore. 252, \textemdash, 134 P. 11, 13 (1913); \textit{See also} Schramm v. Burkhart, 137 Ore. 208, \textemdash, 2 P.2d 14, 17 (1931).
  \item 155. 82 Wis. 364, 52 N.W. 426 (1892).
  \item 156. 183 Wis. 599, 198 N.W. 763 (1924); \textit{accord}, Allen v. Ross, 199 Wis. 162, 225 N.W. 831 (1929).
  \item 157. 183 Wis. at 605, 198 N.W. at 765.
  \item 158. 273 Wis. 404, 78 N.W.2d 912 (1956).
\end{itemize}
survivor of two testators to a joint will or two mutually reciprocal wills "directly benefited" from the will of the first, but did not fulfill his part of the bargain.\textsuperscript{159} Later, however, in its concluding remarks, the court stressed the important factor, upon which these cases hinge, as being that of the inability of the deceased party to consent to any change by the survivor. Absent mutual consent, stated the court, Kreszensia Schwartz could not "revoke or modify" the agreement she made with her husband.\textsuperscript{160} The inconsistency becomes more readily apparent when it is recalled that mutual consent can only occur during the lives of the agreeing parties. This moment is far different and much earlier than the moment the survivor accepts the benefits conferred pursuant to the contractual joint or mutual wills.

This inconsistency was quickly noticed and commented upon in two recent cases, \textit{Estate of Hoeppner}\textsuperscript{161} and \textit{Sipple v. Zimmerman}.\textsuperscript{162} By redefining the concept of "benefit" so as to include the act of one party to a contractual will dying with his agreed-upon will in effect, the court found itself able to affirm both propositions. Thus, while the Doyle-Schwartz "acceptance-of-the-benefits" rationale is yet good law, according to \textit{Hoeppner}, the time of acceptance is not the exclusive moment at which rights and obligations incident to contractual wills blossom in Wisconsin. Included also as a moment at which contract rights and obligations may arise in Wisconsin is the moment one of the parties dies with the agreed-upon will operative. This act on the part of the deceased in leaving such will in effect confers a sufficient "benefit" upon the survivor so as to qualify under the "acceptance-of-the-benefits" theory.

The rationale underlying this apparently inconsistent affirmation found in \textit{Hoeppner} and \textit{Sipple} involves the logic underlying the "acceptance-of-the-benefits" theory itself. It has been suggested that courts have recognized contractual rights and obligations as arising only upon the survivor's acceptance of benefits conferred under the decedent's will because of the problem of proving oral or vaguely written contracts to make wills.\textsuperscript{163} The performance by the survivor, however, in probating the will and accepting benefits

\textsuperscript{159} \textit{Id.} at 409, 78 N.W.2d at 915.
\textsuperscript{160} \textit{Id.} at 412, 78 N.W.2d at 916-17.
\textsuperscript{161} 32 Wis. 2d 339, 145 N.W.2d 754 (1966).
\textsuperscript{162} 39 Wis. 2d 481, 159 N.W.2d 706 (1968).
\textsuperscript{163} See note 151 and accompanying text \textit{supra}. 
thereunder has been felt sufficient to evidence the existence of an agreement.

Jurisdictions adopting the "acceptance-of-the-benefits" theory have usually applied it to all contractual wills rather than to certain types.\textsuperscript{164} Wisconsin, however, apparently has different rules for different situations. The strict "acceptance-of-the-benefits" theory applies to cases wherein the agreement rests in parol or is obliquely written. In other situations—for example, where the agreement is readily apparent and without the statute of frauds—the moment of the first party's death with the agreed-upon will in effect is the moment contract rights arise. This is suggested by language in \textit{Hoeppner}:

[T]he language of \textit{Schwartz} relied upon by the trial court [acceptance of actual benefits] is more appropriate where there is an oral agreement to will real estate contrary to the statute of frauds. . . .\textsuperscript{165}

The anomalous situation thus created in this line of cases is that in Wisconsin there are two distinct, and perhaps conflicting rules governing contractual wills. Where the contract only inferentially exists, the "acceptance-of-\textit{actual}-benefits" rule applies. However, where the agreement is obvious, there is no necessity for demanding an acceptance of \textit{actual} benefits by the survivor. Rather, it is sufficient for one of the parties to the agreement to die with his agreed-upon will in effect to bind the hand of the other. As has been pointed out, these are separate and distinct moments.

The most significant recent Wisconsin case concerning a contractual "joint, mutual, and reciprocal will"\textsuperscript{166} is \textit{Estate of Chayka}.\textsuperscript{167} Though not involving a readily apparent contract, the \textit{Chayka} decision makes no distinction, as suggested in \textit{Hoeppner},\textsuperscript{168} between contracts expressed in separate documents, those referred to in the joint will, or those which must be conclusively presumed. The important factor, according to \textit{Chayka}, in each of the above types of contractual wills is the probate of the deceased's will by the survivor. The contract becomes incapable of unilateral modifi-


\textsuperscript{165}. 32 Wis. 2d 339, 346, 145 N.W.2d 754, 758 (1966); \textit{See also} Estate of Rogers, 30 Wis. 2d 284, 140 N.W.2d 273 (1966).

\textsuperscript{166}. Is this not a semantical impossibility? See note 29 and accompanying text \textit{supra}.

\textsuperscript{167}. 47 Wis. 2d 102, 176 N.W.2d 561 (1970).

\textsuperscript{168}. \textit{Estate of Hoeppner}, 32 Wis. 2d 339, 145 N.W.2d 754 (1966).
cation "upon the death of one of the parties to the agreement and the acceptance by the survivor of properties devised or bequeathed under the will."\(^{169}\)

Immediately, a host of questions arise. Has Chayka overruled sub silentio the distinction between oral and written contracts to will, which was established in both Hoeppner\(^{170}\) and Sipple?\(^{171}\) Does the Doyle-Schwartz rationale (acceptance of actual benefits) again prevail with respect to all contractual wills? Is the "benefit" referred to in Chayka the strict actual benefit or does it include the "benefit" suggested in Hoeppner—that of the other's death with his agreed-upon will in effect? Given this framework of obscurity, a glimmer of clarity emerges. It is clear that Wisconsin has yet to decide precisely at what moment a contract incident to a joint or mutual will is created.

2. Advantages and Disadvantages of Finding a Valid Contract Upon Acceptance of Benefits

One of the advantages of judicial recognition of binding rights and obligations incident to contractual wills as being created only at the moment a survivor probates the will of the deceased and accepts the benefits thereunder is that it results in an enhanced flexibility on the part of the survivor with regard to the subject matter of the agreement. It has been suggested that judicial recognition of enforceable rights and obligations existing either during the lives of the parties\(^ {172}\) or at the death of the first with the agreed-upon will operative\(^ {173}\) results in a high degree of testamentary inflexibility. Indeed, it has often been held that such an arrangement results in the transfer of a mere life estate to the survivor.\(^ {174}\) This rigidity can be mitigated significantly by judicial recognition of the creation of binding rights and obligations at the moment the survivor elects to probate the decedent's will and take the benefits thereunder.

In a typical contractual joint or mutual will situation, the husband and wife either agree not to revoke existing wills or agree to

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169. 47 Wis. 2d at 106, 176 N.W.2d at 563.
170. 32 Wis. 2d at 346-47, 145 N.W.2d at 758.
172. See note 48 and accompanying text supra.
173. See note 88 and accompanying text supra.
174. Matheson v. Gullickson, 222 Minn. 369, 378, 24 N.W.2d 704, 709 (1946): "Subject to the life estate . . . the property . . . may be impressed with a trust . . . for the protection and preservation of a remainder interest in fee . . . ."
execute wills along a specific dispositive scheme. Absent any apparent intent to the contrary, and assuming the judicial climate such that the creation of rights and obligations pursuant to the contract are recognized upon the acceptance of the benefits, the survivor is afforded the opportunity to deal with the property free of the charges of the ultimate beneficiaries. Until he decides whether to probate his spouse's will and accept the benefits thereunder, he is free to deal as he chooses with all of his own property and all property held jointly. Once he accepts the benefits, however, he is bound under the terms of the agreement. At this moment, he subjects his dealings with the property to judicial scrutiny in terms of his good faith,\textsuperscript{175} necessity for maintenance,\textsuperscript{176} reasonableness of gifts,\textsuperscript{177} and the like. Recognizing the creation of a contract at this moment, as is apparent, maximizes the flexibility with which the survivor may deal with his property.

Along a similar vein, in Wisconsin, recognition of the existence of a contract at the moment a survivor accepts material benefits under a contractual will operates to hold in abeyance the rights of third-party beneficiaries. It has been suggested in Estate of Cochrane\textsuperscript{178} that the Tweedale third-party beneficiary rule operates to protect the rights of third parties established by the "original agreement."\textsuperscript{179} Upon the establishment of such an agreement, according to the court, the contracting parties lose the ability to alter the contract, at least insofar as the third-party's rights are affected. In Wisconsin it thus appears that judicial recognition of the existence of a contract only at the moment the survivor accepts benefits conferred pursuant to the contractual will offers the greatest amount of time, from the viewpoint of the survivor, to deal with his property unencumbered by the claims of third parties.\textsuperscript{180}

The chief disadvantage of recognizing rights and obligations as created only at the moment a survivor to a contractual will accepts actual benefits under the other's will involves the conceivable frustration of the contract's purpose. The general intent of a contractual will is to assure a mutually agreeable dispositive scheme.\textsuperscript{181}

\begin{itemize}
\item \textsuperscript{175} Fourth Nat'l Bank v. First Presbyterian Church, 134 Kan. 643, 648-49, 7 P.2d 81, 84 (1932).
\item \textsuperscript{176} Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915).
\item \textsuperscript{177} Estate of Lenders, 247 Iowa 1205, 78 N.W.2d 536 (1956).
\item \textsuperscript{178} 13 Wis. 2d 398, 108 N.W.2d 529 (1968).
\item \textsuperscript{179} Id. at 402, 108 N.W.2d at 532.
\item \textsuperscript{180} See also Estate of Hoeppner, 32 Wis. 2d 339, 347, 145 N.W.2d 754, 759 (1966).
\item \textsuperscript{181} Bruce v. Moon, 57 S.C. 60, 73-74, 35 S.E. 415, 418-19 (1899).
\end{itemize}
Both parties expressly or tacitly agree that each shall execute a will under which certain agreed-upon beneficiaries are to receive specified property. In reliance upon such an agreement, the parties execute either a joint will or mutual wills. With such an agreed-upon will in effect, one of the parties usually predeceases the other. Should the agreement be judicially recognized only when the survivor probates the decedent's will and accepts actual benefits thereunder, it is readily apparent that he is in a position to deal with his individually owned property and all jointly owned property in a manner not contemplated in his agreement with the decedent.

This proposition has been suggested in *Sherman v. Goodson's Heirs*. The permissive negative inference of recognizing the "acceptance-of-the-benefits" rule, according to this Texas decision, is that if there is no acceptance of actual benefits there is no enforceable contract. The court stated: "It may even be conceded that after the death of one it might have been revoked by the survivor before she accepted the benefits which the will conferred." As has been indicated above, what this simply means is that until the time of acceptance of the benefits, only an offer of contract exists. That offer is accepted at the moment the survivor chooses to probate the decedent's will. Until that moment, as Sherman suggests, the survivor is free to deal with as he chooses all jointly or solely owned property. This, of course, is true irrespective of the probable intent of the deceased.

This problem has also received attention in Wisconsin. Under the *Hoeppner* logic, by which the court expanded the concept of a "benefit" to include the mere death of the other except where oral contracts to devise are involved, it appears that the frustration of contract above mentioned is yet possible. In the oral contract situation, as noted, yet required to evidence the agreement is an actual acceptance of material benefits pursuant to the *Doyle-Schwartz* rationale. This being the case, the survivor of an oral contract connected with a joint or mutual will is able to postpone "acceptance" of the offer and the resulting contract rights and obligations.

This frustration is apparently also possible under the reasoning of the recent *Estate of Chayka* decision. Though noting that

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183. *Id.* at 841.
184. See note 146 and accompanying text supra.
186. 47 Wis. 2d 102, 176 N.W.2d 561 (1970).
general good-faith considerations prevail over contract sophisti-
cations, the court did confine itself to "property received under the
joint will."\textsuperscript{187} By deliberately denuding herself of the assets received
pursuant to the contractual joint will, Evelyn Flanagan Chayka
complied with the agreement only in form and not in substance.
This being precisely what the agreement of the parties sought to
prevent, the transfers were voided.

The obvious negative inference of the "received under" state-
ment is that property not passing under the other's will is not
subject to the contract's purview. Thus, for example, property pass-
ing via the survivorship of joint tenancy and property solely owned
by the survivor can be dealt with as the survivor chooses. This can
hardly be said to be in the contemplation of the parties who inten-
tionally include such property within a common dispositive
scheme. Unless Chayka's "convenant of good faith that accompa-
nies every contract"\textsuperscript{188} can be extended to cover a situation where
no property is "received under" the other's will, a frustration of
the contract's purpose could result. The interesting factor concern-
ing Chayka is that it made no distinction between written and oral
contracts to devise, as propounded in previous Wisconsin cases.\textsuperscript{189}
Though involving an oral contract which was "conclusively infer-
red,"\textsuperscript{190} the Chayka opinion looks to apply to all of the var-
iants of a contractual will.\textsuperscript{191} At best, a number of questions remain
unanswered with respect to precisely which property is subject to
the provisions of the contract, and which is not.

IV. Conclusion

Despite countless pages written, both law and commentary,
concerning contractual joint or mutual wills, it should be readily
apparent that the area yet teems with uncertainty. Undertaken

\textsuperscript{187.} Id. at 106, 176 N.W.2d at 563.
\textsuperscript{188.} Id. at 107, 176 N.W.2d at 564.
\textsuperscript{189.} See note 145 and accompanying text supra.
\textsuperscript{190.} 47 Wis. 2d at 106, 176 N.W.2d at 563.
\textsuperscript{191.} Id.: "The parties may express such contract in a separate document, state in the
joint will that it is a contract, or the fact of contract may be conclusively presumed from
the fact of the joint will being executed." It should be noted that this portion of Chayka is
in part superseded by Wis. STAT. \S\ 853.13(1), effective April 1, 1971, which includes in its
provisions:

(1) a contract not to revoke a will can be established only by: (a) provisions of the
will itself sufficiently stating the contract; (b) an express reference in the will to such
a contract and evidence proving the terms of the contract; or (c) if the will makes no
reference to a contract, clear and convincing evidence apart from the will.
herein has been an extensive analysis of one aspect of this unique relationship—the judicially recognized moment at which contract rights and obligations are created and the effect of that recognition upon the wisdom of employing the contractual will as an estate planner's tool.

Without prevailing unduly upon the reader's own conclusions, and assuming the disregard of Professor Page's insight,¹⁹² some observations can be made. Foremost is the utter necessity for recognizing the distinct concepts of contract and will and the impact of that distinction when the two are conjoined. Also critical to the effective use of the contractual will is the knowledge, absent "drafting out," of the judicially recognized moment at which the rights and obligations incident to the contract spring into existence.

From the foregoing analysis, it should be apparent that the use of the contractual will is least desirable where the contract exists and binds the parties during their lives. Notwithstanding the certainty afforded, the testamentary rigidity resulting from an inter vivos bilateral contract virtually negates the value of a will. The two operate at counter purposes, at least with respect to facile testamentary change, when the contractual rights and obligations exist during the lives of the parties. This is especially true in Wisconsin, absent express reservation of the power to rescind or modify.

In a judicial or statutory climate which recognizes the death of one of the parties as the instant a contract becomes effective, the contractual will may offer potential to an estate planner. If a single word serves to describe the chief prerequisite of an efficient use of the contractual will, it is specification. Throughout the reported cases, it is precisely this lack of adequate contract terms which leads contractual wills into litigation. Primary on the specification checklist is an identification of those assets intended to be included within the terms of the contract. Merely to dismiss this consideration with a casual "all-of-our-property" clause is not sufficient. Such a clause does not indicate the intended moment at which "all our property" is to be computed. Thus, for example, a valid question arises as to whether the parties intended only that property owned at the death of the first or that held at the death of the survivor. This determination is critical to the validity of gifts, even reasonable ones, which the survivor may desire to bestow during

¹⁹². See note 2 and accompanying text supra.
the balance of his life. Also specified ought be any limitations upon the survivor's dealings with the property. Thus, any objections to the conversion of real property into personalty, the use of such property as collateral, or the investment of the property in business ventures must be elaborated upon. A close scrutiny of the advisability of using the contractual will in estates large enough to qualify for the marital tax deduction should also be undertaken. As mentioned, at least three contractual will cases have been adjudged as passing an insufficient interest to the survivor to qualify for the marital deduction.

In jurisdictions favoring the moment of death plus the acceptance of benefits conferred pursuant to a contractual will as the moment contract rights and obligations arise, specification is yet the key. With the considerations already enumerated, the cautious estate planner might recall the conceivable partial frustration of the contract's purpose. If the survivor may deal as he chooses with his solely owned property and all jointly owned property, at least until he accepts the benefits conferred under the will of the decedent, there appears to be little certainty, and hence value, in the use of the contractual will. This possible frustration of purpose, at least where the contract is obliquely written and partial performance is relied upon as its proof, exists in Wisconsin. Elaboration would serve to eliminate the problem.

Regardless of the choice a particular jurisdiction has adopted with regard to the moment contract rights and obligations blossom, the attorney drafting the contractual will is usually able to specify, as a term of the contract, when the agreement shall bind the parties. Invariably, statutes and case law define this moment only absent indication in the document itself. The estate planner is, therefore, easily able to foreclose difficulty with this, the chief of all problems incident to use of the contractual will.

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