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CONTRACTS NOT TO REVOKE JOINT OR MUTUAL WILLS

A joint will is a testamentary instrument executed by two or more persons. Mutual wills are separate wills of two or more testators, reciprocal in nature. Although the validity of joint wills was placed in doubt by early English decisions,¹ the clear weight of modern authority in England and the United States is that joint as well as mutual wills are valid if properly drawn.²

Analytical difficulties arise when a joint will or mutual wills are accompanied by a contract not to revoke. Many courts either have failed

1. The first reported decision involving a joint will was *Dufour v. Pereira*, 1 Dick. 419, 21 Eng. Rep. 332 (1769), in which a husband and wife executed a joint will pursuant to a contract not to revoke. The court upheld the rights of the beneficiaries under the will when the wife later attempted to revoke it and make a different testamentary disposition. The court was impressed "more from the novelty of the thing than its difficulty" *Id.* at 420, 21 Eng. Rep. at 333. Six years later, however, Lord Mansfield stated that "there cannot be a joint will." *Darlington v. Pulteney*, 1 Comp. 260, 268, 98 Eng. Rep. 1075, 1079 (1775). Although this pronouncement has resulted in frequent statements that the English common law did not recognize joint wills, Professor Sparks has noted that it is unclear whether Mansfield's statement "was intended as a proposition of law or merely as a statement that a joint will could not accomplish the result that was sought in the case with which he was concerned." B. SPARKS, *CONTRACTS TO MAKE WILLS* 8-9 (1956).

One reason suggested for the slow development of the joint will concept was the inhibiting effect of the status of married women at common law. See, e.g., Eagleton, *Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing*, 15 CORNELL L.Q. 358, 359 (1930). Case analysis, however, reveals that the primary reason for this delay was the failure of courts to recognize the contractual aspects of these testamentary devices:

When the contract involved the making of a will as the manner of performance, the fixed contractual obligation appeared to clash with the inherent ambulatory nature of a will. Somehow it was felt that the will necessarily became a part of the contract. In the midst of these poorly defined and apparently conflicting views, it is little wonder that the various courts dealing with the nature of the relationship created by a contract to make a will reached widely varying results.

B. SPARKS, *supra* at 15.

2. See generally *Lewis v. Scofield*, 26 Conn. 452 (1857); *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909); *Black v. Richards*, 95 Ind. 184 (1883); *Culver v. Hess*, 234 Iowa 877, 14 N.W.2d 692 (1944); *Rastetter v. Hoenninger*, 214 N.Y. 66, 108 N.E. 210 (1915); *In re Davis' Will*, 120 N.C. 9, 26 S.E. 636 (1897); *In re Cawley's Estate*, 136 Pa. 628, 20 A. 567 (1890); *Williams v. Williams*, 123 Va. 643, 96 S.E. 749 (1918); *Cummings v. Sherman*, 16 Wash. 2d 88, 132 P.2d 998 (1943); *Sipple v. Zimmerman*, 39 Wis. 2d 481, 159 N.W.2d 706 (1968).

In Louisiana, however, joint wills are declared void by statute. See LA. CIV. CODE ANN. art. 1572 (1952).

to distinguish the concept of wills from that of contracts or have neglected to use precise language in defining the legal relationships created by a joint or mutual will executed pursuant to a contractual agreement. Indeed, some courts have refused to acknowledge the existence of a contract, holding simply that joint or mutual wills executed under certain circumstances are "irrevocable."³ Most jurisdictions, however, adhere to the traditional view that wills are inherently ambulatory in nature and that "irrevocability" depends upon the existence of a valid contract; thus, it is the express or implied contract between the parties, and not the will, which prevents the survivor from altering the scheme of disposition upon which the parties had agreed.⁴

Serious consequences may result when a surviving testator is prevented from altering the disposition of his property because of an agreement not to revoke his will. In examining contracts not to revoke joint or mutual wills, particular attention must be given to the issues surrounding formation and proof of the existence of such a contract. If a valid contract is found to exist, it is then necessary to analyze its effect on the surviving testator's right to revoke his will and on his ability to dispose of after-acquired property. The effect of anti-lapse statutes on a joint will or mutual wills and the manner of enforcement of contracts not to revoke are also important considerations in evaluating the desirability of joint or mutual wills as testamentary devices.

I. FORMATION AND PROOF OF EXISTENCE OF THE CONTRACT

There are various circumstances under which courts may find that joint or mutual wills were executed pursuant to a preexisting contract not to revoke. A separate written contract may declare a will "irrevocable," or the testamentary device itself may expressly declare its execution pursuant to a preexisting agreement not to revoke. Moreover, some courts have stated that the execution of a joint will with reciprocal provisions creates a presumption that the parties intended the dispositions

3. Cf. *Warwick v. Zimmerman*, 126 Kan. 619, 270 P. 612 (1928); *In re McGinley's Estate*, 257 Pa. 478, 101 A. 807 (1917).

4. See, e.g., *Sumner v. Crane*, 155 Mass. 483, 29 N.E. 1151 (1892); *In re Lieurance's Estate*, 181 Ore. 646, 182 P.2d 969 (1947); *Williams v. Williams*, 123 Va. 643, 96 S.E. 749 (1918); *Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763 (1924).

Much of the confusion surrounding joint wills and mutual wills derives from imprecision of terminology. The expression "contract to make a will" implies an agreement to make a testamentary disposition and is not appropriate where testators have contracted to render irrevocable their previously agreed upon dispositions. An agreement of the latter type is a "contract not to revoke a will."

to be irrevocable.⁵ The leading American case advocating this position is *Frazier v. Patterson*,⁶ in which it was stated:

If two persons make wills, each devising his property to the other, there is no *necessary* inference that the wills were the result of any mutual or reciprocal agreement or understanding. Such wills might be executed without either party knowing that the other had executed his will; but where the parties execute their wills by the *same* instrument, it is not possible that such course could be adopted without some previous understanding or agreement between them.⁷

This result has been strongly criticized,⁸ and today the majority of jurisdictions hold that the mere execution of a joint will is not sufficient to prove the existence of a prior contract not to revoke.⁹

5. *In re Estate of Chayka*, 40 Wis. 2d 715, 162 N.W.2d 632, 634 (1968) ("[A] contract to make mutual and reciprocal wills may be conclusively presumed or inferred from provisions of the wills themselves, *especially* if there is a jointly executed will.") (emphasis supplied); *Doyle v. Fischer*, 183 Wis. 599, 607-08, 198 N.W. 763, 766 (1924) ("[A] pre-existing contract to make mutual and reciprocal wills may be conclusively inferred from the provisions of the wills themselves (*especially* if they be joint), in light of circumstances existing at the time the wills were executed.") (emphasis supplied); *Rastetter v. Hoenninger*, 214 N.Y. 66, 72, 108 N.E. 210, 211 (1915). See also T. ATKINSON, *WILLS* § 49, at 223, 226 (2d ed. 1953); B. SPARKS, *supra* note 1, at 28; Bailey, *Contracts to Make Wills: Proof of Intent to Contract*, 40 TEXAS L. REV. 941, 954 (1962); Evans, *Concerted Wills: A Possible Device for Avoiding the Widow's Privilege of Renunciation*, 33 Kx. L.J. 79, 94-95 (1945).

6. 243 Ill. 80, 90 N.E. 216 (1909).

7. *Id.* at 86, 90 N.E. at 218 (emphasis supplied).

8. See *Menke v. Duwe*, 117 Kan. 207, 230 P. 1065 (1924).

9. See, e.g., *Estate of Randall v. McKibben*, 191 N.W.2d 693, 699 (Iowa 1971) ("A greater quantum of proof than the mere execution of a joint will is, however, essential to the creation of a mutual testamentary instrument."); *In re Estate of Miller*, 186 Kan. 87, 95-97, 348 P.2d 1033, 1040-41 (1960) ("The general rule is that the execution of a joint will is not of itself sufficient evidence of an enforceable contract to devise between the testators, so as to make the contract enforceable in equity [W]here a joint and mutual will is executed by a husband and wife *the will itself and its terms* may be taken into consideration as *circumstantial evidence* upon which to base a finding that the will is contractual. This is not to say that the execution of a joint and mutual will compels such an inference."); *Cram v. Mitchell*, 479 S.W.2d 956, 958 (Tex. Civ. App. 1972) ("A will is not necessarily contractual merely because it is executed jointly, even though its terms are mutual and reciprocal.") But see *Schwartz v. Schwartz*, 273 Wis. 404, 411, 78 N.W.2d 912, 916 (1956) ("A will which is jointly executed *may* furnish in itself *prima facie* proof that it was executed pursuant to a contract between the testators, notwithstanding it does not expressly purport to have been made pursuant to a contract, does not contain the word 'contract' or 'agreement', or include an express promise that the survivor will carry out the dispositions contained in the will.") (emphasis supplied). See also T. ATKINSON, *supra* note 5, § 49, at 226; 1 PAGE ON WILLS § 10.4, at 444 (3d ed. 1960); B. SPARKS, *supra* note 1, at 27.

In the case of mutual wills, most courts require "clear and convincing" evidence that the parties agreed to make their testamentary dispositions irrevocable.¹⁰ For example, in *Edson v. Parsons*¹¹ mutual wills were executed by two sisters. The court acknowledged evidence "that their lives ran in one groove and were so blended, that they seemed to experience the same emotions, to view occurrences with the same eyes and to be moved to the performance of common acts."¹² Nevertheless, the evidence was found insufficient to establish a contract not to revoke, the court holding that proof that the testatrices had acted in concert and with a similarity of purpose did not establish that a binding agreement of such far-reaching consequence was intended.¹³

As a probative minimum, the "clear and convincing" standard relates to a number of corroborative evidentiary factors. Evidence, for instance, that the parties "discussed" the manner of final disposition of their property might not alone be sufficient to support the inference; however, such proof may be sufficient if combined with other material evidence, such as identical dispositions of property, the use of plural pronouns when describing the property, or retention of the same attorney and

10. See, e.g., *Kisor v. Litzenberg*, 203 Iowa 1183, 1187, 212 N.W. 343, 345 (1927) ("[P]roof, when resting in parol, must be clear, satisfactory, and convincing."); *In re Estate of LeBorius*, 224 Minn. 203, 214, 28 N.W.2d 157, 163 (1947) ("clear, positive, and convincing"); *Gromek v. Gidzela*, 36 N.J. Super. 212, 218, 115 A.2d 144, 147 (App. Div. 1955) ("In any case, a parol agreement to execute irrevocable mutual wills is subject to close scrutiny. Such an agreement is permitted to stand only when established by evidence that is cogent, clear and convincing, leaving no doubt in the court's mind as to the parties actually having entered into such an agreement."); *Allen v. Dillard*, 15 Wash. 2d 35, 37, 129 P.2d 813, 817-18 (1942) ("Contracts to make mutual wills are recognized under our law as valid, and, when sufficient facts are proven by competent evidence, such contracts may be specifically enforced. Because, however, of the great opportunity for fraud, and because of reluctance on the part of courts to render ineffective a subsequent will of a testator, the contract to make mutual wills must be established by clear and convincing evidence."). See also *Clements v. Jones*, 166 Ga. 738, 743, 144 S.E. 319, 322 (1928); *In re Estate of McLean*, 219 Wis. 222, 227, 262 N.W. 707, 709-10 (1935); B. SPARKS, *supra* note 1, at 24.

11. 155 N.Y. 555, 50 N.E. 265 (1898).

12. *Id.* at 562, 50 N.E. at 266.

13. Professor Page has argued:

It is more logical to expect that in many settings, particularly that of husband and wife, the reciprocity or similarity in the dispositive provisions of the two wills results from similar tastes and affections that have resulted from years of living together, and the making of identical or similar wills was a spontaneous thing unaccompanied by even so much as a thought on the part of either husband or wife that they should enter into a contract with each other.

1 PAGE ON WILLS, *supra* note 9, at 554.

execution of the mutual wills at the same time and place with the same attesting witnesses.¹⁴

It has been held that evidence of statements made by a decedent to a beneficiary, when used to support an inference of a contract not to revoke a will, must meet a statutory sufficiency requirement.¹⁵ The existence of a contract has been established by testimony of the attorney who drafted the agreement together with verification of the testators' agreement by a business associate of one of the parties.¹⁶ Conversely, evidence that a wife told her husband he could do with their estate "as he pleased," when considered in conjunction with the wife's failure to execute a new will which would have carried out the terms of any existing contract between the parties, has been held to show the nonexistence of such a contract as a matter of law.¹⁷

A recent decision combining an analysis of corroborative factors with the clear and convincing evidence test is *Lamberg v. Callahan*,¹⁸ in which a husband and wife executed mutual wills on the same date. Although the wills contained reciprocal provisions, the court refused to find a contract not to revoke because "[v]iewed as a whole, the evidence was insufficient to establish that [the testators] agreed that their wills would be irrevocable."¹⁹ Requiring substantial corroborative evidence beyond the mere reciprocity of disposition, the court held that the evidence presented was not clear and convincing.

The clear and convincing sufficiency standard should apply not only

14. See Evans, *supra* note 5, at 98.

15. *Woll v. Dugas*, 104 N.J. Super. 586, 250 A.2d 775 (1969). The court, pursuant to a New Jersey rule of probability of evidence, held that a father's explanation to his son of apparent disinheritance, along with other oral statements made in the wife's presence, was sufficient to show an irrevocable contract to dispose of their total assets and that the agreement's terms were expressed in the wills.

16. *Pederson v. First Nat'l Bank*, 31 Wis. 2d 648, 143 N.W.2d 425 (1966). A husband and wife had prepared separate wills with identical bequests of all property to the survivor. The same attorney prepared both documents. After the husband died, the wife executed a will substantially different from the earlier instruments. The trial court held that although testimony was sufficient to show an agreement, the proper quantum of proof—clear and convincing—had not been met in showing the terms of that agreement. This decision was reversed, the appellate court holding: "[The attorney's] testimony left no doubt of the purport of the agreement. Although his testimony at times varied slightly, there was absolutely no question that the expressed intent of the agreement was to make the wills contractual. [A business associate] also corroborated the contents of that agreement and stated that the wills 'were not to be changed without mutual consent.'" 143 N.W.2d at 426.

17. *Rose v. El Paso Nat'l Bank*, 476 S.W.2d 861 (Tex. Civ. App. 1972).

18. 455 F.2d 1213 (2d Cir. 1972).

19. *Id.* at 1219 (emphasis supplied).

to the question of whether the parties made an "agreement" concerning the irrevocability of the will or wills but also to the separate formation requirements of offer, acceptance, and consideration. A mere discussion or acknowledgment by the parties of a particular testamentary form or scheme should be insufficient to establish the parties' intent to enter into a legally binding agreement. Rebutting evidence will be difficult to find if one of the parties is dead, and, although "dead man's statutes" offer some protection,²⁰ a close inspection of contractual intent should be employed to guard against fraudulent claims. As one commentator has noted:

Guarding against an otherwise probable tendency to find a contract based upon moral oughtness rather than upon offer and acceptance supported by consideration is the rule requiring a higher degree of evidence to sustain [such] a contract than is required in contracts generally.²¹

The offer and acceptance should make definite reference to a limitation on the survivor's power of revocation. Thus, in *Father Flanagan's Boys' Home v. Turpm*,²² it was held that the mere fact that the testator's wife had convinced him to make a joint will including a bequest to her church did not evidence "an agreement to make a contract for an irrevocable will or that the property of the survivor should be devised and bequeathed in any certain way or to certain beneficiaries."²³ The court observed that although the parties may have bargained for the form of the will they would use and for the beneficiaries of their estates, they had not agreed that the dispositions were to be irrevocable.

In examining the traditional contract requirement of consideration, some courts have taken the position that a "promise to devise all of one's interest in certain property is legal consideration even though the promisor actually has no interest and even though the unlikelihood of his having any interest is known to both parties at the time the bargain is entered into."²⁴ Other courts, however, have examined the amount of

20. See B. SPARKS, *supra* note 1, at 26.

21. B. SPARKS, *supra* note 1, at 24.

22. 252 Iowa 603, 106 N.W.2d 637 (1960).

23. *Id.* at 607, 106 N.W.2d at 641.

24. B. SPARKS, *supra* note 1, at 35. In *Tooker v. Vreeland*, 92 N.J. Eq. 340, 345, 112 A. 665, 668, *aff'd per curiam sub nom.* *Tooker v. Maple*, 93 N.J. Eq. 224, 115 A. 255 (1921), it was held: "The disparity in the amounts of the estates involved does not militate against the conclusions I have come to, that the mutual wills were the outcome of a contract. Equality of consideration is not essential to a binding obligation."

the testamentary dispositions involved and have refused specific performance where the consideration flowing between the parties appears grossly disproportionate. *In re Johnson's Estate*,²⁵ for example, involved a joint will executed by a husband with a large estate and by his wife, who had few assets and little chance of enhancing her estate except through acquisition of assets from her husband. Holding that the wife had not given "adequate or honest" consideration, the court refused to enforce the alleged contract not to revoke.²⁶

Provisions of the Statute of Frauds may constitute an obstacle to establishing the existence of a contract not to revoke.²⁷ In most jurisdictions, the Statute of Frauds requires that contracts for the conveyance of land be in writing; included, of course, are contracts to devise realty.²⁸ Moreover, courts generally hold that if a contract to devise both realty and personalty is indivisible, the entire contract is within the Statute.²⁹ Some states require that *any* testamentary contract must be written; however, a will which incorporates material provisions of a contract to devise may be sufficient to satisfy the Statute.³⁰

Another obstacle to establishing that the testators intended to enter a contract not to revoke is the parol evidence rule. In general, as applied to enforcement of wills, the rule operates to exclude oral testimony

25. 233 Iowa 782, 10 N.W.2d 664 (1943).

26. Compare *Sample v. Butler Univ.*, 211 Ind. 122, 4 N.E.2d 545 (1936) (mutual agreement of the makers of the wills sufficient consideration to bind the promisors) and *Geiger v. Geiger*, 185 Neb. 700, 178 N.W.2d 575 (1970) (mutual promises of the testators adequate consideration for the agreement) with *Notten v. Mensing*, 20 Cal. App. 2d 694, 67 P.2d 734 (1937), in which the court held that even if an agreement not to revoke is established, equity will not grant specific performance if the consideration is inadequate. (The wife's estate was approximately one thousand times as large as the husband's.)

27. Contracts to devise have been held not to be within the prohibition on parol agreements not to be performed within one year, since the promisor may die within the first year. *Lee v. McCrocklin's Adm'r*, 247 Ky. 44, 56 S.W.2d 570 (1933); T. ATKINSON, *supra* note 5, § 48. Moreover, contracts to devise generally are held not to be within provisions requiring written contracts for the sale of personalty exceeding a certain purchase price. 1 PAGE ON WILLS, *supra* note 9, § 10.11.

28. *Masquart v. Dick*, 210 Ore. 459, 310 P.2d 742 (1957)

29. E.g., *Humphrey v. Faison*, 247 N.C. 127, 100 S.E.2d 524 (1957)

30. *Upton v. Fitzgerald*, 129 Tex. 211, 102 S.W.2d 147 (1937).

Where the agreement between testators to leave joint or mutual wills rests in parol, as is normally the case with relatives, if the survivor accepts the benefits of the first testator's will, he may be forced to honor his agreement on the ground that part performance has taken the contract outside the Statute of Frauds. *Kirk v. Beard*, 162 Tex. 144, 345 S.W.2d 267 (1961). Furthermore, where joint or mutual wills are executed pursuant to an oral agreement, the execution itself has been held to be a sufficient performance to take the contract outside the Statute, so long as it can be proven that the parties bargained. See, e.g., *Brown v. Johanson*, 69 Colo. 400, 194 P. 943 (1920).

when the terms of the will are clear; extrinsic evidence is permitted only when ambiguities are present.³¹ In its application to contracts, however, the parol evidence rule generally excludes extrinsic evidence only when the parties intend the writing to be the complete integration of their agreement.³² It is important to recognize that even though provisions of a will clearly indicate that the will was made pursuant to a contract, the parol evidence rule should not apply to exclude evidence of the terms of that contract, unless it can be determined that the parties intended the will to set forth their complete agreement.

The few courts which have considered the question have tended to confuse the manner in which the parol evidence rule should be applied. For example, in *In re Estate of Chronister*,³³ it was held that where "a joint will shows *on its face* by the terms and provisions thereof that it is contractual in character, extrinsic evidence is not admissible for the purpose of proving otherwise."³⁴ This holding, however, overlooks the generally accepted statement that the "parol evidence rule does not apply to every contract of which there is written evidence, but *only* applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement."³⁵ Thus, in *Tucker v. Zachary*,³⁶ plaintiffs were beneficiaries under mutual wills which they claimed were executed in accordance with an oral contract not to revoke. Defendants argued that oral testimony should not be admitted because the testamentary dispositions had been reduced to writing. In rejecting this proposition, the court stated that the will was "not relied upon as a 'written contract' . . . It was offered in evidence merely as an 'instrument of proof,' and it was nowhere alleged or contended that it was in fact the agreement sued upon."³⁷

The Uniform Probate Code provision concerning proof of the existence of a contract not to revoke joint and mutual wills states:

Sec. 2-701. [Contracts Concerning Succession.] A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this Act, can be established only by (1) provisions of a will stating material provisions of the

31. T. ATKINSON, *supra* note 5, § 60, at 287

32. SELECTIONS FROM WILLISTON ON CONTRACTS § 633, at 504-05 (rev. ed. 1938).

33. 203 Kan. 366, 454 P.2d 438 (1969).

34. 454 P.2d at 443.

35. WILLISTON, *supra* note 32, at 504 (emphasis supplied).

36. 269 P.2d 773 (Okla. 1954).

37. *Id.* at 777 (emphasis supplied).

contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.³⁸

The Code's denial of a presumption of a contract not to revoke from the mere execution of a joint will or mutual wills is in accordance with the weight of modern authority. Nevertheless, although suggesting the methods by which a contract not to revoke must be established, the Code fails to define factors which will assure that the parties acted with the necessary contractual intent. Thus, section 2-701 appears to suffer from the same infirmities which it has been argued are present in the "clear and convincing evidence" rule: "There is good reason to fear that the 'clear-and-convincing-evidence rule,' together with the 'deadman's' statute and other safeguards, has not afforded adequate protection in the case of joint wills and mutual wills against the danger of finding a contract where no intent to contract really existed."³⁹

In order to establish the necessary contractual intent, a number of indicia should be scrutinized. These considerations, none of which standing alone generally will be sufficient evidence of a contract, may include the relationship of the parties, language in the will or wills indicating not only a preexisting agreement on testamentary dispositions but also an agreement that such disposition be irrevocable, evidence that the parties acted in concert in executing the will or wills, use of plural pronouns when referring to property and identical dispositive provisions concerning such property, and declarations of the testators before or

38. The Comment to section 2-701 states:

It is the purpose of this section to tighten the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to much litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a presumption that the parties had contracted not to revoke the will except by consent of both.

This section requires that either the will must set forth the material provisions of the contract, or the will must make express reference to the contract and extrinsic evidence [proving] the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract. Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence.

The Uniform Probate Code has been enacted in Idaho and Alaska and is under consideration in 16 other states. 1 PROBATE & PROPERTY 4 (April 1973).

39. Bailey, *supra* note 5, at 953.

after execution of the instrument. A rule which requires that a contract not to revoke a will can be established only by clear and convincing evidence and which does not presume the existence of a contract from any one factor is necessary in light of the harsh consequences which may result when a surviving testator is precluded from altering the disposition of his estate to meet changed circumstances.

II. OPERATIVE EFFECT OF THE CONTRACT

The vast majority of courts have held that joint or mutual wills, even though executed pursuant to a contract not to revoke, retain the quality of revocability.⁴⁰ However, a few courts continue to hold that a will executed pursuant to a contract is or may become irrevocable.⁴¹ Such holdings are in direct conflict with the hallmark of the law of wills that a will is a valid testamentary device only if it remains ambulatory during the life of the testator.⁴² It is the contract, and not the will, which affords an aura of permanence to the beneficiary's rights. Thus, according to the weight of authority, although a joint or a mutual will executed pursuant to a contract not to revoke may be revoked, the rights given a beneficiary by that will may be asserted under the contract, if it is found that the contract has taken effect.

In some jurisdictions, the contract is deemed to be formed at the instant of mutual agreement between or among the testators; a bilateral contract results, and the rights and duties arising therefrom are fixed from that moment. The contract thus may be enforced during the joint lives of the testators.⁴³ Other jurisdictions, however, hold that the con-

40. See, e.g., *Menke v. Duwe*, 117 Kan. 207, 230 P. 1065 (1924); *Irwin v. First Nat'l Bank*, 212 Ore. 534, 321 P.2d 299 (1958); *Church of Christ Home for Aged, Inc. v. Nashville Trust Co.*, 184 Tenn. 629, 202 S.W.2d 178 (1947); *Shawver v. Parks*, 239 S.W.2d 188 (Tex. Civ. App. 1951); G. THOMPSON, *THE LAW OF WILLS* 153 (Supp. 1962).

41. See, e.g., *Frazier v. Patterson*, 243 Ill. 80, 84-86, 90 N.E. 216, 218 (1909); *In re Estate of Thompson*, 206 Kan. 288, 478 P.2d 174 (1970); *Underwood v. Myer*, 107 W. Va. 57, 146 S.E. 896 (1929); B. SPARKS, *supra* note 1, at 111-15; cf. *Garland v. Meyer*, 169 S.W.2d 531, 534 (Tex. Civ. App. 1942); W. ROLLISON, *THE LAW OF WILLS* § 186 (1939).

42. See, e.g., *Keith v. Culp*, 111 So. 2d 278, 281 (Fla. Dist. Ct. App. 1959); *Baker v. Syfritt*, 147 Iowa 49, 125 N.W. 998 (1910); *First Nat'l Bank v. Friednash*, 72 Nev. 237, 302 P.2d 281 (1956); *Tutunjian v. Vetzgian*, 299 N.Y. 315, 319, 87 N.E.2d 275, 276-77 (1949); *Allen v. Dillard*, 15 Wash. 2d 35, 129 P.2d 813 (1942); *Pederson v. First Nat'l Bank*, 31 Wis. 2d 648, 143 N.W.2d 425 (1966); B. SPARKS, *supra* note 1, at 111; Evans, *supra* note 5, at 98; Partridge, *The Revocability of Mutual and Reciprocal Wills*, 77 U. PA. L. REV. 357, 360 (1929); Sparks, *Application of the Marital Deduction to Joint and Mutual Wills*, 37 MISS. L.J. 226, 230 (1966); 50 MARQ. L. REV. 549, 552 (1967).

43. See, e.g., *In re Estate of Thompson*, 206 Kan. 288, 478 P.2d 174 (1970); *Pederson v. First Nat'l Bank*, 31 Wis. 2d 648, 143 N.W.2d 425 (1966).

tract is not formed until one testator dies.⁴⁴ It is reasoned that the execution of the will constitutes only an offer by each testator; acceptance can be accomplished only by the death of one of the testators while his joint or mutual will is in effect. Acceptance by "performance" indicates that the resulting contract is unilateral. Under a third approach, it is held that the contract is not formed until the surviving testator accepts the gifts made to him in the will of the first to die. The predeceasing testator's death with his joint or mutual will in effect is viewed as an offer to contract, the contract is formed upon acceptance of the benefits of the will by the survivor.⁴⁵

A. "Revocation" During the Joint Lifetimes of the Testators

The position of a party who seeks to withdraw from an agreement not to revoke his joint or mutual will is dependent upon the applicable rule as to time of formation of the contract.⁴⁶ In jurisdictions where a contract arises only after the death of one testator or after acceptance of benefits by the survivor, there is, of course, no problem of "revocation" during the joint lives of the testators. Since the contract does not arise until after the death of one testator, the agreement is not binding during their joint lives and thus can be avoided without legal significance. Moreover, even in a jurisdiction which holds that a contract not to revoke arises immediately upon agreement between the parties, there are several means by which the binding effect of the contract may be avoided.

A fundamental premise of contract law is that a bilateral contract cannot be rescinded unilaterally; nevertheless, a number of courts have stated that during the joint lifetimes of the testators, either party may unilaterally rescind by giving notice to the other testator.⁴⁷ Although such hold-

44. See, e.g., *In re Estate of Ramthun*, 249 Iowa 790, 89 N.W.2d 337 (1958); *Canada v. Ihmsen*, 33 Wyo. 439, 240 P. 927 (1925).

45. See, e.g., *Scofield v. Bethea*, 170 F.2d 934 (5th Cir. 1948); *Wimp v. Collett*, 414 S.W.2d 65 (Mo. 1967).

46. For a discussion of the three events which indicate contract formation in the various jurisdictions, see Comment, *Contracts to Make Joint or Mutual Wills*, 55 MARQ. L. REV. 103, 108-133 (1972).

47. Many courts have taken the position that mere notice will effectively rescind the contract. See, e.g., *Frazier v. Patterson*, 243 Ill. 80, 84-85, 90 N.E. 216, 218 (1909); *Luthy v. Seaburn*, 242 Iowa 184, 46 N.W.2d 44 (1951); *In re Farley's Estate*, 237 Iowa 1069, 24 N.W.2d 453 (1946); *Maurer v. Johansson*, 223 Iowa 1102, 274 N.W. 99 (1937); *Ankeny v. Lievallen*, 169 Ore. 206, 113 P.2d 1113 (1941) (dictum), *aff'd on rehearing*, 169 Ore. 206, 127 P.2d 735 (1942); *Church of Christ Home for Aged, Inc. v. Nashville Trust Co.*, 184 Tenn. 629, 202 S.W.2d 178 (1947). See also *Boner's Adm'x v. Chesnut's Ex'r*, 317 S.W.2d 867, 869 (Ky. 1958).

ings give effect to the policy favoring free alienation of property,⁴⁸ they clearly are repugnant to basic contract law. The same result often could be accomplished if the courts simply required more exacting evidence *before* finding an underlying contract.

Other courts correctly hold that a contract not to revoke joint or mutual wills can be rescinded only upon the mutual consent of the parties.⁴⁹ This rule aligns with traditional contract law in preventing unilateral rescission of a bilateral contract. Since the formation of a contract not to revoke a joint will or mutual wills requires the mutual consent of both testators, the same mutual consent should be required to rescind the contract.⁵⁰

In some jurisdictions, the binding effect of a contract not to revoke joint or mutual wills may be removed if the testator marries or remarries subsequent to the execution of a will pursuant to a contract not to revoke. If the testator's spouse knew of the contract at the time of the marriage, the beneficiary may enforce the contract.⁵¹ In some states the contract remains binding even though the subsequent spouse had no knowledge thereof.⁵² Other jurisdictions, however, have refused to enforce the contract, at least to the extent of the wife's forced share or dower rights, if the subsequent spouse was unaware of the contract.⁵³

The subsequent marriage situation should not be confused with the result under statutory provisions in a number of states whereby a will automatically is revoked upon the happening of specified events.⁵⁴ Among the events or combination of events which may give rise to a total or

Other courts have stated that notice will rescind the contract *only* if the co-testator is given sufficient time to make new testamentary provisions. *See, e.g.,* Allen v. Dillard, 15 Wash. 2d 35, 129 P.2d 813 (1942); W. ROLLISON, *THE LAW OF WILLS* § 186 (1939). Both positions are criticized in B. SPARKS, *supra* note 1, at 114, where it is noted that most cases containing this statement actually have involved actions by the survivor. *Id.* at 121.

48. 50 MARQ. L. REV. 549, 552 (1967).

49. *See, e.g.,* Curry v. Cotton, 356 Ill. 538, 191 N.E. 307 (1934); Stewart v. Todd, 190 Iowa 283, 173 N.W. 619 (1919); *In re* Estate of Thompson, 206 Kan. 288, 478 P.2d 174 (1970) (dissenting opinion); Pederson v. First Nat'l Bank, 31 Wis. 2d 648, 143 N.W.2d 425 (1966); D. REMSEN, *THE PREPARATION OF WILLS AND TRUSTS* ch. II, § 6 (2d ed. 1930); B. SPARKS, *supra* note 1, at 111, 114.

50. *See* Stewart v. Todd, 190 Iowa 283, 173 N.W. 619 (1919); 17 AM. JUR. 2d *Contracts* § 490 (1964); 5A A. CORBIN, *CORBIN ON CONTRACTS* § 1236 (1964).

51. 1 PAGE ON WILLS, *supra* note 9, § 10.24. *Contra*, Boner's Adm'x v. Chesnut's Ex'r, 317 S.W.2d 867 (Ky. 1958).

52. 1 PAGE ON WILLS, *supra* note 9, § 10.24.

53. *Id.*, B. SPARKS, *supra* note 1, at 199.

54. *See generally* Rees, *American Wills Statutes*, 46 VA. L. REV. 613, 880-90 (1960).

partial revocation of a will are the birth of a child,⁵⁵ marriage and birth of issue,⁵⁶ divorce,⁵⁷ and remarriage.⁵⁸ Those states which have considered the effect of such statutes upon joint or mutual wills executed pursuant to a contract not to revoke generally have held that although the specified event may revoke the will, it has no effect upon the underlying contract.⁵⁹

B. *Revocation After the Death of the First Testator*

In jurisdictions where a contract not to revoke joint or mutual wills is deemed to be formed upon the death of the first testator, both parties are free to withdraw from their agreement prior to that event in accordance with the contract rule that an offer to contract may be revoked at any time until accepted.⁶⁰ Withdrawal from the agreement requires notice to other parties, since revocation of an offer is not effective until notice is received by the offeree.⁶¹

Similarly, either party may withdraw from the agreement during the joint lifetimes of the testators in jurisdictions in which contracts not to revoke are not deemed formed until acceptance by the survivor of benefits under the will of the predeceased testator. Moreover, in such jurisdictions, the survivor may withdraw during the period between the death of the first testator and the time at which the benefits of the first testator's will become available for his acceptance. Although it has been

55. After-born children are provided for in most states by statutes which permit them to take their intestate shares. *Id.* at 881-82. A few statutes provide that if an after-born child survives the testator, the will is revoked. *Id.*

56. This combination of events is provided for by statute in a minority of states, and the effect of such statutes varies greatly. *Id.* at 884-85.

57. As of 1960, fourteen states had legislation under which a testator's divorce affected his will. In only two of those states did the legislation mandate total revocation. *Id.* at 885-86.

58. The statutes vary greatly as to the effect of remarriage on the testator's prior will. *Id.* at 882-84.

59. *Lewis v Lewis*, 104 Kan. 269, 178 P. 421 (1919); *Boner's Adm'x v. Chesnut's Ex'r*, 317 S.W.2d 867 (Ky. 1958); *Schomp v. Brown*, 215 Ore. 714, 335 P.2d 847, *clarified on denial of rehearing*, 215 Ore. 714, 337 P.2d 358 (1959) (holding the will revoked on testator's remarriage, but the underlying contract irrevocable if the survivor accepts the benefits); *Irwin v. First Nat'l Bank*, 212 Ore. 534, 321 P.2d 299 (1958); *Underwood v. Myer*, 107 W. Va. 57, 59-60, 146 S.E. 896, 897 (1929) ("[R]eciprocal agreement became a *fixed obligation* upon the death of [the husband] and the acceptance by the [wife] of the testamentary benefits accruing to her from that arrangement."); B. SPARKS, *supra* note 1, at 176; Evans, *supra* note 5, at 99.

60. See, e.g., *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909); *Lally v. Cronen*, 247 N.Y. 58, 159 N.E. 723 (1928).

61. RESTATEMENT OF CONTRACTS § 41 (1932). See *Wright v. Wright*, 215 Ky. 394, 285 S.W. 188 (1926).

suggested only infrequently that a survivor might avoid his contractual obligations by declining to accept the benefits of the first testator's will, a rule that no contract is formed until the surviving testator accepts such benefits raises an inference that if there is no acceptance of benefits, there is no contract. In *Sherman v. Goodson's Hirs*,⁶² it was held that a contract not to revoke became binding "after the survivor ratified the will by having it probated, and then accepted and enjoyed the benefits derived from its provisions." The court, however, noted: "It may 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."⁶³

Thus, it would appear that in jurisdictions which place contract formation at the acceptance of benefits stage, a surviving testator has the option of taking under the predeceased testator's will with resulting contract obligations or of renouncing the will, thus preventing the formation of the contract. The latter choice may be attractive to survivors who qualify to receive a share in the estate under common law rules of dower, curtesy, or homestead allowance, or under statutes of similar effect.⁶⁴ Furthermore, if the survivor owned property jointly with the predeceased testator, he may elect to succeed to full ownership by his right of survivorship, independently of any devise of such property to him.⁶⁵ On the other hand, a survivor's withdrawal from the contract by refusal to accept the benefits of the other testator's will may result from a simple desire to deny to third parties the gifts they were to have received under the terms of the contract or from a desire to make provision for third parties not contemplated by the contract.

It is submitted that since a testator who dies with a joint or mutual will in force departs life in the belief that he has provided for the surviving testator and through him for some ultimate third-party benefi-

62. 219 S.W. 839, 841 (Tex. Civ. App. 1920).

63. *Id.*

64. The UNIFORM PROBATE CODE, art. II, pt. 2, provides for a surviving spouse by means of an elective share in lieu of dower or curtesy. Provision is made for a homestead allowance in section 2-401 and for exempt property in section 2-402.

65. Where husband and wife owned a parcel of real estate as tenants by the entirety, it was held that even though the parcel was the subject of their joint will, the wife, as survivor, could dispose of the property unfettered by the joint agreement. *Levenson v. Levenson*, 229 App. Div. 402, 242 N.Y.S. 165 (1930). Similarly, where a joint will executed by a husband and wife pursuant to a contract disposed of real estate owned by them in joint tenancy, the husband did not offer the joint will for probate after the wife's death but asserted his right of survivorship in the property *In re Estate of Hoepfner*, 32 Wis. 2d 339, 145 N.W.2d 754 (1966).

ciaries, a rule which permits a survivor's option may result in frustration of the predeceased party's testamentary purpose. It may be for this reason that it has been suggested so infrequently that the survivor may sidestep the contract by declining the benefits.⁶⁶ A surviving party should not be able to withdraw from the bargain after it is too late for the deceased party to readjust his testamentary dispositions.

C. *Advantages, Disadvantages, Recommendations*

In general, the earlier a contract not to revoke is deemed to be formed, the more certain it is that the property involved will pass in accordance with the agreement between the parties. If the agreement not to revoke a joint or mutual will is made in a jurisdiction whose courts will hold a contract to have been formed at the moment of agreement, each party can rest in relative assurance that there can be no deviation from the terms of the agreement except with his consent.⁶⁷ If, however, the contract is not deemed formed until death of a party to the agreement, each party remains free to withdraw from the agreement during the joint lifetimes of the parties. Finally, in jurisdictions in which the contract is not deemed formed until the survivor's acceptance of the benefits of a deceased party's will, it would appear that there is no assurance that the agreement will be carried out, since the survivor may at his option avoid the contract by declining to accept the benefits accruing to him under the predeceased testator's will.

If the purpose of contracts not to revoke joint or mutual wills is to create inter vivos certainty as to the testamentary dispositions of parties thereto, that purpose would be best served by a rule that a contract is formed at the time of the parties' agreement. There are, however, significant considerations which militate against such a rule. Parties to an agreement not to revoke joint or mutual wills may live long after the agreement is reached, during which time the situation of the parties could change drastically. If a contract is deemed to have been formed at the moment of their agreement, no party could effect a modification of the

66. Apart from *Sherman v. Goodson's Heirs*, 219 S.W. 839 (Tex. Civ. App. 1920), the argument was found in only one other case, wherein it was rejected. The Supreme Court of Wisconsin, in affirming the rule that "it is the duty of equity to grant such relief where, as here, the survivor of the two testators to a joint will or to two mutually reciprocal wills, has directly benefitted," stated that such a rule "does not necessitate our concurrence in respondent's argument for the converse: 'Equity will not grant relief if the survivor does not receive property under the contract.'" *In re Estate of Hoepfner*, 32 Wis. 2d 339, 145 N.W.2d 754, 758 (1966).

67. Note, however, the minority rule that a party may unilaterally rescind the contract. See note 47 *supra* & accompanying text.

agreement without the consent of the other party or parties. The result could be highly inequitable if one party reaps advantage from the improved situation of another. Moreover, the existence of rules protecting the interests of third-party beneficiaries to contracts may, in many instances, prevent alteration or rescission of a contract not to revoke joint or mutual wills, even with the concurrence of principals thereto, unless parties who would take legacies or devises at the death of the surviving principal also give their consent to the alteration or rescission.⁶⁸ Finally, a contract not to revoke joint or mutual wills represents a cloud on the title of all property which is the subject of the contract. Transfer of an absolute interest in such property requires that all parties join in the conveyance.

All of these factors could give rise to situations in which the existence of a contract not to revoke could prove burdensome to the parties to the contract. To prevent such consequences, the time at which a contract is deemed formed arguably should be postponed. However, to delay the time of formation until the survivor's acceptance of benefits may be no more desirable in light of the opportunity provided the survivor to undo the entire agreement after a deceased testator has fully performed his part thereof. It would thus appear that a rule placing the time of contract formation at the death of one of the parties would be preferable. Under such a rule, the parties would be free to alter their dispositions during their joint lives to reflect changed circumstances. In addition, each party could rest in the certainty that, should he be the first to die, the agreement for which he bargained would be carried out.⁶⁹

68. For a discussion of third-party beneficiary rules applicable to joint and mutual will contracts in Wisconsin, see Comment, *Contracts to Make Joint or Mutual Wills*, 55 MARQ. L. REV. 103, 115-16 (1972).

69. A rule requiring a party wishing to withdraw from the agreement during the joint lifetimes of the parties to notify the other parties before the withdrawal is effective in most cases and provides ample opportunity for the other parties to adjust their testamentary plans. There is, however, the possibility that one of the parties, while on his deathbed, could receive notice of another's withdrawal from the agreement and be incapable of effecting appropriate changes in his own testamentary dispositions. To protect against this contingency, the notification rule could be modified so as to render ineffective any notice of withdrawal received by a party within a specified period prior to his own death.

The Uniform Code is silent as to the power of testators to withdraw from agreements not to revoke joint or mutual wills. A suggested addition to Article II, Part 7, dealing with "Contractual Arrangements Relating to Death," is as follows:

Section 2-702. [Withdrawal from Agreement not to Revoke a Joint Will or Mutual Wills.]

Any party to an agreement not to revoke a joint will or mutual wills may withdraw from the agreement during the joint lifetimes of parties thereto

III. AFTER-ACQUIRED PROPERTY

"After-acquired property," a term embracing all of the property to which a testator becomes entitled between the time of execution of his will and his death, is a familiar topic in the law of wills and estates.⁷⁰ Statutes in most jurisdictions provide that after-acquired property may pass under such terms of a will as it would pass had it been owned at the time of the making of the will.⁷¹ These statutes, however, are not uniform as to the effect of a testator's intent. Some statutes provide that after-acquired property may pass under a will only where there is clear indication in that will that the testator so intended.⁷² Other statutes permit after-acquired property to pass under a will in the absence of a contrary intention appearing in the will.⁷³ The Uniform Probate Code is in accord with the latter class of statutes.⁷⁴

As applied to joint or mutual wills, the term "after-acquired property" could refer to property acquired by the survivor of the parties to a

upon notification to the other parties of his action, except that such notice shall be ineffective against a party by whom such notice is received within 30 days of his death or legal incapacitation.

Comment

Three different rules are in effect in various jurisdictions governing unilateral withdrawal from a joint or mutual will agreement. A contractual obligation not to revoke a joint or mutual will is said to arise either at the instant of agreement between or among the parties, or at the death of the first party with his agreed-upon will in force, or upon the acceptance of the benefits of the predeceasing party's will by the surviving party. The rule adopted is a compromise which permits parties to adjust their testamentary dispositions to changed circumstances during their joint lifetimes but which also assures each party that, should he be the first to die, the agreement will be carried out. The 30-day provision protects a party in his last illness or during a physical or mental incapacity against a bad faith withdrawal.

70. See generally 4 PAGE ON WILLS, *supra* note 9, § 33.20; Annot., 75 A.L.R. 474 (1931).

71. The first such statute probably was the English Wills Act of 1837, 7 Will. 4 & 1 Vict. c. 26.

72. E.g., MICH. COMP. LAWS ANN. § 702.3 (1948):

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.

73. E.g., N.J. STAT. ANN. § 3A:3-9 (1951):

Real property acquired by a testator after making his will shall pass by any general or special devise or sale under any power of sale contained in the will sufficient to include such real property, had the same been acquired before the making of the will, unless a contrary intention appear on the face of the will.

74. Section 2-604 should be read in conjunction with section 2-603.

joint or mutual will agreement after the death of another party as well as to property acquired after execution of the will or wills. To distinguish these two concepts for the purposes of this Note, the term "after-acquired property" will be restricted to property acquired after execution of a will but prior to the death of a party; the property acquired by the surviving testator after the death of another party to a joint or mutual will arrangement will be termed "postmortem assets."

Statutory provisions relating to after-acquired property take effect only after a testator's death when disposition is being made of the property he acquired between the execution of his will and his death. The statutes do not govern the right of a surviving testator to dispose of postmortem assets during his lifetime. This distinction, however, is not always recognized.⁷⁵

A. *The Rule of Murphy v. Slaton*

Legislative formulation of probate law has left open the question of the surviving testator's rights and duties with respect to postmortem assets. Moreover, since joint or mutual will agreements frequently make express provision for postmortem assets,⁷⁶ courts rarely have been compelled to consider the question.⁷⁷ There are, however, instances in which no such express provision has been made.⁷⁸

The leading decision concerning the disposition of a survivor's postmortem assets was rendered by the Supreme Court of Texas in *Murphy v. Slaton*.⁷⁹ There it was held:

75. See, e.g., *In re Scheffe's Estate*, 261 Wis. 113, 52 N.W.2d 375 (1952) (dissenting opinion).

76. An example of such a provision is found in the will litigated in *Menke v. Duwe*, 117 Kan. 207, 230 P. 1065, 1072 (1924) (emphasis supplied).

If my wife does not survive after my death, in that event I give, devise and bequeath *all the property owned by me at the time of my death* to the same persons to whom I have bequeathed and devised the same in case my wife first takes a life estate in my property

77. The court in *Murphy v. Slaton*, 154 Tex. 35, 273 S.W.2d 588, 594 (1954), stated that no case directly in point had been cited.

78. The joint will litigated in *Rastetter v. Hoenninger*, 214 N.Y. 66, 108 N.E. 210 (1915), for example, gave no guidance as to the disposition of property acquired by the survivor:

Second. We give unto the survivor of either of us, the income of our real and personal property, during his or her natural life for his or her own use and benefit. Third. After the death of the survivor of either of us, all our property, both real and personal, shall be divided in the manner following

79. 154 Tex. 35, 273 S.W.2d 588 (1954).

While the question is not free from difficulty, and we recognize that the makers of a joint and mutual will, or of mutual wills, have the right and power to provide that all of the property owned by the survivor at his death shall pass under and be bound by the terms of their will, we do not believe such effect should be given to mutual wills unless the intention to do so is set forth in the will by very plain, specific and unambiguous language. In the absence of such clearly expressed intention we feel that the *better reasoning* supports the rule that [postmortem assets] owned by the survivor in his or her individual right [do] not pass.⁸⁰

The rule has been affirmed repeatedly in Texas.⁸¹ Outside that jurisdiction, however, the question does not appear to have been litigated to any notable extent;⁸² *Corpus Juris Secundum*, for example, states the rule of *Murphy v. Slaton* but cites only Texas cases in support.⁸³

B. Suggested Rationale for the Rule of *Murphy v. Slaton*

It is not clear what constitutes the "better reasoning" to which the court alludes in *Murphy v. Slaton*.⁸⁴ The substantiality of the issue would seem to have required an elucidation of the reasoning underlying the decision, especially since the issue was one of first impression in Texas.⁸⁵ However, the only language in the opinion which provides any insight into the court's reasoning is the following poorly worded statement:

To construe the estate disposed of by the will to be all the property owned by the survivor at his or her death would be to make an impossible and intolerable situation. The survivor could not enjoy his own estate after such survivor [sic] had died.⁸⁶

A rationale to support the rule of *Murphy v. Slaton* may be found in an examination of the possible intentions of the parties to the contract.⁸⁷ In entering into an arrangement involving joint or mutual wills, a testa-

80. 273 S.W.2d at 595 (emphasis supplied).

81. *Weidner v. Crowther*, 157 Tex. 240, 301 S.W.2d 621 (1957); *Martinez v. Pearson*, 373 S.W.2d 76 (Tex. Civ. App. 1963).

82. A California decision recognizing the rule of *Murphy v. Slaton* is *Brewer v. Simpson*, 53 Cal. 2d 567, 349 P.2d 289, 2 Cal. Rptr. 609 (1960).

83. 96 C.J.S. *Wills* § 756(a) (1957).

84. See quote in text accompanying note 80 *supra*.

85. See note 77 *supra*.

86. 273 S.W.2d at 594.

87. See generally 4 PAGE ON WILLS, *supra* note 9, § 33.20.

tor's intention may be to provide for the co-testator and third parties, not simultaneously, but as successive beneficiaries. If a testator desired simply to divide his property among his co-testator and third parties, no contractual arrangement would be necessary; a simple will would suffice. A joint or mutual will agreement assures the testator that, should he be the first to die, his property will pass into the hands of the surviving testator and then to third parties in accordance with the contractual agreement. In order to give effect to this intention, it would not appear essential that the survivor's postmortem assets also be given over to the third parties.

The motivation of a testator in entering into a joint or mutual will agreement may be to ensure not only that his own property will reach ultimate beneficiaries but also that the property of the co-testator will devolve to him, should he survive the co-testator, or to third parties, should he predecease the co-testator. If the aim of the testator is to obtain the co-testator's property for himself in the event that he survives the co-testator, it would be inappropriate, in the event that the testator did not survive, to require that the co-testator's postmortem assets be held for the benefit of third parties. If, however, the testator's intention is to ensure that property of the co-testator will pass to ultimate beneficiaries even if the co-testator survives him, then there are grounds for holding that postmortem assets of the surviving co-testator pass under the terms of the joint or mutual will in accordance with the predeceased testator's intention, a result contrary to the rule of *Murphy v. Slaton*.

Thus, there are four basic reasons for which a testator might enter into a joint or mutual will agreement: to ensure that his property will pass to the co-testator, that property of the co-testator will pass to him, that his property will pass to ultimate beneficiaries, or that property of the co-testator will pass to ultimate beneficiaries. The first intention can be fulfilled only if the testator predeceases his co-testator, whereas the second intention can be fulfilled only if the testator survives his co-testator. The third and fourth intentions can be carried out regardless of who dies first, but the testator is concerned only with the possibility that he will be the first to die, since, if he knew that he would survive, he could provide directly for the ultimate beneficiaries. Thus, the fulfillment of the various possible intentions is dependent upon which party dies first. Since, however, the testator does not know at the time of entering into a joint or mutual will agreement which party that is to be, and because there is nothing mutually exclusive about the intentions, it is possible that each such intention forms part of the motivation for making the agreement.

If, in the absence of any intention expressed in the will or contract, a judicial rule must govern the disposition of property acquired by the survivor of the makers of a joint or mutual will agreement after the death of one party, such a rule should comport with the apparent intentions of the parties to the agreement. Only the assumed intention of ensuring that property of a co-testator will pass to ultimate beneficiaries affords any logical basis for a requirement that the survivor's postmortem assets must pass under his joint or mutual will. It would be consistent with the other possible motivations, however, to permit the survivor to dispose of postmortem assets as he sees fit. A simple weighing of the possible reasons for which testators may enter into joint or mutual will agreements suggests that the testator's motivations will have related principally to his property and that of the co-testator owned during their joint lifetimes rather than to the property acquired by one of them after the death of the other. Accordingly, a balance should be struck in favor of a rule which gives a survivor complete freedom to dispose of his postmortem assets unrestricted by the provisions of a joint or mutual will—the rule of *Murphy v. Slaton*.

The foregoing reasoning is, of course, to some degree speculative. It should be noted, however, that where the problem of postmortem assets arises, a court will be without the benefit of controlling indicia in the contract or in the will and will have no guidance from statutes. Under such circumstances, its decision must be founded solely upon a policy of giving expression to what it believes to be the intentions of testators generally.⁸⁸

Another, although more generalized, argument in support of the rule of *Murphy v. Slaton* derives from property law. Since the surviving testator may live long after the death of the first testator, during which time he may acquire a considerable amount of property, any restrictions on his right of alienation should be imposed by operation of law only for compelling reasons, for it is well established that the law disfavors such restraints.⁸⁹ Thus, when parties to a joint or mutual will agreement

88. Cf. UNIFORM PROBATE CODE, art. II, pt. 1, General Comment: "The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death, and for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want." This approach could be adapted to the situation where testators fail to make disposition of postmortem assets by contract or joint or mutual wills executed pursuant thereto. Cf. 1 PAGE ON WILLS, *supra* note 9, § 1.1.

89. Restraints upon alienation may, for example, keep property out of commerce, concentrate wealth, prevent improvement of realty, and work a hardship upon creditors.

have not expressed an intention that a survivor's postmortem assets are to devolve according to the provisions of the joint or mutual will and no other compelling considerations are present, public policy weighs against imposition of such a burden upon the survivor.⁹⁰

In conclusion, it is submitted that the rule of *Murphy v. Slaton* merits inclusion in statutes dealing with probate, particularly the Uniform Probate Code. The rule might be placed in either the portion of the Code dealing with "Contractual Arrangements Relating to Death"⁹¹ or in the section setting forth "Rules of Construction,"⁹² but would be best located immediately following the section pertaining to after-acquired property in order to call attention to the distinction between after-acquired property and postmortem assets.⁹³

IV ANTI-LAPSE STATUTES

Anti-lapse statutes have been enacted to alter the common law doctrine⁹⁴ that a testamentary gift will fail, or lapse, if an intended legatee or devisee predeceases a testator⁹⁵ whose will makes no provision for passing the legacy or devise to the predeceasing legatee's legal representative, heirs, or next of kin⁹⁶ or to a substitute beneficiary.⁹⁷ Under an

Schnebly, *Restraints Upon the Alienation of Legal Interests*, 44 YALE L.J. 961, 964 (1935). See J. GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* § 4 (2d ed. 1895).

90. J. GRAY, *supra* note 89, § 3.

91. UNIFORM PROBATE CODE, art. II, pt. 7.

92. *Id.* art. II, pt. 6.

93. *Id.* § 2-604. A suggested wording for the rule is as follows:

[Construction That Contract to Leave Joint Will or Mutual Will Inapplicable to Postmortem Assets] Neither a contract to leave a joint will or mutual wills nor a will executed pursuant thereto is to be construed to affect property rights acquired by the survivor of the parties to the contract after the death of the other parties. The provisions of Section 2-603 applying to this construction shall be deemed to include a contrary intention indicated by the contract.

Comment

This section does not alter the surviving testator's rights in the case of joint or mutual wills not executed pursuant to a contract, since the surviving testator is free to revoke such a will and, in no event, is bound by the will to any particular disposition of his postmortem assets.

The term postmortem assets is used to designate property rights acquired by the surviving testator in a joint or mutual will context after the death(s) of the co-testator(s)

94. See 6 PAGE ON WILLS, *supra* note 9, § 50.10.

95. *Id.* § 50.2.

96. *Id.* § 50.14.

97. *Id.* § 50.8. The common law provided that a lapsed legacy would pass under an applicable residuary clause. Since, however, at common law after-acquired realty could not be devised, a lapsed devise would pass, not under a residuary clause, but by intestacy.

anti-lapse statute, the gift which otherwise would fail is treated as though the testator had, in fact, made some provision for passing it to other parties in the event the intended beneficiary predeceased the testator. Frequently, the gift is passed directly to the issue⁹⁸ or descendants⁹⁹ of the intended beneficiary

Numerous purposes have been ascribed to the enactment of anti-lapse statutes. Such statutes have been said to give effect to a presumption that the testator would have made provision for the relatives of the intended beneficiary if he had foreseen the possibility of lapse.¹⁰⁰ One court has stated the purpose as being "to substitute the natural objects of the testator's bounty" for the predeceased legatee.¹⁰¹ Moreover, anti-lapse statutes are viewed as preserving the otherwise lapsed gift for persons who presumably would have enjoyed the gift if the intended beneficiary had died immediately *after* the testator.¹⁰² Finally, such statutes accord with the policy which disfavors intestacy, it being considered more equitable that the gift should pass to the relatives of the intended beneficiary than to the testator's heirs.¹⁰³

Application of generally worded anti-lapse statutes to joint or mutual wills occasionally causes problems not encountered elsewhere. In an Iowa case,¹⁰⁴ for example, a husband and wife executed mutual wills with reciprocal provisions but made no provisions for third parties.¹⁰⁵ The

Id. § 50.16. Of course, if there were no applicable residuary clause, a lapsed legacy also would pass by intestacy *Id.* § 50.15.

98. *E.g.*, MASS. GEN'L LAWS ANN. ch. 191, § 22 (1958).

If a devise or legacy is made to a child or other relation of the testator, who dies before the testator but leaves issue surviving the testator, such issue shall, unless a different disposition is made or required by the will, take the same estate which the person whose issue they are would have taken if he had survived the testator.

99. *E.g.*, ARIZ. REV. STAT. § 14-133 (1955).

When a testator devises or bequeaths an estate or interest to a child or other descendant, and such devisee or legatee dies during the lifetime of the testator, leaving descendants surviving the testator, the devise or legacy shall not lapse by reason of such death, but the estate so devised or bequeathed shall vest in the descendants of the legatee or devisee as though he had survived the testator and died intestate.

100. *See, e.g.*, *Weiss v. Broadway Nat'l Bank*, 204 Tenn. 563, 322 S.W.2d 427 (1959)

101. *Kling v. Goodman*, 236 Ala. 297, 181 So. 745 (1938).

102. *See, e.g.*, *In re McCarthy's Estate*, 256 Iowa 66, 126 N.W.2d 357 (1964)

103. *See, e.g.*, *In re Burns' Estate*, 78 S.D. 223, 100 N.W.2d 399 (1960)

104. *In re Croulek's Estate*, 252 Iowa 700, 107 N.W.2d 77 (1961).

105. In the discussion which follows, wills described as being without provisions for third parties will connote those making no provision for a testamentary disposition to be made by the survivor of the parties to the agreement in favor of ultimate beneficiaries. If there were a provision for third parties, it would supersede a provision favoring one

husband died, and the wife took under his will. At the wife's death; however, heirs of the husband claimed that under the Iowa anti-lapse statute,¹⁰⁶ property which was the subject of the reciprocal provisions made by the wife in behalf of the husband passed to the husband's heirs. Citing previous decisions,¹⁰⁷ the Iowa Supreme Court rejected the argument that the anti-lapse statute was designed to have such an effect. The court held that if mutual wills contain no provisions for third parties, the will of the first to die constitutes a single will (of the first to die) and has no further existence as the will of the survivor.¹⁰⁸ Although the court did not articulate the basis for this portion of its holding, other Iowa decisions have clarified the reasoning underpinning the rule. In *Anderson v. Anderson*,¹⁰⁹ for instance, the court noted that the reciprocal provisions of joint or mutual wills which operate to transfer the estate of one testator to another are necessarily conditioned upon the survival of the testator who is to take the estate of the other. No property passes under a joint or mutual will until one testator dies; the property passes to the testator who *survives* the other. From these observations, the court concluded that at the death of a surviving testator, there can be no lapse of the provisions originally made in the survivor's will in behalf of the predeceasing testator, since the predeceasing testator never qualified, by outliving his co-testator, to take under those provisions.¹¹⁰

It may appear to be mere formalism to require that one testator must survive the other in order to take under a joint or mutual will; however, such a requirement must be implied, if it is not expressly stated, in order to preclude the operation of an anti-lapse statute in cases where there is no gift over to third parties. Otherwise, if mutual wills were drafted in which each testator named the other as recipient of his estate without making any mention of the necessity of the other's surviving him,¹¹¹ an anti-lapse statute would operate to pass the surviving testator's

of the parties to the contract upon the testator's death and thereby preclude operation of an anti-lapse statute.

106. IOWA CODE ANN. § 633.16 (1958).

107. *Maloney v. Rose*, 224 Iowa 1071, 1074, 277 N.W. 572, 574 (1938); *Maurer v. Johanson*, 223 Iowa 1102, 1105, 274 N.W. 99, 101 (1937).

108. *Accord*, *Wright v. Wright*, 215 Ky. 394, 285 S.W. 188 (1926); *Rogers v. Mosier*, 121 Okla. 213, 245 P. 36 (1926); *Wilson v. Starbuck*, 116 W. Va. 554, 182 S.E. 539 (1935).

109. 181 Iowa 578, 164 N.W. 1042 (1917).

110. 164 N.W. at 1045.

111. A joint will speaks for two or more testators. Its reciprocal provisions can identify a beneficiary only as a survivor or through the use of a term having that effect. A mutual will, however, speaks for one testator and may identify a beneficiary by name with the understanding that such beneficiary takes at the testator's death, no mention being made of survival.

property to issue or descendants of the predeceasing testator at the survivor's death. Thus, for example, spinster sisters could execute mutual wills with reciprocal provisions in favor of each other but with no express requirements that the beneficiary must survive the testatrix and no provisions for third parties. Upon the death of one sister, the other would succeed to her estate and could, for instance, marry and live for a considerable time thereafter. Thinking that her mutual will in favor of the deceased sister was no longer effective, the surviving sister might die in the belief that her estate would pass to her husband by intestacy. A third sister, however, could offer the surviving sister's mutual will for probate, claiming that by reason of the anti-lapse statute, she, as the predeceased sister's nearest living relative, should take the estate devised to the predeceased sister. If there is no implication that the surviving sister intended to condition her will upon her co-testatrix's survival, this position would appear correct.

Although an identical result might ensue if the surviving sister's will had been a simple rather than a mutual will, it is submitted that the presumptions underlying anti-lapse statutes, which may be justified in the case of a simple will, are not supported by the intentions of a party to a mutual will. The testator who executes a simple will ordinarily does so with the intention of providing for parties who probably will outlive him. If, however, the beneficiary does not survive the testator, an anti-lapse statute operates on the presumption that the testator would desire to have the property pass to the relatives of the deceased beneficiary rather than by intestacy. On the other hand, a testator who executes a mutual will with reciprocal provisions usually does so, at least in part, to secure for himself the reciprocal provisions made in his behalf by the co-testator; indeed, when there are no provisions for third parties, it is difficult to infer any other compelling motivation. The presumptive basis of an anti-lapse statute is of questionable validity in such a case, since it would appear that the mutual will of the survivor of the testators has served its purpose once the survivor takes under the mutual will of the first to die. There does not appear to be any basis for a presumption that the survivor would desire that at his own death, the property received from the co-testator should return to relatives of the predeceased testator.

Thus, every mutual will should be deemed to contain the implied condition that a party shall not qualify to take under its reciprocal provisions except by his surviving the testator. Placing reciprocal provisions on this contingent basis eliminates the possibility of lapse, since either the in-

tended beneficiary will survive the testator and take under such provisions or the intended beneficiary will predecease the testator and his expectancy will never vest.¹¹²

V ENFORCEMENT

As noted earlier,¹¹³ most courts recognize that the obligations created by the contractual features of a joint or mutual will are distinct from those which arise out of the testamentary dispositions¹¹⁴ and that a joint or mutual will executed pursuant to a contract remains ambulatory and may be revoked at any time, even after the death of one of the parties to the contract.¹¹⁵ While the parties to a joint or mutual will agreement are living, any violation of an agreement to leave joint or mutual wills may be redressed, if at all, only as a breach of contract. The testamentary provisions of the will or wills executed pursuant to the agreement afford no grounds for relief, since no will, in and of itself, creates a vested interest in an intended beneficiary while the testator lives.¹¹⁶

After the death of one of the parties to the agreement, the dual existence of contract and will complicates the situation when redress is sought for a violation of the agreement. By way of illustration, assume that two testators agree to leave mutual wills¹¹⁷ containing reciprocal

112. It should be noted that not every testamentary disposition is prevented from lapsing by an anti-lapse statute. Many statutes restrict their application to gifts made to specified categories of beneficiaries. For example, some statutes do not prevent lapse of gifts made to beneficiaries who are not relatives. See note 98 *supra*. Others prevent lapse of only those gifts made to descendants. See note 99 *supra*. The anti-lapse provision of the Uniform Probate Code applies only to gifts made to a grandparent or lineal descendant of a grandparent—in other words, a near blood relative. UNIFORM PROBATE CODE § 2-605.

Hence, in the typical husband-wife mutual will containing no gift over to a third party, the lapsed provisions of the survivor's will would not be affected by a statute which applies only to gifts made to descendants or blood relatives. In the illustration in the text involving sisters, however, any anti-lapse statute, other than those limited in application to gifts to children or descendants, would operate.

113. See notes 40-42 *supra* & accompanying text.

114. See, e.g., *Florey v. Meeker*, 194 Ore. 257, 240 P.2d 1177 (1952) ("[T]he appellants have confused the contractual elements of the will and the law relating thereto with the testamentary elements of the will and the law appropriate to testamentary disposition.").

115. See, e.g., *Collord v. Cooley*, 92 Idaho 789, 451 P.2d 535 (1969); *Wimp v. Collett*, 414 S.W.2d 65 (Mo. 1967); *Olive v. Biggs*, 276 N.C. 445, 173 S.E.2d 301 (1970); *Tips v. Yancey*, 431 S.W.2d 763 (Tex. 1968).

116. *In re Kent's Estate*, 22 Misc. 2d 66, 194 N.Y.S.2d 944 (1959).

117. The illustration would be equally valid were a joint will postulated.

provisions and providing for a gift over to *A* at the death of the survivor and that the agreement meets all requirements for a valid will. At the time, if not sooner, that the surviving testator probates the will of the predeceasing testator and accepts the benefits of the reciprocal provisions made in his behalf, all jurisdictions would hold that a contract is formed. Assume that at the survivor's death, *A*, the ultimate beneficiary under the mutual wills, offers the survivor's mutual will for probate, but *B* appears and propounds a later will of the survivor naming *B* to receive all of the survivor's estate.

The familiar rule that a later inconsistent will revokes an earlier will to the extent of the inconsistency¹¹⁸ applies as well to wills of a contractual nature.¹¹⁹ A probate court will admit only the later will,¹²⁰ even though that will revokes an earlier will executed pursuant to a contract not to revoke.¹²¹ Since the subject matter jurisdiction of the probate courts of most states extends only to establishment of the validity of a will as the last will of a testator,¹²² a probate court has no authority to address the issue of testamentary dispositions which a testator may have contracted to make or to leave in force.¹²³ Thus, in the illustration, the will in favor of *B* will be probated and the survivor's estate will pass into his hands.

Although the inchoate rights of *A* as beneficiary under the mutual will are entirely abrogated by probate of the survivor's subsequent will, the contractual obligations embodied in the mutual will cannot be set aside by probate of the subsequent will. As a beneficiary of the contract not to revoke, *A* retains the rights conferred upon him by the third party beneficiary doctrine of contract law.¹²⁴ The survivor's failure to leave in force the testamentary disposition in favor of *A* pursuant to his agreement with the predeceased testator constitutes a breach of contract for

118. *E.g.*, *Albuquerque Nat'l Bank v. Johnson*, 74 N.M. 69, 390 P.2d 657 (1964); *In re Franey's Estate*, 436 Pa. 94, 257 A.2d 515 (1969).

119. *E.g.*, *In re Middaugh's Estate*, 179 Neb. 25, 136 N.W.2d 217 (1965); *In re Stringer's Estate*, 80 Wyo. 389, 345 P.2d 786 (1959).

120. *See, e.g.*, *In re Campbell's Estate*, 46 Wash. 2d 292, 280 P.2d 686 (1955).

121. *See, e.g.*, *Bee v. Smith*, 6 Cal. App. 3d 521, 86 Cal. Rptr. 115 (1970); *Hoff v. Armbruster*, 122 Colo. 563, 226 P.2d 312 (1950); *In re Shepherd's Estate*, 130 So. 2d 888 (Fla. (1961)).

122. 3 PAGE ON WILLS, *supra* note 9, §§ 26.142, 26.79.

123. *In re Lortz' Will*, 23 Ill. 2d 344, 178 N.E.2d 298 (1961); *In re Middaugh's Estate*, 179 Neb. 25, 136 N.W.2d 217 (1965).

124. *See* RESTATEMENT (SECOND) OF CONTRACTS § 135 (Tent. Draft No. 3, 1967).

which *A* may seek the usual contract remedies at law or in equity Damages may be obtained in an action at law;¹²⁵ however, difficulties in valuation of the estate may require an accounting in equity¹²⁶ Thus, equitable remedies are more frequently sought in the first instance.¹²⁷ Relief is generally granted in the form of specific performance¹²⁸ or by imposition of a trust upon the survivor's estate.¹²⁹

Where both a will and a valid contract are involved, it is clear that the contract must ultimately prevail. Generally, however, the supremacy of the contract will not be established until the will has been probated, whereupon that instrument gains temporary ascendancy The incapacity of a probate court to decide anything beyond the validity of a will, and the consequent necessity of resort to a court of general jurisdiction to determine contract rights, is a situation reminiscent of the classical distinction between law and equity The necessity of entering separate courts to secure probate of a will and to enforce a contract to leave a will has been attacked frequently¹³⁰ For example, Chief Judge Cardozo, referring to the narrowness of probate jurisdiction in New York, observed that to "remit the claimant to another forum after all these advances and retreats, these reconnaissances, and skirmishes, would be a postponement of justice equivalent to a denial. If anything is due him, he should get it in the forum whose aid he has invoked."¹³¹

No state has yet vested its probate courts with power to set aside a last will or some of its provisions in favor of a contractual order of disposi-

125. *In re Shepherd's Estate*, 130 So. 2d 888 (Fla. 1961) (dictum); *Schomp v. Brown*, 215 Ore. 714, 335 P.2d 847, *clarified on denial of rehearing*, 215 Ore. 714, 337 P.2d 358 (1959).

126. B. SPARKS, *supra* note 1, at 136-37

127. *Id.* at 146.

128. *E.g.*, *Citizens & Southern Nat'l Bank v. Leaptrot*, 225 Ga. 783, 171 S.E.2d 555 (1969); *Turner v. Theiss*, 129 W. Va. 23, 38 S.E.2d 369 (1946).

129. *E.g.*, *Tooker v. Vreeland*, 92 N.J. Eq. 340, 112 A. 665, *aff'd per curiam sub nom. Tooker v. Maple*, 93 N.J. Eq. 224, 115 A. 255 (1921); *Underwood v. Myer*, 107 W. Va. 57, 146 S.E. 896 (1929).

130. *See, e.g.*, *Goddard, Mutual Wills*, 17 MICH. L. REV. 677, 686 (1919) (footnotes omitted):

Why send the party out of the probate court into equity when he has a will that equity will protect as a compact? If the will cannot be revoked, why not probate it, and refuse probate to the later instrument? Why should not the law say, when a testator has legally agreed not to make another will, that that will is his last will, and the one to be probated, and no other is his will?

131. *Raymond v. Davis' Estate*, 248 N.Y. 67, 72, 161 N.E. 421, 423 (1928).

tion.¹³² In addition to an enlargement of subject matter jurisdiction,¹³³ liberalized probate would necessitate modification of the common law rule that a testator's last will governs the disposition of his estate. Legislation might be enacted to provide that a testator's last will shall control the disposition of his estate, *except* that testamentary dispositions which a testator has contracted to make or to leave in force and which would be enforceable in equity shall take precedence over any inconsistent dispositions made in the last will, such contractual dispositions to be given effect in probate.

Although Professor Sparks recognizes that "since the contract is valid and may be enforced at law or in equity it is merely prolonging litigation to deny complete relief in the probate court,"¹³⁴ he labels a "misguided notion" the argument that the probate court should be given power to determine the validity of the contract.¹³⁵ His reasons for such a conclusion are several: (1) an ultimate beneficiary under a contractual will is not a proper party to contest a later revoking will; (2) probate courts generally lack the machinery or jurisdiction for determining the validity of contracts; (3) the findings of a probate court are not *res judicata* as to an action on the same matter at law or in equity; (4) where a contractual will disposes of only part of the testator's estate, another will disposing of the remainder may have to be probated with resulting confusion; (5) the essence of such a proceeding in a probate court would be the determination of the validity of the contract, a matter with which the court is usually unfamiliar; and (6) the definition of a will would be

132. It should be noted, however, that the courts of Kansas have construed that state's probate code liberally, holding that a suit on a contract is a contest of an inconsistent will. *Yeager v. Yeager*, 155 Kan. 734, 129 P.2d 242 (1942). The applicable statute provides that the probate courts have original jurisdiction to admit last wills to probate, as well as such powers "as may be necessary and proper fully to hear and determine any matter properly before such courts." KAN. STAT. ANN. § 59-301 (1963). This language has been held to confer upon the probate court exclusive jurisdiction to enforce the oral contract of a decedent to devise real estate. *Dixon v. Fluker*, 155 Kan. 399, 125 P.2d 364 (1942). It should be observed that in *Dixon* no will was involved; the claim was made by the beneficiaries of the alleged contract against the heirs in intestacy. Although the probate courts of Kansas thus have a wide scope of authority, it does not appear that any case yet has been decided in which a probate court has gone so far as to set aside a will or a part thereof in order to enforce a testator's contractual promise to devise or bequeath property. Nor does such a step appear to have been taken in other jurisdictions.

133. Some states now have legislation which grants equitable powers to probate courts. See, e.g., ORE. REV. STAT. § 111.095(1) (Supp. 1971); N.Y. Surr. Ct. Pro. § 201.3 (McKinney 1967).

134. B. SPARKS, *supra* note 1, at 126.

135. *Id.*

fundamentally altered by the requirement that a valid will could not be inconsistent with an outstanding contractual obligation relative to the estate.¹³⁶

It is submitted that the objections that an ultimate beneficiary under a contractual will is not a proper party to contest a later revoking will, that probate courts lack the necessary machinery or jurisdiction for determining the validity of the contract, and that the findings of a probate court are not *res judicata* at law or in equity could be overcome immediately by statute. In addition, the objection that a new element would be added to the execution of wills is hardly an objection at all, in view of the fact that the *purpose* of liberalized probate is to modify the rule concerning validity of a testator's last will. The remaining objections are concerned with the competence of probate courts to adjudicate contract matters in a liberalized probate proceeding. Although difficulties in distributing an estate may arise where some of the property devolves in accordance with a will and other property is transferred according to the terms of a contract, problems of distributing an estate under a will partially revoked by a later codicil are analogous and are familiar to probate courts. The problem of the unfamiliarity of probate judges with contract law would not arise in those jurisdictions where a court of general jurisdiction sits as a probate court. Moreover, even where the probate court is separate from other courts, if the probate judge has had legal training, the contract principles involved should not be difficult to master; only in those jurisdictions where probate judges are not required to have legal training would the problem appear significant.

Although the Uniform Probate Code makes no express provision for the enforcement of contractual arrangements to leave wills, a provision for expanded probate would be consonant with the stated purpose of the Code: to promote "a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors."¹³⁷ However, any attempt by the draftsmen of the Code to reorganize judicial functioning along uniform lines would be limited by the variety of state constitutional provisions creating and authorizing their respective judicial establishments. Uniform legislation proposed for multistate adoption necessarily must speak in general terms on those subjects which approach constitutional boundaries. Accordingly, the Code's treatment of subject matter jurisdiction would have to be limited by reference to the state constitution, as it now is in section 1-302:

136. *Id.* at 126-27.

137. UNIFORM PROBATE CODE § 1-102(b) (3).

(a) *To the full extent permitted by the constitution*, the Court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; (2) protection of minors and incapacitated persons; and (3) trusts.¹³⁸

In a state where authority to define probate court subject matter jurisdiction is vested in the legislature, the language of the Uniform Probate Code might be modified by the addition of a sentence broadening the probate court's jurisdiction, such as: "The subject matter jurisdiction of the Court shall include power to construe and enforce contracts to make wills or devises, or not to revoke wills or devises, or to die intestate." Such a change would necessitate a modification of section 3-101, dealing with the devolution of estates in accordance with the last will or the laws of intestacy, so as to read: "Upon the death of a person, his real and personal property, *except that property which is the subject of a contract to make a will or devise, or not to revoke a will or devise, or to die intestate*, devolves to the persons" In addition, the following sentence could be added to section 3-101. "Contracts to make wills or devises, or not to revoke wills or devises, or to die intestate shall be enforced as against inconsistent provisions of otherwise valid wills, notwithstanding any provisions of this Code governing intestate succession."

An alternative to liberalizing probate by granting the probate court power to set aside dispositions of a last will would be to permit the probate court, through its function of supervising the administration of decedents' estates, to effect a "distribution" of the estate consistent with a contract.¹³⁹ Professor Sparks has proposed that since the probate court possesses the power of supervision over the personal representative who succeeds to the estate of a decedent for the purpose of distributing the estate or its proceeds to the parties entitled thereto,¹⁴⁰ the claim of a party to a contract not to revoke a prior will could be recognized at the stage of administration. His proposal notes:

138. *Id.* § 1-302 (emphasis supplied). The same section continues:

(b) The Court has full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

139. B. SPARKS, *supra* note 1, at 132.

140. 1 PAGE ON WILLS, *supra* note 9, § 1.3; 1 J. WOERNER, AMERICAN LAW OF ADMINISTRATION § 10 (3d ed. 1923)

[W]hen the personal representative succeeds to the estate of the deceased he takes it subject to whatever burdens or encumbrances that exist against it. A contract to devise or bequeath creates an equitable right in the promisee. That equitable right in the promisee constitutes an encumbrance or burden upon the estate and may be asserted by filing a claim in the probate court in the usual manner prescribed for the filing of ordinary claims against a decedent's estate. This type of procedure does not question the admission of the last will to probate. It is a claim against the estate and if recognized might have the effect of consuming part or all the property before the provisions of the will are applied to it.¹⁴¹

The effectiveness of this procedure would depend upon the power of the probate court to adjudicate claims against the estate. Many states permit their probate courts to *allow* claims against an estate but vest no authority in such courts to *enforce payments* of the claims.¹⁴² Other states vest equitable powers in the probate courts, enabling them to compel specific performance or to impress a trust.¹⁴³ The proceedings in such jurisdictions, however, are of a summary nature; all states, regardless of the scope of powers granted to their probate courts, reserve to litigants the right of appeal to courts of plenary jurisdiction where the matter may be taken up in a trial de novo.¹⁴⁴

Thus, treating a promisee's right under a contract to make or not to revoke a testamentary disposition as a claim against the estate affecting the distribution of that estate would not necessarily achieve the desired result of eliminating separate litigation. Nevertheless, at least in cases in which a claim is uncontested, the matter could be settled within the probate court, subject, of course, to the variations which exist in the powers of different state probate courts.¹⁴⁵

VI. CONCLUSION

The practical consequences of executing joint or mutual wills should be of paramount importance to the draftsman of testamentary instru-

141. B. SPARKS, *supra* note 1, at 133.

142. 2 J. WOERNER, *supra* note 140, § 391.

143. *Id.* § 392.

144. *Id.* § 391.

145. In recognition of these variations, the Uniform Probate Code describes only in general fashion the powers of a probate court to adjudicate claims against an estate: "[T]he primary purpose of Article III is to describe functions to be performed by various public officials, rather than to prescribe how these responsibilities should be assigned within a given state or county" UNIFORM PROBATE CODE § 3-105, Comment.

ments. In this regard, it should be noted that there are numerous considerations militating against the employment of such wills.¹⁴⁶ A fundamental disadvantage is the possibility that courts will construe a joint will or mutual wills as having been executed pursuant to a contractual arrangement when in fact no contract existed. Some courts have inferred the existence of a contract from the mere execution of the wills, while others have required only a minimal quantum of proof.

An even greater disadvantage of joint or mutual wills stems from the serious consequences which may result from limitations imposed upon the testator's flexibility and freedom in arranging his affairs. For example, soon after a young couple execute mutual wills, the wife might die. If the husband remarries and attempts to revise his estate plan to be consistent with the changed family situation, he may be precluded from providing fully for his second spouse and the children of the second marriage even though he and his first wife never intended to be bound by their mutual wills. Even if the parties desire a binding arrangement, the use of a joint will or mutual wills would be ill advised.¹⁴⁷ Under such circumstances, a trust instrument often could provide the desired features of permanence and irrevocability, while placing with the trustee powers to meet certain future contingencies not predictable at the time of execution.¹⁴⁸

Related to the possibility that joint or mutual wills may freeze the testamentary aspects of an estate plan are the restrictions which may be imposed upon inter vivos use and disposition of a party's estate.¹⁴⁹ Contractual devices may preclude the use or disposition of the testator's property in any manner which would impair the third party beneficiary's interest.¹⁵⁰ For instance, when specific realty is involved, the testator might not be able to mortgage or encumber more than his life interest.¹⁵¹

146. A number of courts and commentators have advised against employment of joint wills and mutual wills. See, e.g., H. HARRIS, *FAMILY ESTATE PLANNING GUIDE* §§ 86, 250 (1957); D. REMSEN, *THE PREPARATION OF WILLS AND TRUSTS* ch. II, § 6 (2d ed. 1930).

147. Beyond the possibility that a party to a joint or mutual will arrangement would be unable to change beneficiaries to meet changing circumstances is the chance that he would be unable to revise his testamentary plans to adapt to changes in the nature or extent of his estate. This problem is especially troublesome when specific bequests or devises are involved. See, e.g., *Lamberg v Callahan*, 455 F.2d 1213 (2d Cir. 1972); *First Nat'l Bank v. Friednash*, 72 Nev. 237, 302 P.2d 281 (1956).

148. See generally J. FARR, *AN ESTATE PLANNER'S HANDBOOK* § 15 (3d ed. 1966).

149. See generally B. SPARKS, *supra* note 1, at 50-69.

150. *Id.* at 109-10.

151. *Id.* at 54. Provisions in a will for general bequests pose the difficulty for a court of setting forth a standard. A few courts have taken the position that the testator may use and dispose of his property freely during his lifetime unless it can be shown

One of the primary concerns in deciding upon a testamentary scheme is the effect of the federal estate tax. The use of joint or mutual wills may have a detrimental effect upon the testator's freedom to rewrite his will to reflect new tax developments.¹⁵² In light of the frequent changes which occur in the federal estate and state inheritance tax laws, a wise planner will retain the freedom to change his testamentary scheme to reflect favorable tax developments and to avoid the imposition of new tax burdens.¹⁵³

that the testator is acting with an *actual intent* to defeat the contract. See, e.g., *Schauer v. Schauer*, 43 N.M. 209, 89 P.2d 521 (1939). The more accepted theory is that actual intent need not be shown; rather, any inter vivos disposal which is *out of proportion* with the testator's estate is invalid and may be set aside. See, e.g., *Bruce v. Moon*, 57 S.C. 60, 35 S.E. 415 (1900); *Swingley v. Daniels*, 123 Wash. 409, 212 P. 729 (1923). The difficulty of applying a precise standard is illustrated in *Turner v. Theiss*, 129 W. Va. 23, 34, 38 S.E.2d 369, 376 (1946) (emphasis supplied).

[T]he rights of the makers of such wills to dispose of his or her property in *good faith* during his or her lifetime is not affected. But a survivor, in *bad faith* or *in fraud of the rights of the beneficiaries* of the testamentary agreement, cannot make an *unreasonable* disposition of his or her property. See also *Boner's Adm'x v. Chesnut's Ex'r*, 317 S.W.2d 867, 869-70 (Ky. 1958); B. SPARKS, *supra* note 1, at 63.

152. See *Lamberg v. Callahan*, 455 F.2d 1213, 1218 (2d Cir. 1972). Analysis and discussion of the tax implications of executing joint wills and mutual wills may be found in Sparks, *Application of the Marital Deduction to Joint and Mutual Wills*, 37 Miss. L.J. 226 (1966); Comment, *Estate, Gift, and Inheritance Taxes and the Joint and Mutual Will*, 16 BAYLOR L. REV. 407 (1964); Comment, *Federal Estate Tax—Joint Wills and the Marital Deduction*, 1964 DUKE L.J. 562; Comment, *Joint and Mutual Wills in Nebraska and the Marital Deduction*, 46 NEB. L. REV. 872 (1967); Comment, *The Mysterious Non-Terminable Interest: Reciprocal Wills, Inter-Spousal Contracts, Joint Tenancies, and the Federal Estate Tax Marital Deduction*, 55 NW U.L. REV. 727 (1961); Comment, *The Contractual Will: Invitation to Litigation and Excess Taxation*, 48 TEX. L. REV. 909 (1970).

153. The undesirability of joint wills or mutual wills in the federal estate tax context arises from the possible loss of the marital deduction where spouses have provided for the estate to pass to the survivor of them and, on his or her death, to a *third party*. The marital deduction permits the exclusion from tax of that amount, not exceeding one-half of the adjusted gross estate, which passes or has passed to the decedent's surviving spouse. INT. REV. CODE OF 1954, § 2056. However, the deduction is subject to the qualification that the estate which passes to the spouse must be, as one commentator has termed it, "in the nature of a fee simple absolute." Sparks, *Application of the Marital Deduction to Joint and Mutual Wills*, 37 Miss. L.J. 226 (1966). The problem then centers on the effect which the survivor's obligation to will his estate or a part thereof to a third party will have upon the qualification that the survivor's interest in the estate cannot be in the nature of a life estate or a terminable interest.

The cases have dealt with several variations of the overall problem, and generalizations are difficult. See generally 4 J. MERTENS, THE LAW OF FEDERAL GIFT & ESTATE TAXATION § 29.28 (1959). In what is perhaps the leading case, it was conceded that the interest received by the surviving spouse in property not held jointly was terminable and therefore did not qualify for the marital deduction. The court then turned to the issue of the property which had been held in joint tenancy and concluded that since under state

In addition to producing inflexibility, the use of joint or mutual wills may result in protracted litigation, which not only might delay enjoyment of the estate by the ultimate beneficiary but also could dissipate a sizable portion of the estate through legal fees and court costs.¹⁵⁴

It thus would appear that the use of a joint will or mutual wills should be avoided whenever possible. When it is convenient or necessary to use wills with reciprocal provisions or if a joint will is insisted upon, the will or wills should recite whether a contractual arrangement is contemplated. If a contract is involved, the parties should employ a separate writing evidencing the agreement, with copies thereof attached to the will or wills.¹⁵⁵

law the wife's title was derived from the joint tenancy and was therefore not terminable, it qualified for the marital deduction. *Estate of Nelson v. Commissioner*, 232 F.2d 720 (5th Cir. 1956). This decision as to jointly held property has been adopted by other courts. *McLean v. United States*, 224 F. Supp. 726 (E.D. Mich. 1963); *Schildmeier v. United States*, 171 F. Supp. 328 (S.D. Ind. 1959). The Tax Court has made a distinction between bequests of specific property and bequests of property of a general class, holding that the former does not qualify for the marital deduction, while the latter does. *Estate of James Mead Vermilya*, 41 T.C. 226 (1963). The contention of the Internal Revenue Service has been that the survivor's interest is terminable, even if the property is held jointly. *FED. EST. & GIFT TAX. REP.* ¶ 2081.08.

154. See H. HARRIS, *supra* note 146, § 250; D. REMSEN, *supra* note 146, ch. II, § 6; G. THOMPSON, *THE LAW OF WILLS* § 34 (3d ed. 1947).

155. See generally *Lamberg v. Callahan*, 455 F.2d 1213 (2d Cir. 1972); H. HARRIS, *supra* note 146, § 250; B. SPARKS, *supra* note 1, at 192; Evans, *supra* note 5, at 98.

The following provision has been suggested to preclude the possibility of joint or mutual wills being construed as contractual where no contract is intended:

We do hereby declare that the mutual and reciprocal dispositive provisions herein for the benefit of the other have not been made pursuant to any agreement or understanding that they have been in consideration of the other similarly providing, and each of us reserve to ourselves, severally, the right, power and privilege to revoke said will, without notice by either to the other, under any and all circumstances, and irrespective of the death of either.

H. HARRIS, *supra* note 146, § 250.

Conversely, if a contract is contemplated, the following provision may be helpful:

Our purpose in making this joint and reciprocal Will is to dispose of our property in accordance with a carefully considered common plan; the reciprocal and other gifts and bequests made herein are made in fulfillment of this purpose and in consideration of each of us waiving any and all right to alter, amend, or revoke this Will in whole or in part, by Codicil or otherwise, without written consent of the other during our joint lives, or under any circumstances after the death of the first of us.

In re Shepherd's Estate, 130 So. 2d 888, 889 (Fla. 1961).