

Operation of Joint Wills in Texas

By BERTEL M. SPARKS of Durham, N. C.

In 1775 Lord Mansfield declared, "Now there cannot be a joint will."¹ The statement was offered as a self-evident truism² and such it was. And it is no less true now than it was then. By its very nature a will is a one-party instrument having to do with the winding up or settling of an individual's affairs at death. As such it is impossible for a will, even when jointly executed by two or more persons, to have a joint operation like a deed or contract executed by joint grantors or obligors. But in spite of the self-evident nature of Lord Mansfield's dictum, the term "joint will" has become rather thoroughly embedded in Anglo-American legal literature and there appears no likelihood that it is going to disappear. In view of all this, it is the purpose of the present paper to ascertain the meaning of that term as it is generally used and to further inquire into whether or not it has acquired any peculiar or unique meaning in the law of Texas.

The General View

A satisfactory functional definition of a "joint will" is that it is a term used to describe the separate wills of two or more persons expressed in a single writing which is executed by each of them. And the point worthy of special emphasis in this connection is that there are separate wills in spite of the single writing. The writing is often phrased in such language as "This is *our* will, . . . *we* dispose of *our* property," and similar expressions. Thus it is joint in form but it can never be joint in operation. Neither does the fact that the separate wills are expressed in one writing give them any peculiar or unique character. They are still separate wills and the validity of the execution as to each maker must be separately considered.³ When the first maker dies, the document is offered for probate as his will. Whether or not it is admitted to probate at that time has no bearing on its validity as the will of the survivor⁴ nor does it af-



BERTEL M. SPARKS concludes that joint wills are not suitable instruments for any estate plan, are especially unwise in Texas.

fect the right of the survivor to subsequently revoke the will.⁵ Upon the death of the survivor the same document may be offered for probate as the survivor's will. At that time the question to be decided is whether or not the writing was properly executed by the survivor, and, if it was, whether it has been revoked. In the determination of these questions, the admission or non-admission of the document to probate as the will of the first maker to die is irrelevant. Even if the parties die simultaneously and leave no property except that which is jointly owned, there are still separate estates to be administered and the claims against each must be separately considered.

A concept that is at least as old, and probably older, than the joint will is that of a contract to make a will, or, more accurately stated, a contract for the passage of property at death.⁶ By the terms of such contracts the promisor becomes

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obligated to provide for a particular testamentary disposition. If he dies without having made such a provision, he will be in breach of contract and his estate will be subject to the same kind of contractual liability as would be the case if he had died in breach of some other contract. His last will should be admitted to probate without regard to whether it is in compliance with the contract or is inconsistent with it.⁷ The obligation to the promisee will be a claim against the estate and will take priority over the claims of beneficiaries of an inconsistent will. Enforcement of the contract has no direct bearing upon the will but might have the effect of so removing the assets from the estate that there will be nothing left upon which the will can operate. The result is the same as any other case where a testator's liabilities equal or exceed his assets.⁸

But it is altogether possible that the will contracted for might be a joint will, that is to say, it might be a contract whereby each of two parties bind themselves to execute a joint writing as the separate wills of each of them. In such a case it is also possible that the terms of the contract itself might be expressed on the face of the will. If this is done, the result is three independent legal documents, two wills and one contract, expressed in a single

writing. The presence of the single writing does not alter the fact that three separate legal relationships are involved. When the first party dies, the document may be offered for probate as his will, and, if his proper execution is shown and if there is no showing that he has subsequently revoked, the instrument should be admitted as his will. If perchance he executed a subsequent revoking will, even without notice to his joint maker, the joint will must be denied probate and the subsequent will admitted. In such a case the surviving joint maker *as promisee of the contract* or the third party beneficiary if there is one may bring an action on the contract. When the surviving joint maker dies, the writing may be offered for probate as his will. If it is found that his will was not properly executed or if he has subsequently revoked, probate will be denied and his entire estate will be liable for his breach of contract.

The presence of three legal relationships arising out of one document has led many writers on the subject to assume that all three must stand or fall together, that the physical unity necessitates a unity of legal effect. Once that line of reasoning is accepted, it is but a short step to the conclusion that somehow the contract is a necessary element of the joint will or that the joint will as such has a legal significance that sets it apart from an individual will. It is often said that joint wills are irrevocable. It is even more often said that joint wills are revocable so long as both parties are alive but that if one party dies with the will in effect, the other cannot thereafter revoke. There is no rational foundation for either statement so long as it is recognized that wills are creatures of statute and that the statute provides for their revocation but makes no provision for their irrevocability. Assertions of the kind referred to are usually made without any inquiry into whether or not any evidence of a contract has been presented and without regard to whether the instrument concerned includes any contractual language. They seem to be based on the assumption that the wills themselves by virtue of their reciprocal testamentary provisions, are sufficient evidence of the contract. But that assumption is without foundation unless it is also assumed that the interests of husbands and wives are so adverse to

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Joint Wills

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each other that their testamentary wishes are in the nature of things so antagonistic that it is virtually impossible for them to make similar testamentary arrangements without their having subjected themselves to a binding legal obligation to do so. But even if the contract did exist and the statements concerning revocability were intended to apply, not to joint wills, but to contracts to make joint wills, they would still be fallacious. A contract is never "revocable" or subject to unilateral rescission, and in this respect a contract to make a joint will is no different from any other contract. If one party undertakes to rescind, even while the other is living, the attempted rescission will be ineffective and the contract will be enforced.⁹

Although a unilateral rescission of a contract is impossible, the parties are free to get together and agree upon a rescission any time they wish.¹⁰ As soon as one party dies with the contract still in effect, rescission by the survivor is impossible. It is impossible, not because it concerns a will, and not because it concerns a joint will, but because it is a simple contract which, like all other contracts, cannot be rescinded without the concurrence of both parties to it. It is in this sense, and in this sense only, that it may be said that the contractual obligation to make joint wills may be terminated while both parties are alive but cannot be terminated by the survivor after one of them has died. A more accurate way of putting it would be that the wills are always revocable, and that the contract is never revocable but may be rescinded provided both, not just one, of the parties so agree.

The Texas View

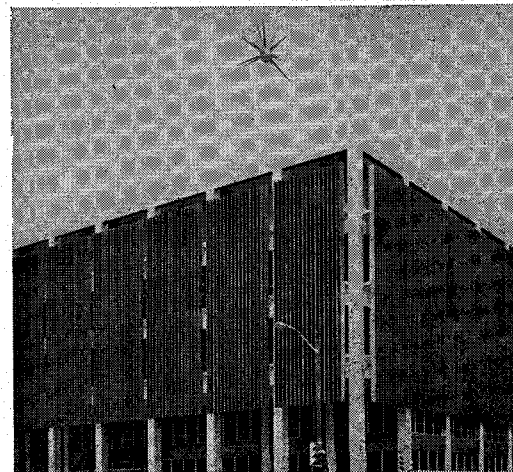
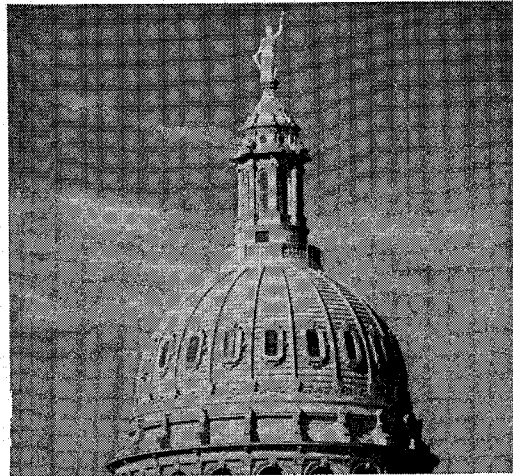
But the above analysis of the general view does not seem to be applicable in Texas where there is an unusual tendency to fuse the wills and the contract into a single concept. The position of the Texas court is well illustrated by a decision of the Texarkana Court of Civil Appeals in 1920.¹¹ Two sisters executed a joint will (that is to say, a joint writing as their separate wills) by which the first of them to die gave all her property to the survivor

for life and further provided for a gift over of the property of both upon the death of the survivor. One sister died and the will was admitted to probate as her will and her estate was distributed to the surviving sister. Thereafter the survivor executed a new will revoking the joint will and providing for a different disposition. Upon the survivor's death the joint will was admitted to probate as her last legal will. No effort was made to explain how this could be harmonized with the statutory provisions for the execution and revocation of wills.¹² It would seem that the better view, and the view followed by a clear majority of the American courts, would have been to admit the last validly executed will to probate and then, in a separate proceeding, inquire into whether or not the beneficiaries of the joint will had any contractual claim against the estate of the survivor.¹³

But failure to explain why it ignored the Texas Wills Act was not the only shortcoming of the Texarkana court. It failed to give any satisfactory explanation of what gave the beneficiaries of the revoked joint will any claim of any kind against the decedent's estate. In a curious statement that sounds both in contract and in estoppel without a contract, the court declared: "The fact that the will was executed in that form conclusively evidences an agreement by the participants to do what was actually done by them. The will became irrevocable after the death of one, not because it was made in pursuance of a previous contract, but because the survivor, after ratifying and accepting the benefits conferred, became estopped to repudiate the will."¹⁴ If the court intended to rest its decision upon a contract, which appears at least doubtful, it seemed to assume that the existence of the joint will was sufficient evidence of the contract. Such a position is clearly inconsistent with sound reason as well as against the clear weight of authority outside of Texas.¹⁵ The presence of a joint will is evidence that the parties had talked the matter over and had arrived at an understanding concerning their respective testamentary dispositions. Discussions and understandings of this kind between persons of close affinities, sisters in this case, are not unusual and should not be regarded as any indication of an intent to make a binding contract.

Reliance upon estoppel in this connection is even more difficult to justify than reliance upon contract. If a contract could be proved, the denial of the privilege of rescission (of the contract) to the survivor could be based on orthodox contract law that one party cannot rescind without the consent of the other. Admission of an inconsistent will to probate would not deprive the promisee of his contractual remedy. If it is admitted that no contract exists, it is difficult to find any basis for an obligation upon the survivor that would prevent her from making any disposition of her property that she chose. The position of the Texarkana court tends toward the untenable doctrine that the mere existence of reciprocal testamentary provisions constitutes a sufficient basis for reliance by each testator on a belief that the other will not change his will, that upon the death of either the other is estopped from altering his testamentary intentions.¹⁶

Whatever might be its rationalization, the case discussed above held that where two parties execute a joint will by which the first to die gives the survivor his or her entire estate for life and both give their entire property at the death of the survivor to a third person, as soon as one party has died and the other has claimed the benefits under the will, the survivor is under an enforceable obligation not to alter his testamentary plans. Subsequent Texas cases have both clarified and expanded this position but they have not abandoned it. And while some uncertainty as to the theory remains, it appears that the tendency is away from reliance upon estoppel and toward reliance upon contract as well as away from probate remedies and toward contractual remedies.¹⁷ It has also become clear that whether the surviving joint maker is given a life estate or a fee simple is immaterial and that his contractual obligation does not depend upon his accepting the benefits of the will of the first to die. Both of these points were applied in *Weidner v. Crowther*¹⁸ where a joint will executed by a husband and wife as joint makers gave the survivor of them a fee and provided for a gift over of "all our property" at the death of the survivor. The survivor's renunciation and subsequent execution of an inconsistent will did not deprive the beneficiaries of the gift over of their claim to "all our property."

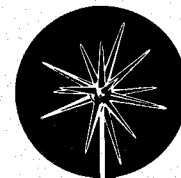


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In reaching its decision the court made it rather clear that it was relying upon the presence of a contract rather than any doctrine of estoppel when it declared, "At the heart of a mutual will lies a contract of the parties. It would be manifestly unjust to permit the surviving party to the contract to disavow it and its obligations, as those obligations are incorporated in their will. . . ."19 The importance of the words "as those obligations are incorporated in their will" as used in this connection has been emphasized by subsequent developments. Standing alone these words would seem to indicate that in the absence of any words of contract on the face of the joint will, the will would not be considered evidence of an enforceable obligation. Such is not the case. The words apparently mean nothing more than that the testamentary provisions of the will must be construed and interpreted to ascertain specifically what was promised. The only element essential to establish that something was promised is that there be express words or gift to take effect upon the death of the survivor without regard to who the survivor might be. This was sufficient proof of a contract in the *Weidner* case. It is out of harmony with the law generally²⁰ but it appears to be the law in Texas. And the fact that the surviving joint maker is given broad or even unlimited power of inter vivos disposition does not defeat the presumption that the provision in the joint will for a gift over of what remains at the survivor's death is the result of an enforceable contract that it be there.²¹ But the inter vivos power might be stated in such broad terms that it will enable the surviving joint maker to effectively defeat the beneficiaries of the gift over by making a complete inter vivos disposition, and, if the power is sufficiently broad, the fact that it is exercised in bad faith will make no difference.²²

Once it is assumed that the provision for a gift over upon the death of the surviving party to a joint will is ipso facto evidence that it is the fruit of a contract between the joint makers, it is inevitable that the testamentary provision itself must be construed in order to ascertain the subject matter of the contract. In the *Weidner* case the provision was for a gift over of "all our property" and this was held to impose a contractual obligation upon the survivor to leave all his property, including property acquired subsequent to

the death of the first maker to die, in accordance with the joint will. But for this purpose a gift of "all our property" is not necessarily synonymous with a gift of a residue or remaining part. In *Kirk v. Beard*²³ two brothers who owned certain property as tenants in common each executed a will giving the other his undivided share of the commonly-held property and leaving the residue to certain named nieces, the two groups of nieces being identical. Upon the death of the first brother to die his will was admitted to probate and his estate was distributed accordingly. Upon the death of the surviving brother the nieces claimed his entire estate under an alleged contract between the two brothers. Certain extrinsic evidence of the contract was introduced but it was of a somewhat nebulous character and was apparently not relied upon by the court. The court considered the wills themselves sufficient to prove a contract and then construed the contract as not including the commonly held property, thus leaving the surviving brother free to make a different disposition of that part of his estate.

It should be noted that the *Kirk* case involved, not a joint will, but two separate writings having reciprocal provisions and being in such form as to indicate on their faces that they were executed in conjunction with each other. Such wills are usually referred to as "mutual wills." The court apparently assumed that they should not be distinguished from joint wills so far as their tendency to prove the existence of a contract is concerned.²⁴

There is scarcely any end to the unusual construction problems created by reliance upon either joint wills or mutual wills as evidence of a contract when no contractual language is used. It necessitates the examination of testamentary language to ascertain the terms of a contract no part of which was ever stated expressly in any form. In *Murphy v. Slaton*²⁵ a husband and wife executed a joint will leaving their respective estates to the survivor of them for life and providing that upon the death of the survivor the "estate then remaining" was to be disposed of in a certain manner. The husband died first and the will was admitted to probate as his will. Thereafter the wife executed codicils purporting to make a different disposition. It was held that the joint will was sufficient

evidence of a contract which applied to all property, whether separate or community, held by either party at the time of the husband's death but did not apply to any subsequently acquired property of the wife. Under this ruling the wife's after acquired property was distributed in accordance with the codicils and all other property distributed to the beneficiaries of the joint will. The court gave no indication of what disposition would have been made of the after acquired property if no codicils had been executed. At least two possibilities present themselves for consideration. It could have passed under the joint will as part of the wife's "estate then remaining," which would have been proper if the phrase "estate then remaining" had been given its normal and natural testamentary meaning, or it could have passed as intestate property, which would have been the necessary result if the quoted phrase had been given the same meaning in its testamentary capacity as the court attributed to it in its contractual capacity. The Fort Worth Court of Civil Appeals has held in a similar case that it should have passed under the joint will.²⁶ Of course, if a joint will makes no provision for any kind of gift over at the death of the surviving joint maker, it is not evidence of any kind of contract concerning the survivor's estate.²⁷ The result reached in the Fort Worth case is probably the proper one but it does create something of a paradox to hold that a given phrase used only one time on one piece of paper identifies one item of property for testamentary purposes and an entirely different item of property for contractual purposes. It is submitted that the error lies in the mistaken assumption of the Texas courts that the writing had any contractual purpose in the first place.

The arbitrariness of the Texas position is illustrated by the holding in *Graser v. Graser*,²⁸ a holding that has since been followed in an almost identical case by the Dallas Court of Civil Appeals.²⁹ A writing purporting to be the joint will of a husband and wife was entirely in the handwriting of the husband, was signed by both husband and wife, and was also signed by a third person. It had no attestation clause. The husband died first and the instrument was admitted to probate as his holographic will. Upon the death of the wife the writing was offered for pro-

bate as her will but probate was denied because it was not properly attested. No appeal was taken from this denial of probate but the would-be beneficiaries of the ill-starred document brought action to establish their claim as third party beneficiaries of a contract between husband and wife. The writing was offered as evidence of the contract but relief was denied on the rather peculiar theory that it could not be evidence of a contract unless it was validly executed as the will of both parties to it. The reasoning back of this conclusion is difficult to comprehend. Although the document was ineffective as the will of the wife, it was signed by her as well as by her husband, and each of them intended it to be their respective wills. Its being signed by attesting witnesses (although necessary to its validity as a will) could not have added anything to its value as evidence that there was also a contract. The court's conclusion seemed to rest in part at least upon the notion that unless the writing was properly executed as a will by both parties it would show on its face that there was a failure of consideration, in which case there could be no contract. But this overlooks the fact that the consideration in most cases of this kind consists of the mutual promises to make wills.³⁰ If the writing signed by both parties did not evidence such mutual promises, how could the signing of attesting witnesses be of any help?

A question involved but apparently not effectively presented in the *Graser* case is that of whether or not one of two joint makers can serve as an attesting witness to the will of the other and the further question of whether or not he automatically becomes such a witness when he signs as a joint maker. As to the first question, there appears no logical reason why one joint maker could not so act. The problem might be that it would invalidate the gift to that witness but it should not affect the validity of the remaining portions of the will.³¹ The second question raises problems concerning order of signing, whether or not the joint maker intended to become a witness, whether there was publication, request by the testator, etc. All these problems were considered satisfied and a joint maker's signature upheld as being that of an attesting witness by a California court.³² In the *Graser* case no appeal was taken from the denial of probate by the

probate court, and the Supreme Court indicated that if an appeal had been taken, the decree denying probate would have been upheld.³³ But there was nothing in the Supreme Court's opinion to indicate that the point had been argued; therefore, the question might be considered an open one. The cases rejecting efforts to cure defective execution by attaching a subsequently executed self-proving affidavit signed by the appropriate number of witnesses³⁴ would not be in point.

The Statute of Frauds

A contract to make a will, whether it be for a joint will, an individual will, or separate wills, is a contract for the transfer of property at death. As such it is subject to the same Statute of Frauds problems as any other kind of contract for a property transfer. The fact that it cannot be performed until the death of the promisor does not bring it within the Statute of Frauds as a contract not to be performed within a year since there is a possibility of its being performed within that time.³⁵ On the same theory an agreement to render personal services to the promisor for his life is not a promise not to be performed within a year.³⁶ But an agreement to render personal services for a designated number of years, if more than one, is within the ban of the Statute.³⁷ And if the subject matter is real estate, the contract is within the Statute of Frauds provision covering a "contract for the sale of lands."³⁸ If the subject matter is personalty, it is within the statutory provision concerning contracts for the sale of personal property of more than a certain amount.³⁹ However, since part payment is as effective as a writing to satisfy the Statute of Frauds requirement concerning contracts for the sale of goods and since in the usual contract-to-make-a-will case the promisee has rendered full performance by the time action is brought, the Statute is usually satisfied.⁴⁰

Contracts to make wills involve contracts for entire estates or for fractional parts of estates more often than they do either specific personalty or specific realty. In such cases if the estate consists entirely of personalty, there is usually no problem for the reason given above. If

any part of the estate is realty, the contract is likely to be held indivisible and therefore entirely within the ban of the statute.⁴¹

In all the instances noted above the Statute of Frauds problems are no different from what they would have been if a contract for an inter vivos property transfer rather than a contract to make a will had been involved. For this purpose there is nothing peculiar or unique about the fact that the transfer contemplated is to take place by will. Here as elsewhere the cases dealing with questions of part performance tend to divide themselves into two categories. First, there are those that require a type of performance that is unequivocally referable to the contract, or in the words of Judge Cardozo, the acts of performance themselves must "supply the framework of the promise."⁴² Second, there are cases placing emphasis upon what is called the "hardship" or "virtual fraud" of the promisee.⁴³

In case of a contract to make a will the promisee is usually not entitled to possession and therefore not in a position to make valuable improvements or do other acts upon the property prior to the death of the promisor; therefore, if the unequivocally referable test is strictly adhered to, the part performance rendered will usually be insufficient to give relief against the Statute.⁴⁴ This position was taken in 1921 in Texas in the case of *Hooks v. Bridgewater*⁴⁵ and was reaffirmed in 1937.⁴⁶ In the *Hooks* case an oral contract was entered into whereby a parent released custody of a child to a promisor who agreed to rear the child and to leave his entire estate to the child at his death. Both parent and child⁴⁷ fully performed their part of the bargain but the promisor died without leaving the promised will. Enforcement of the oral contract was refused on the ground that there had not been sufficient part performance to remove the case from the operation of the Statute of Frauds. The court declared that in order to justify such relief there must be payment of consideration, possession, and valuable improvements.⁴⁸

If the Texas court had been favorably disposed toward the "hardship" or "virtual fraud" doctrine, a different result might have been reached. Courts taking

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this position have recognized that filial devotion, society and companionship, care, nursing, or other personal service might be valuable consideration but incapable of monetary valuation and therefore incapable of being recovered in quantum meruit. This has been accepted as ground for granting relief against the Statute of Frauds, and enforcing oral contracts to devise.⁴⁰ The Texas court considered but expressly rejected this position.⁵⁰ The court did indicate, however, that the oral contract would have been enforced if failure to do so would have perpetrated "an actual fraud as distinguished from a mere wrong."⁵¹ Then in 1961 in *Kirk v. Beard*,⁵² while purporting to follow the *Hooks* case, the court seized upon the earlier dictum to enforce a contract under circumstances which might amount to an acceptance of the "virtual fraud" or "hardship" doctrine. Two brothers had executed their separate wills devising certain property to each other with their remaining property going to third persons. One brother died with his will in effect and his property was distributed in accordance with the will. Upon the death of the surviving brother the third persons, as third party beneficiaries, brought action to enforce an alleged contract between the two brothers. In upholding the contract against a plea of the Statute of Frauds, the court apparently believed it was merely applying the fraud exception referred to in the *Hooks* case. However, no actual fraud was shown and all that could have been meant by the term "fraud" in this connection was that the death of one party to the contract with his will in effect constituted such an irretrievable change of position that it would be unconscionable to permit the Statute of Frauds to be used to enable the survivor to avoid his promised performance. If this is the doctrine of the case, Texas may be said to have accepted the "hardship" or "virtual fraud" theory and to have impliedly overruled the *Hooks* case. But since the court purported to be following *Hooks*, additional litigation will be necessary before the position can be clarified.

The confusion presently existing is illustrated by *Haynes v. Henderson*⁵³ where a husband and wife executed their separate wills by which each gave his or her property to the other. Although not expressly indicated in the court's opinion,

it did not appear that there was any provision in either will for any alternative beneficiary. The husband died first. His will was admitted to probate and his estate distributed accordingly. The wife subsequently executed a new will and upon her death an action was brought to enforce an alleged oral contract between the husband and wife by which it was agreed that upon the death of the survivor of them the property was to be divided equally between the husband's relatives and the wife's relatives. The Austin Court of Civil Appeals held that recovery on the contract was barred by the Statute of Frauds but failed to even discuss the question of part performance. A concurring justice did consider the matter and took the position that the death of the husband with his will in effect could not be considered such performance as would remove the case from the operation of the Statute because it was not an act "unequivocally referable" to a contract.⁵⁴ This result would appear to be dictated by the decision in *Hooks v. Bridgewater*. A dissenting justice would have enforced the contract on the ground that the husband's death with his will in effect was sufficient performance to justify relief against the Statute of Frauds. This result would seem to be the proper one under the authority of *Kirk v. Beard* which was cited in the dissenting opinion as being "directly in point."⁵⁵ Thus the concurring and dissenting justices took opposite positions but each appears to be correct *under the authorities upon which they respectively relied*.

If both *Hooks v. Bridgewater* and *Kirk v. Beard* are to continue as authorities, a rationalization for one or both of them that is different from any that has been offered by the court thus far must be found. It is believed that such a difference can be found by removing the *Kirk* case from the part performance doctrine entirely. Inquiry might be made as to when or under what circumstances a will executed pursuant to an oral contract may serve as the written memorandum required to satisfy the Statute of Frauds. A recital of the contract, including all its essential terms, could be included in the body of the will. If this is done, there appears no reason why it could not qualify as a memorandum of the contract signed by the party to be charged.⁵⁶

In the absence of any such recital, the will, whether it is a joint will, two wills with reciprocal provisions, or an individual will without any counterpart executed by the promisee, is not a memorandum of the contract.⁵⁷ It is not a sufficient memorandum because it contains no words of contract. But in those few courts where the mere execution of joint or mutual wills having appropriate reciprocal provisions is regarded as sufficient evidence of the contract there is no reason why such a will could not serve as a sufficient memorandum.⁵⁸ And in view of the Texas position on the evidentiary question, the *Kirk* case could have been placed squarely on that ground. There is no assurance that this theory will be adopted by the Texas Supreme Court. It is hoped, however, that at its earliest opportunity the Court will either adopt this or some other theory that will harmonize the two apparently conflicting cases or else will indicate which of the two is to be followed in the future.

Conclusion

Joint wills are not suitable instruments for any estate plan and their use is especially unwise in Texas, where there is such a strong tendency to rely upon their presence as evidence of a contract. No useful purpose is served by having two people execute the same document as the will of each of them anyway except possibly the sentimental one of permitting a husband and wife to exercise the appearance of unity in the performance of this particular chore. The uncertainty surrounding their operation is a high price to pay for such a limited amount of sentimentality. Any concrete goals that might be achieved through the use of a joint will can be more satisfactorily achieved with two separate wills having similar reciprocal provisions. But even here the intentions of the respective testators are likely to be frustrated unless the wills are drafted with extreme care. In the normal course of events a husband and wife are likely to prepare and execute their respective wills at or about the same time under the supervision of the same attorney. Each of them is likely to make testamentary provision for the other and the wills often include provisions for identical dispositions upon the

death of the last to die. All this might be done without any binding contractual arrangement having entered the mind of either party. But there is every indication that the Texas courts will look upon the similarity between the two wills and the circumstances surrounding their execution as evidence of an enforceable obligation which might become very distasteful to the surviving party and which was never intended by either party.

But reciprocal provisions of the kind described represent the normal and natural desires of many testators. No lawyer can avoid drafting such wills, and when he does, he should always find out whether or not the parties really intend to enter into a contract concerning their testamentary arrangements. If they do not, as is probably the case in most instances, he should include a clause in each of their wills expressly stating that the testator is aware of the will of the other party but that the wills are not being executed pursuant to any contract of any kind and that each party reserves the right to revoke his or her will with or without the consent of the other party. In the unlikely event that a contract is desired, each will should contain a clause expressly stating the terms of the contract. But the inclusion of clauses of this kind should not be allowed to conceal the fact that the instruments being drafted are wills.⁵⁹ In each instance the clause concerning the contract is nothing more than evidence of a matter outside the will. It is the testator's own declaration that he has or has not entered into a collateral transaction. Such a unilateral declaration is not conclusive evidence of the truth of the thing declared. And if the declaration is affirmative, that is to say, if there actually is a contract, the contract itself

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should be reduced to writing as a separate document and signed by both parties. Precautions of this kind should help to avoid expensive litigation and should go a long way toward protecting testators from having thrust upon them bargains they never intended to make. In the meantime it is to be hoped that the Texas Supreme Court will re-examine its position concerning the evidence necessary to prove the existence of a contract to make a will.

1. *Darlington v. Pulteney*, 1 Cowp. 260, 268, 98 Eng. Rep. 1075, 1079 (1775).

2. The case before the court did not have any direct relationship to a joint will. The quoted statement was offered as an obvious truth which tended to give analogical support to the question that was being decided.

3. Probably the best illustration of the complete separateness of the two wills written in joint form is a case holding that although each maker signed the writing only once, and that as maker, the signature could serve the dual purposes of maker of his or her own will and attesting witness to the will of the other. *In re Estate of Lee*, 225 Cal. App.2d 578, 37 Cal. Rptr. 572 (1964). See also *Hill v. Godwin*, 120 Miss. 83, 89, 81 So. 790, 791 (1919) (declaring that, "While two or more persons may jointly execute a single testamentary document, sometimes spoken of as a joint, double, mutual, or reciprocal will, it is well settled in America that this document constitutes the valid separate will of each of those executing it, and that on the death of each it may be probated as a will"); *Graser v. Graser*, 147 Tex. 404, 215 S.W.2d 867 (1948) (admitting the document to probate as the will of one joint maker but denying probate as to the other joint maker on the ground that as to her there has not been an adequate execution).

4. *Ibid.*

5. *Lynch v. Lichtenthaler*, 85 Cal. App.2d 437, 193 P.2d 77 (1948); *Elmer v. Elmer*, 271 Mich. 517, 260 N.W. 759 (1935); *Paull v. Earlywine*, 195 Okla. 486, 159 P.2d 556 (1945).

6. The validity of a contract to leave property at the death of the promisor was accepted without question at least as early as 1682. *Goilmere v. Battison*, 1 Vern. 48, 23 Eng. Rep. 301 (1682). Similar cases decided in the early part of the eighteenth century include *Gregor v. Kemp*, 3 Swanst. 482, note, 36 Eng. Rep. 926 (1722); *Webster & Milford's Case*, 2 Eq. Cas. Abr. 362, 22 Eng. Rep. 308 (1708). But a joint will was sufficiently unique as late as 1769 to lead Lord Camden to say he was struck "more from the novelty of the thing than its difficulty." *Dufour v. Pereira*, 1 Dick. 419, 420, 21 Eng. Rep. 332, 333 (1769).

7. *Allen v. First National Bank of Batesville*, 230 Ark. 201, 321 S.W.2d 750 (1959); *In re Carpenter's Estate*, 104 Cal. App. 33, 285 Pac. 348 (1930); *In re Rolls Estate*, 193 Cal. 594, 226 Pac. 608 (1924); *Manrow v. Deveney*, 109 Ind. App. 264, 33 N.E.2d 371 (1941); *Matter of the Estate*

of Adkins, 161 Kan. 239, 167 P.2d 618 (1946); *Morgan v. Sanborn*, 225 N.Y. 454, 122 N.E. 696 (1919); *Van Vlack v. Van Vlack*, 181 Ore. 646, 182 P.2d 969, rehearing denied, 185 P.2d 575 (1947); *Shawver v. Parks*, 239 S.W.2d 188 (Tex. Civ. App. 1951); *Pullen v. Russ*, 209 S.W.2d 630 (Tex. Civ. App. 1948).

8. For an outline of the remedies available for breach of contract to make a will see Sparks, *Contracts to Wills* 124-161 (N.Y.U. Press, 1956). Sparks, *Enforcement of Contracts to Devise or Bequeath After the Death of the Promisor*, 39 Minn. L. Rev. 1 (1954).

9. *Trindle v. Zimmerman*, 115 Cal. 323, 172 P.2d 676 (1946); *Curry v. Cotton*, 356 Ill. 538, 191 N.E. 307 (1934) (giving considerable attention to the lack of notice to the survivor prior to the death of the deceased but also emphasizing that where the wills are made pursuant to a contract neither can withdraw "with or without notice, without the consent of the other testator"); *Stewart v. Todd*, 190 Iowa 283, 291, 173 N.W. 619, 622 (1919), modified, 190 Iowa 296, 180 N.W. 146 (1920) (pointing out that, "As it takes the mutual consent of both to make a contract, so it takes the mutual consent of both to rescind" it); *St. Denis v. Johnson*, 143 Kan. 955, 57 P.2d 70 (1936) (enforcing the contract without any discussion of a possible right of rescission); *Brown v. Webster*, 90 Neb. 591, 134 N.W. 185 (1912); *Tiggelbeck v. Russell*, 187 Ore. 554, 213 P.2d 156 (1949); *In re Fischer's Estate*, 196 Wash. 41, 81 P.2d 836 (1938) (enforcing the contract against the estate of the first to die without even suggesting a right of rescission).

10. *Kingsbury v. Kingsbury*, 120 Misc. Rep. 362, 198 N.Y. Supp. 512 (Sup. Ct. 1923) is a case of this kind and one that well illustrates the erroneous interpretation often placed upon contracts to make mutual wills. The action really failed for lack of sufficient evidence to prove the contract. The court then discussed the question on the assumption that there was a contract and found that the contract, if it ever existed, had been revoked. The evidence of revocation consisted of discussions between the parties indicating a mutual rescission. (See 198 N.Y. Supp. at 515-516.) The case has been cited for the proposition that "either party to a contract to make joint or mutual wills may withdraw from the contract during the lives of both parties." Hirsch, *Contracts to Devise or Bequeath*, 9 Wis. L. Rev. 267, 274, note 50 (1934). See also *Phelps v. Pipher*, 320 Mich. 663, 31 N.W.2d 836 (1948) (involving a modification of the original contract).

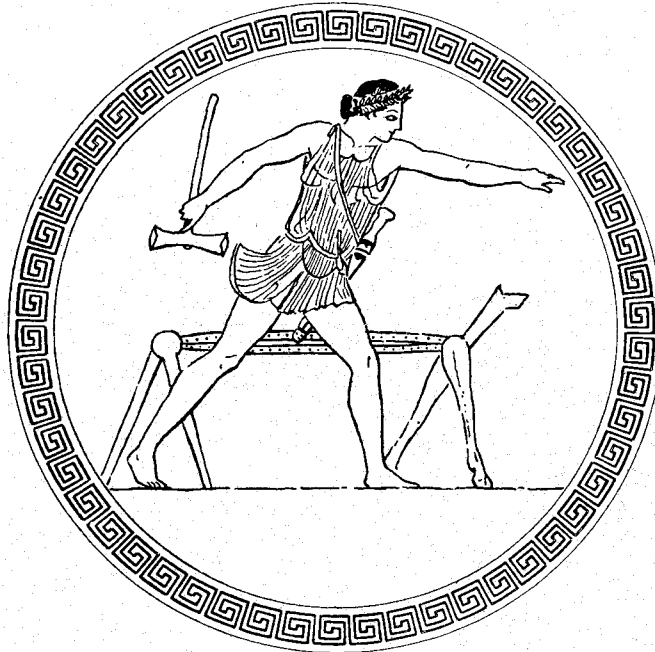
11. *Sherman v. Goodson's Heirs*, 219 S.W. 839 (Tex. Civ. App. 1920).

12. Texas Prob. Code sec. 59 (Vernon Supp. 1966), sec. 63 Vernon 1956).

13. The result more generally reached is that the most recent will should be admitted to probate even though its effect is to revoke a prior will made pursuant to contract. See cases cited in note 6 *supra*.

14. *Sherman v. Goodson's Heirs*, 219 S.W. 839, 841 (Tex. Civ. App. 1920).

15. *Rolls v. Allen*, 204 Cal. 604, 269 Pac. 450 (1928) (the court declaring that the execution of joint wills with reciprocal provisions had no tendency to show the existence of a contractual obligation); *Jacoby v. Jacoby*, 342 Ill. App. 277, 96



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N.E.2d 362 (1950); *Menke v. Duwe*, 117 Kan. 207, 230 Pac. 1065 (1924); *Glidewell v. Glidewell*, 360 Mo. 713, 230 S.W.2d 752 (1950); *Ginn v. Edmondson*, 173 N.C. 85, 91 S.E. 696 (1917); *In re Gudewicz' Will*, 72 N.Y.S.2d 838 (Surr. Ct. 1947); *Loflin v. Capps*, 327 P.2d 443 (Okla. 1958); *In re Rhodes' Estate*, 277 Pa. 450, 121 Atl. 327 (1923); *Hoffert's Estate*, 65 Pa. Super. 515 (1917) (not influenced by a provision in the will that, "Whereas we have agreed to and with each other . . ."). *Contra: Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909); *Culver v. Hess*, 234 Iowa 877, 14 N.W.2d 692 (1944); *Lewis v. Lewis*, 104 Kan. 269, 178 Pac. 421 (1919).

16. For another case using the language of estoppel in similar circumstances see *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N.W. 56 (1915).

17. Although the contractual will, not the most recent will, was actually admitted to probate in the *Sherman* case, that procedure has not been followed in the more recent decisions. This is particularly emphasized by two Supreme Court cases recognizing the enforceability of the contract. *Kirk v. Beard*, 162 Tex. 144, 152, 345 S.W.2d 267, 272 (1961) (stating in the opinion that "it is the contractual portion of the will and not the will itself which is irrevocable"); *Murphy v. Slaton*, 154 Tex. 35, 43, 273 S.W.2d 588, 593 (1954) (declaring that the surviving joint maker "technically could have revoked her will, but the beneficiaries under the joint will . . . would have had a cause of action" had she done so).

18. 157 Texas 240, 301 S.W.2d 621 (1957).

19. *Id.* at 245, 301 S.W.2d at 624.

20. Note 14 *supra*.

21. *Scales v. Scales*, 297 F.2d 219 (5th Cir. 1961); *Murphy v. Slaton*, 154 Tex. 35, 273 S.W.2d 588 (1954) (holding that a joint will providing for a gift over of the "estate then remaining" at the death of the surviving joint maker was evidence of a contract which did not include property acquired after the death of the first to die); *McKamey v. McKamey*, 332 S.W.2d 801 (Tex. Civ. App. 1960).

22. *Scales v. Scales*, 297 F.2d 219 (5th Cir. 1961).

23. 162 Texas 144, 345 S.W. 2d 267 (1961).

24. This position with regard to separate but "mutual" wills is even harder to justify than it is with reference to joint wills. The view taken by the better reasoned cases on the subject is that wills drawn in identical language and containing reciprocal provisions indicate a common understanding but do not show a contract. *Lynch v. Lichtenthaler*, 85 Cal. App.2d 437, 193 P.2d 77 (1948); *Johansen v. Davenport Bank & Trust Co.*, 242, Iowa 172, 46 N.W.2d 48 (1951); *Eicholtz v. Grunewald*, 313 Mich. 666, 21 N.W.2d 914 (1946); *Wallace v. Wallace*, 216 N.Y. 28, 109 N.E. 872 (1915); *Edson v. Parsons*, 155 N.Y. 555, 50 N.E. 265 (1898); *Paull v. Earlywine*, 195 Okla. 486, 159 P.2d 556 (1945); *Williams v. Rhode Island Hospital Trust Co.*, 88 R.I. 23, 143 A.2d 324 (1958); *In Matter of Werkman's Will*, 122 W. Va. 583, 13 S.E.2d 73 (1940). Employment of a common draftsman and common attestors does not strengthen the case in favor of a contract. *National Bank of Austin v. Emerson*, 335 Ill. App. 494, 82 N.E.2d 382 (1948); *Knox v. Perkins*, 86 N.H. 66, 163 Atl. 497 (1932); *In re*

Strong's Will, 171 Misc. Rep. 445, 12 N.Y.S.2d 544 (Surr. Ct. 1939); *Kingsbury v. Kingsbury*, 120 Misc. Rep. 362, 198 N.Y.Supp. 512 (Sup. Ct. 1923); *Ridders v. Ridders*, 156 Ore. 165, 65 P.2d 1424 (1937). The fact that the testators execute the wills simultaneously and in the presence of each other makes no difference. *Klussman v. Wessling*, 238 Ill. 568, 87 N.E. 544 (1909); *Elmer v. Elmer*, 271 Mich. 517, 260 N.W. 759 (1935); *Sommers v. Zuck*, 139 N.J.Eq. 245, 50 A.2d 648 (1947); *Wiley v. Trustees of Masonic Hall and Asylum Fund*, 9 N.Y.S.2d 836 (Sup. Ct. 1939).

25. 154 Texas 35, 273 S.W.2d 588 (1954).

26. *Thrash v. Boggs*, 346 S.W.2d 660 (Tex. Civ. App. 1961).

27. *Martinez v. Pearson*, 373 S.W.2d 76 (Tex. Civ. App. 1963).

28. 147 Tex. 404, 215 S.W.2d 867 (1948).

29. *Roberts v. Drake*, 380 S.W.2d 657 (Tex. Civ. App. 1964).

30. For cases holding that such mutual promises are sufficient consideration for each other see *Ashbauth v. Davis*, 71 Idaho 150, 227 P.2d 954 (1951); *Brown v. Webster*, 90 Neb. 591, 134 N.W. 185 (1912); *Auger v. Shideler*, 23 Wash.2d 505, 161 P.2d 200 (1945). Even though the contract is that the first to die will leave his entire estate to the survivor and there is no obligation placed upon the survivor concerning his testamentary disposition, the mutual promises are nevertheless adequate consideration. *Turnipseed v. Serrine*, 57 S.C. 559, 35 S.E. 757 (1900) And the adequacy of the consideration is not affected by the fact that one of the parties promising to leave his entire estate in a certain manner actually owns no property when the contract is made and has no great likelihood of ever acquiring any. *Rosenberg v. Equitable Trust Co.*, 68 F. Supp. 991 (D. Del. 1946).

31. Tex. Prob. Code sec. 61 (Vernon, 1956).

32. *In re Estate of Lee*, 225 Cal. App.2d 578, 37 Cal. Rptr. 572 (1964).

33. See *Graser v. Graser*, 147 Tex. 404, 408, 215 S.W.2d 867, 870 (1948).

34. *Boren v. Boren*, — Tex. —, 402 S.W.2d 728 (1966); *McGrew v. Bartlett*, 387 S.W.2d 702 (Tex. Civ. App. 1965).

35. *Appleby v. Noble*, 101 Conn. 54, 124 Atl. 717 (1924); *Berger v. Jackson*, 156 Fla. 251, 23 So.2d 265 (1945); *Heery v. Reed*, 80 Kan. 380, 102 Pac. 846 (1909); *Story v. Story*, 22 Ky. L. Rep. 1714, 61 S.W. 279 (1901); *Fenton v. Emblers*, 3 Burr. 1278, 97 Eng. Rep. 831 (1762); 1 Page, Wills sec. 10.11 (Bowe-Parker Rev. 1960).

36. *Boggan v. Scruggs*, 200 Miss. 747, 29 So.2d 86 (1947).

37. *Heine v. The First Trust Company of Wichita*, 141 Kan. 370, 41 P.2d 767 (1935).

38. *Fred v. Asbury*, 105 Ark. 494, 152 S.W. 155 (1912); *Miller v. Carr*, 137 Fla. 114, 188 So. 103 (1939); *Rudd v. Planters Bank & Trust Co.*, 283 Ky. 351, 141 S.W.2d 299 (1940); *Brickley v. Leonard*, 129 Me. 94, 149 Atl. 833 (1930); *Donovan v. Walsh*, 238 Mass. 356, 130 N.E. 841 (1921).

39. *Wallace v. Long*, 105 Ind. 522, 5 N.E. 666 (1886); *Maloney v. Maloney*, 258 Ky. 567, 80 S.W.2d 611 (1935); *Boyle v. Dudley*, 87 N.H. 282, 179 Atl. 11 (1935).

40. *Turnipseed v. Serrine*, 57 S.C. 559, 35 S.E. 757 (1900).

41. *Cheatham's Ex'r v. Parr*, 308 Ky. 175, 214 S.W.2d 91 (1948); *Lemire v. Haley*, 91 N.H. 357, 19 A.2d 436 (1941); *Foster v. Barton*, 365 P.2d 714 (Okla. 1961); *In re Byrne's Estate*, 122 Pa. Super. 413, 186 Atl. 187 (1936) (applying the rule even though the estate included personal property valued at about \$70,000 and real estate of only about \$3,000); *Kessler v. Olen*, 228 Wis. 662, 280 N.W. 352, rehearing denied, 228 Wis. 662, 281 N.W. 691 (1938). The same rule is applied even though the contract is for something less than the entire estate and could be completely satisfied out of personalty if the court were willing to make an election. *Quirk v. Bank of Commerce & Trust Co.*, 244 Fed. 682 (6th Cir. 1917); *Upson v. Fitzgerald*, 129 Tex. 211, 103 S.W.2d 147 (1937); *In re Rosenthal's Estate*, 247 Wis. 555, 20 N.W.2d 643 (1945).

42. *Burns v. McCormick*, 233 N.Y. 230, 234, 135 N.E. 273, 274 (1922).

43. This type of relief is illustrated by the case of *Bryson v. McShane*, 48 W. Va. 126, 35 S.E. 848 (1900). See also 2 Corbin, Contracts sec. 435 (1950); Pomeroy, Specific Performance sec. 114 (3rd ed. 1926).

44. *Grant v. Grant*, 63 Conn. 530, 29 Atl. 15 (1893); *Diez v. Rosicky*, 145 Neb. 242, 16 N.W.2d 155 (1944) (probably not sufficient part performance on any theory).

45. 111 Tex. 122, 229 S.W. 1114 (1921).

46. *Upson v. Fitzgerald*, 129 Tex. 211, 103 S.W. 2d 147 (1937).

47. The child was only nine years old when the contract was entered into. Although he was not a formal party to the contract, it was understood that he was expected to render to the promisee the filial devotion ordinarily expected of a natural child. This he did.

48. *Hooks v. Bridgewater*, 111 Tex. 122, 128, 229 S.W. 1114, 1117 (1921).

49. *Fred v. Asbury*, 105 Ark. 494, 152 S.W. 155 (1912); *Savannah Bank & Trust Co. v. Wolff*, 191 Ga. 111, 11 S.E.2d 766 (1940); *White v. Smith*, 43 Idaho 354, 253 Pac. 849 (1926); *Nichols v. Reed*, 186 Md. 317, 46 A.2d 695 (1946); *Matheson v. Gullickson*, 222 Minn. 369, 24 N.W.2d 704 (1946); *McCullom v. Mackrell*, 13 S.E. 262, 83 N.W. 255 (1900); *Clark v. Atkins*, 188 Va. 668, 51 S.E.2d 222 (1949).

50. *Hooks v. Bridgewater*, 111 Tex. 122, 130-131, 229 S.W. 1114, 1117-1118 (1921).

51. *Id.* at 128, 229 S.W. at 1116.

52. 162 Tex. 144, 345 S.W.2d 267 (1961).

53. 345 S.W.2d 857 (Tex. Civ. App. 1961, R.N.R.E.).

54. *Id.* at 863 (concurring opinion).

55. *Id.* at 864 (dissenting opinion).

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

57. *Brought v. Howard*, 30 Ariz. 522, 249 Pac. 76 (1926); *Gibson v. Crawford*, 247 Ky. 228, 56 S.W.2d 985 (1932); *Busque v. Marcou*, 147 Me. 289, 86 A.2d 873 (1952); *Holsz v. Stephen*, 362 Ill. 527, 200 N.E. 601 (1936); *Hathaway v. Jones*, 48 Ohio App. 447, 194 N.E. 37 (1934); *Southern v. Kittredge*, 85 N.H. 307, 158 Atl. 132 (1932); *Anderson Estate*, 348 Pa. 294, 35 A.2d 301 (1944); *White v. McKnight*, 146 S.C. 59, 143 S.E. 552 (1928); *Upson v. Fitzgerald*, 129 Tex. 211, 103 S.W.2d 147 (1937); *Hale v. Hale*, 90 Va. 728,

19 S.E. 739 (1894); *In re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1041 (1913); *Canada v. Ihmsen*, 33 Wyo. 439, 240 Pac. 927 (1925).

58. See *Mack v. Swanson*, 140 Neb. 295, 299 N.W. 543 (1941); *Brown v. Webster*, 90 Neb. 591, 134 N.W. 185 (1912).

59. There is always a possibility that contractual language might become so blended with testamentary language as to raise doubt as to whether the instrument is a will or a contract and thereby prevent its being upheld as either. For illustrations of particularly poor drafting see *Curry v. Cotton*, 356 Ill. 538, 191 N.E. 307 (1934); *Spinks v. Rice*, 187 Va. 730, 47 S.E.2d 424 (1948).

Property Management

(Continued from Page 280)

V. TAX CONSEQUENCES OF PARTITION

(a) Tax consequences must be considered in connection with every partition agreement but this subject is being treated by another speaker and will therefore not be covered in this portion of the program.

VI. POWERS OF THE COURT IN DIVISION OF THE ESTATE OF THE PARTIES AND ITS EFFECT UPON SETTLEMENT

(a) Statutory authority is contained in Article 4638 which states, "The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title of real estate." *Hailey v. Hailey*, 331 S.W. 2d 299 (Tex. 1959) now clarifies the last sentence of Article 4638 to mean title to separate real estate.

(b) Considerations in determining division of the estate:

1. Relative fault of the parties.
2. Respective ages of the parties.
3. Health of the parties.
4. Earning capacity of each spouse.
5. Size of community estate.
6. Need of each party for future support.
7. Benefits the innocent spouse would have received from continuation of the marriage.