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Concerted Wills--Again

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NOTES

CONCERTED WILLS—AGAIN

Several suits involving the issue of joint and/or mutual wills have been decided since the writer's paper on Concerted Wills appeared somewhat over a year ago.¹ These cases together with others not commented on in that article are the occasion of this note.

Some of the problems arising in the cases herein referred to raise issues respecting the loss of one (where two were executed); the loose use of the terms joint, mutual, reciprocal, or double, and attempted definitions of the concept; the character of the evidence sought to be used to set up a lost will or to prove its contractual nature; the remedies; the property involved; the combination of testamentary purpose with other purposes in the same document; and the matter of notice (where the testators are still alive) as a prerequisite to revocation.

Again the vast majority of cases concern the wills of husband and wife. Two of the cases involve brothers² and in one the will makers are sisters. A surprising number of them, about one-third, are cases of joint wills.

(a) *Lost Wills*. The mere fact that one of two wills is contractual does not generally make the problem of proof different from that arising in other cases of lost wills. In *Brown v. Johansen*³ there was no sufficient proof that the wills were contractual and as a consequence, the will being lost, it was presumed to have been revoked.

In one case the husband's will was lost and if it was not contractual it was presumably revoked. To rebut this presump-

¹ Evans, *Concerted Wills—A Possible Device for Avoiding the Widow's Privilege of Renunciation* (1945) 33 Ky. L. J. 79. See also *Chambers v. Porter*, 183 N. W. 431 (Iowa 1921). (Contract to make mutual wills by husband and wife, executed after divorce and intended as a settlement of property rights. The husband's lost will was set up in equity.)

² *Wehrle v. Pickering*, 106 Colo. 134, 102 P. 2d 737 (1940); *McLean v. Jones*, 90 Colo. 213, 8 P. 2d 261 (1932); *Brown v. Johansen*, 69 Colo. 400, 404, 194 Pac. 943 (1920); see also *Fagan v. Fisher*, 74 Colo. 473, 222 Pac. 647 (1924).

³ 69 Colo. 400, 404, 194 Pac. 943 (1920).

tion, the surviving wife offered evidence to the effect that the spouse's relations with herself continued to be affectionate and the same as before the loss. This proof is admissible but was not of course conclusive that the will was unrevoked and the further evidence failed to overcome the usual presumption.⁴ The holding in the other case is more questionable. In *Campbell v. Cavanaugh*⁵ the spouses had executed identical wills. When the wife's will could not be found (both being still alive) the wife took a carbon copy of her husband's will to a lawyer and requested that new wills be drawn for each, identical with the lost will and with the carbon copy. A new draft was made of each instrument which the spouses failed to execute. The court declared that when a person knows his will is lost and fails to make another, he is presumed to wish to die intestate. That seems to be erroneous. An inference is clearly to be drawn not only that the wife did not wish to die intestate but wished to restore the original will.

(b) *Confusion in Use of Terms.* When the testators have executed only one instrument the spouses recite their wishes successively in like or identical terms; one court denies that this is a joint will and prefers the term "double" will.⁶

Attempts at definitions seem to be unsuccessful. Thus one court declares that a will is not a joint will unless it disposes of property owned concurrently by the testators such as joint or several or community interest.⁷ It must be true that usually the parties will have some community of interest in the property⁸ but why may they not thus dispose of property held separately by them and why may not effect be given to their wills, as binding upon the survivor, if they were contractual? It is sometimes asserted that if the wills are reciprocal they are

⁴ Appeal of Spencer, 77 Conn. 638, 60 Atl. 289 (1905).

⁵ 96 N. J. Eq. 724, 125 Atl. 569 (1923).

⁶ This is literally correct but it does not seem to be significant whether the will begins "we and each of us" or whether it has two successive parts each beginning "this is my will." *Cawley's Estate*, 136 Pa. 628, 20 Atl. 567 (1890). And see *Buchanan v. Anderson*, 70 S. C. 454, 50 S. E. 12 (1905).

⁷ *Frese v. Meyer*, 392 Ill. 59, 63 N. E. 2d 768 (1945); *Curry v. Cotton*, 356 Ill. 538, 191 N. E. 307 (1934).

⁸ *Ireland v. Jacobs*, — Colo. —, 163 P. 2d 203 (1945); *Frese v. Meyer*, 392 Ill. 59, 63 N. E. 2d 768 (1945); *Curry v. Cotton*, 356 Ill. 538, 191 N.E. 307 (1934); *Nye v. Bradford*, — Tex. —, 193 S.W. 2d 165 (1946).

conclusively contractual and this rule is applied where the wills are separate instruments as well as where only one document was executed by the testators.⁹

Another court says that a joint will which is reciprocal is necessarily contractual but that rule is inapplicable where there are two documents and the contractual quality in that case must be proved.¹⁰ Still other courts more realistically hold that there is no presumption that joint wills are contractual.¹¹

(c) *The Evidence of Contractual Interest.* Where the will or one of the pair of wills recites that a contract has been made, there is no difficulty. Thus a document signed by two entitled "matrimonial and testamentary agreement" may perform the function of a will if it purports to dispose of property at the death of the signers and is properly signed, attested and subscribed.¹²

In *McGinn v. Gilroy*¹³ one will recited an agreement respecting the residue only, and it was held that there was no such obligation respecting the other provisions. In another case¹⁴ the words "it is covenanted that" were regarded as establishing a contract. The further fact that the joint will was sealed by the seal of each testator was also held to establish a contract. It seems difficult, however, to say that equity should enforce an agreement just because it was under seal.

Where there is no such declaration the evidence must come from the outside if at all. That suggests the application of the Statute of Frauds. Assuming that parol evidence is admissible to prove the contract, the statute may be avoided by the theory of part performance, the performance consisting of the probate by the survivor of the other's will and the receipt of benefits therefrom.¹⁵ Some courts still think that the identical character of the provisions of the two wills, as well as of the date, the drafter and the witnesses, is some evidence of a contract.¹⁶ Yet

⁹ *Brown v. Johansen*, 69 Colo. 400, 404, 194 Pac. 943 (1920).

¹⁰ *Frese v. Meyer*, 392 Ill. 59, 63 N. E. 2d 768 (1945).

¹¹ *Ireland v. Jacobs*, —Colo.—, 163 P. 2d 203 (1945); *McDonald v. Polansky*, 48 N. M. 518, 153 P. 2d 670 (1944); *Nye v. Bradford*, —Tex.—, 193 S.W. 2d 165 (1946).

¹² *Re Diez*, 50 N. Y. 88 (1872).

¹³ —Ore.—, 165 P. 2d 73 (1946).

¹⁴ *Curry v. Cotton*, 356 Ill. 538, 191 N. E. 307 (1934).

¹⁵ *Re Doerfer's Estate*, 100 Calif. 304, 67 P. 2d 492 (1937); *Wehrle v. Pickering*, 106 Colo. 134, 102 P. 2d 737 (1940).

¹⁶ *Wehrle v. Pickering*, 106 Colo. 134, 102 P. 2d 737 (1940).

a parol agreement to make identical wills, never carried out, would fall afoul of the statute.¹⁷

Where the evidence shows that the will-makers executed contractual wills, and one of the wills is lost, the other one has been introduced in evidence to establish the content of the lost one.¹⁸

(d) *The Remedy*. If the wills were contractual, it is apparent that if the survivor executes a different will, the legatees of the prior will have an enforceable interest as third party beneficiaries.¹⁹ This is frequently enforceable as a constructive trust placed upon the beneficiary of the revoking will.

Perhaps something may be added by way of observing how not to approach the matter of relief. Thus a bill to construe the will of the first decedent when the survivor's will is lost or destroyed is an erroneous choice of procedure.²⁰ A construction of the will would not necessarily establish its contractual character, nor show the unjust enrichment of the survivor. Apparently the beneficiaries should first seek to prove that there was a contract, and that wills were executed in accordance with it and then offer evidence of the contents of the lost will. The idea of revocability of a joint will only during the lifetime of both and only with notice persists in some decisions while if these same dispositions are made in two wills notice before the death of either is not necessary to revocability.²¹

The most recent case observed calls for further consideration. In *Ireland v. Jacobs*²² the spouses intended to execute a joint will, each giving to the other his or her entire interest in the property. There was the further understanding that a trust should be set up for a pet dog by the survivor's will and the balance should be used for an educational and charitable purpose. The husband signed the will in the presence of the attesters who likewise subscribed it. The wife's signature appeared there also but she was not present when it was attested and sub-

¹⁷ *McLean v. Jones*, 90 Colo. 213, 8 P. 2d 261 (1932); *Fagan v. Fisher*, 74 Colo. 473, 222 Pac. 647 (1924).

¹⁸ *Wehrle v. Pickering*, 106 Colo. 134, 102 P. 2d 737 (1940).

¹⁹ *re Doerfer's Estate*, 100 Calif. 304, 67 P. 2d 492 (1937); *Sick v. Wiegand*, 123 N. J. Eq. 239, 197 Atl. 413 (1938).

²⁰ *Williams Estate*, 101 Colo. 262, 72 P. 2d 476 (1937).

²¹ *Curry v. Cotton*, 356 Ill. 538, 191 N. E. 307 (1934).

²² ———Colo.—, 163 P. 2d 203 (1945).

scribed. The wife was the survivor. There had been no effort on her part to repudiate any obligation arising from the transaction, but unless there was an obligation resting upon her the property would pass under the Statute of Descent and Distribution. At this point the State's Attorney General conceived it to be his duty to enforce the trust for public charity. While the situation appears unique as a problem growing out of a concerted will, yet if the spouses had made a contract, it seems that the Attorney General's position was justifiable.

The court thought that there was evidence of a contract presented and that there was a promise for a promise. Its language, however, is somewhat confusing at this point. It says that no consideration was mentioned in the will. "Having made no will did she make a contract, and if so when and where? There was none named in the contract." Here the court assumes that there was a contract but that none was made. In fact the result that there was no obligation upon her was due to the fact that the husband could not have taken under her will if he had survived. That is to say there would not be mutuality of remedy. Even granting that mutuality of remedy under the will would be lacking would not the contractual obligation be enforceable by him as survivor, and would that not reach substantially the same result?

A recent writer²³ makes the criticism above suggested. He also believes that the husband's will, though giving his entire estate to the survivor, still created an executory limitation over to the trustee. The present writer believes that it is simpler as well as orthodox to urge that she took the property in fee but under a contractual obligation which should be enforceable in equity and that there was no legal interest given to the trustee. The view taken in *Sick v. Wiegand*²⁴ was that the survivor was bound by his promise to a third party beneficiary. It is true, of course, that there the survivor left a valid will which he repudiated.

In many cases where there is no will made or contemplated by the promisor but a mere promise is given to hold according to oral directions for a beneficiary, two views have been taken.

²³ Sears, *Joint and Mutual Wills* (1946) 18 ROCKY MOUNTAIN L. REV. 366.

²⁴ 123 N. J. Eq. 239, 197 Atl. 413 (1938).

One²⁵ is that the beneficiary of the will does not take free and clear but that the property goes back to the estate. Applying that rule here would it not pass to the trustee under the husband's will?

Another view is that the oral promise to hold for the beneficiary is enforceable²⁶ and that it carries the property over to the beneficiary. There would not be the same difficulty here as arises where the beneficiary is declared orally only, inasmuch as the wife's will was in writing and the Statute of Frauds might be said to be satisfied though the Wills Act was not. It may be noted that where the conveyance is by deed or oral trust for a beneficiary the grantee may take free and clear though he may be unjustly enriched.²⁷

It seems now that concerted wills may come into wider use as the suitability of this device for several purposes comes to be more broadly understood.

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²⁵ See *re Boyes*, 26 Ch. D. 531 (1884).

²⁶ See *Caldwell v. Caldwell*, 70 Ky. (7 Bush) 515 (1870).

²⁷ *Tillman v. Kifer*, 166 Ala. 403, 52 So. 309 (1910).