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JOINT AND MUTUAL WILLS-- EFFECT OF CONTRACT NOT TO REVOKE

*Owens v. Savage*¹

Samuel F. and Ida Alice Jones, husband and wife, executed their joint and mutual last will and testament on March 23, 1959 and a codicil thereto in 1964. These instruments contained an agreement not to revoke the testamentary dispositions. Ida Alice Jones died on June 6, 1968. On January 11, 1969 Samuel executed an instrument declaring it to be his last will and testament and therein expressly revoked all former wills. In this instrument Samuel made several small specific bequests, and devised and bequeathed all of his remaining property according to a dispositive scheme different from that contained in the joint and mutual will. Samuel died on May 15, 1971 and probate proceedings were initiated. Subsequent to these proceedings, the legatees and devisees of the joint and mutual will filed suit in the circuit court for declaratory judgment and equitable relief, naming as defendants Samuel's personal representative, legatees, and devisees. Plaintiffs based their claim upon the existence of a binding contractual obligation between Samuel and Ida.

The trial court found that there was an agreement between Samuel and Ida to make a joint and mutual will and that the agreed testamentary distribution constituted an irrevocable contract. Based upon these findings, the trial court declared that the 1959 joint and mutual will could not be revoked by the surviving testator and ordered it admitted to probate. On appeal, the Kansas City District of the Missouri Court of Appeals affirmed as to the existence of a binding and enforceable contract inuring to the benefit of the plaintiffs and granted relief in the nature of specific performance, but ordered stricken that portion of the decree admitting the 1959 will to probate.²

The contract involved in *Owens* is one of several types which may become involved with testamentary dispositions. Contracts to make a will, contracts not to make a will, contracts to revoke a will, and contracts not to revoke a will, each with variations, appear frequently in reported cases. Many questions relating to contractual obligations and their effect on testamentary disposition have been definitively answered, but the effect of a contract not to revoke testamentary dispositions contained in a joint and mutual will³ has remained confused. In part this confusion may be attributable to the hesitancy with which courts recognized the validity of

1. 518 S.W.2d 192 (Mo. App., D.K.C. 1974).

2. *Id.* at 199-201.

3. As used herein the term "joint will" means one where the same instrument is made the will of two or more persons and is jointly signed by them. The term "mutual wills" means the separate wills of two persons which are reciprocal in their provisions. See *Curry v. Cotton*, 356 Ill. 538, 543, 191 N.E. 307, 309 (1934); *American Trust and Safe Deposit Co. v. Eckhardt*, 331 Ill. 261, 264, 162 N.E. 843, 845 (1928). See generally *Eagleton, Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing*, 15 CORNELL L.Q. 358 (1930); *Partridge, The Revocability of Mutual or Reciprocal Wills*, 77 U. PA. L. REV. 357 (1929).

a testamentary instrument purporting to be the will of two or more persons.⁴ The more persuasive reason for the confusion is that a testamentary instrument executed pursuant to, or embodying, a contract not to revoke gives rise to a conflict of legal concepts. The conceptual nature of wills is that they are ambulatory until the death of the testator.⁵ An equally strong hallmark of contract law is that enforceable rights are created at the making of a contract.⁶ It is in dealing with the "hybrid" relationship, resulting from combining the elements of contracts and wills, that confusion was created and remains.

Contractual and testamentary principles are brought sharply into conflict when a joint and mutual will embodying a contract not to revoke is unilaterally revoked by the surviving testator.⁷ In dealing with this conflict some courts have given preference to the contractual principles by holding a contract not to revoke is not only enforceable, but operates to deprive the will of its ambulatory nature.⁸ The will is thus deemed irrevocable after the death of one of the testators and an attempted revocation by the surviving testator is without effect. Cases so holding often

Missouri courts, while not totally consistent in the use of terms, seem to have settled upon the use of the term "joint and mutual" to denote a single document containing testamentary dispositions of two testators, with the dispositions being reciprocal in nature. This terminology may not be semantically pure, but in light of its use in *Owens* and other cases it will be used in this note.

4. See, e.g., *Darlington v. Pulteney*, 1 Cowp. 260, 98 Eng. Rep. 1075 (K.B. 1775) (Lord Mansfield stated "there cannot be a joint will"); *Hobson v. Blackburn*, 1 Add. 274, 162 Eng. Rep. 96 (Eccl. 1822) (mutual or "conjoint" will is an instrument "unknown to the testamentary law of this country"). For American cases refusing to probate joint wills, see *Shackleford v. Edwards*, 278 S.W.2d 775 (Mo. 1955); *Clayton v. Liverman*, 2 N.C. 558 (1837); *Walker v. Walker*, 14 Ohio St. 157 (1862). See also B. SPARKS, *CONTRACTS TO MAKE WILLS* 3 (1956) [hereinafter cited as SPARKS].

5. See, e.g., *Owens v. Savage*, 518 S.W.2d 192, 200 (Mo. App., D.K.C. 1974); *Starks v. Lincoln*, 316 Mo. 483, 488, 291 S.W. 132, 134 (1927); *Edson v. Parsons*, 155 N.Y. 555, 568, 50 N.E. 265, 268 (1898).

6. See 1 S. WILLISTON, *CONTRACTS* 1 (rev. ed. 1938).

7. The contract involved may arise in several ways. A minority of jurisdictions adhere to the view that the mere execution of a joint will with reciprocal provisions gives rise to a contract not to revoke. See, e.g., *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909); cf. *Tutunjian v. Vetzgian*, 299 N.Y. 315, 87 N.E.2d 275 (1949). Missouri joins the majority holding that mere execution of such a will does not per se create such a contract. See, e.g., *Plemmons v. Pember-ton*, 346 Mo. 45, 139 S.W.2d 910 (1940), citing the "general rule" of *Clements v. Jones*, 166 Ga. 738, 742, 144 S.E. 319, 322 (1928); *Wanger v. Marr*, 257 Mo. 482, 165 S.W. 1027 (1914). In jurisdictions following the majority view a contract not to revoke may be oral, contained within the testamentary instrument, or set forth in a separate document. See Comment, *Contracts to Make Joint or Mutual Wills*, 55 MARQ. L. REV. 103, 108-33 (1972).

As to revocation of a contract not to revoke prior to the death of either of the contracting parties, the weight of authority reaches the conclusion that the contract is irrevocable except by mutual consent of both parties to the contract. See SPARKS, *supra* note 4, at 111. See generally, Note, *Contracts Not to Revoke Joint or Mutual Wills*, 15 WM. & MARY L. REV. 144 (1973).

8. See, e.g., *Frazier v. Patterson*, 243 Ill. 80, 84-86, 90 N.E. 216, 218 (1909); *Stewart v. Shelton*, 356 Mo. 258, 201 S.W.2d 395 (1947). See also SPARKS, *supra* note 4, at 111-15.

appear to treat the rights under the will and the preexisting contract rights as being identical. This deprivation of the ambulatory qualities of a will has been widely criticized as violating basic testamentary law.⁹

The better reasoned view would seem to be that, notwithstanding a contract not to revoke, the survivor may subsequently revoke the will thereby rendering it ineligible for probate as his last will and testament.¹⁰ By adhering to this approach, a court is not put in the undesirable position of probating an instrument it knows the testator did not intend as his last will and testament. This approach also avoids what the *Owens* court referred to as "[a] miscegenation of the law of contracts and law of wills . . . when courts state wills are irrevocable."¹¹

The Missouri courts' position with respect to the effect of a contract not to revoke testamentary dispositions contained in a joint and mutual will has not been clear or consistent. Through loose and sometimes contradictory language, two lines of cases emerge. Some cases, failing to delineate between contractual and testamentary principles, have held a later revoking will "void"¹² or the joint and mutual will "irrevocable."¹³ The second line of cases, which *Owens* joins, holds that, notwithstanding a contract not to revoke, the joint and mutual will retains its ambulatory nature and is denied probate as the last will and testament.¹⁴

Cases upholding the revocable nature of joint and mutual wills, even in the presence of a contract not to revoke, do not necessarily deny relief to the devisees and legatees of the revoked will. These cases grant relief relying upon the third party beneficiary doctrine of contract law rather than the probate of a revoked will, and indicate that the aggrieved contract beneficiary may have a remedy at law or in equity.¹⁵

While cases and commentators indicate the availability of either legal or equitable relief, the vast majority of the cases involve equitable relief. The preponderance of equitable proceedings is partially explainable because of the operation of the Statute of Frauds¹⁶ and the equitable doc-

9. See generally T. ATKINSON, ATKINSON ON WILLS 224 (2d ed. 1953); SPARKS, *supra* note 4, at 111; Eagleton, *Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing*, 15 CORNELL L.Q. 358, 367 (1930).

10. See, e.g., Menke v. Duwe, 117 Kan. 207, 230 P. 1065 (1924); Irwin v. First Nat'l Bank, 212 Or. 534, 321 P.2d 299 (1958); Owens v. Savage, 518 S.W.2d 192 (Mo. App., D.K.C. 1974); 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); Hobson v. Blackburn, 1 Add. 274, 162 Eng. Rep. 96 (1822).

11. 518 S.W.2d at 200.

12. Ragsdale v. Achuff, 324 Mo. 1159, 1175, 27 S.W.2d 6, 13 (1930).

13. See, e.g., Wimp v. Collett, 414 S.W.2d 65, 75 (Mo. 1967); Stewart v. Shelton, 356 Mo. 258, 201 S.W.2d 395, 399 (1947).

14. Owens v. Savage, 518 S.W.2d 192 (Mo. App., D.K.C. 1974); Plemmons v. Pemberton, 346 Mo. 45, 139 S.W.2d 910 (1940); Starks v. Lincoln, 316 Mo. 483, 291 S.W. 132 (1927); Green v. Whaley, 271 Mo. 636, 197 S.W. 355 (1917).

15. See, e.g., Curry v. Cotton, 356 Ill. 538, 191 N.E. 307 (1934); *In re Farley's Estate*, 237 Iowa 1069, 24 N.W.2d 453 (1946); Clark v. Cordry, 69 Mo. App. 6 (K.C. Ct. App., 1897).

16. § 432.010, RSMo 1969.

trine of part performance. A large number of the reported decisions involve either oral agreements or vague agreements contained within the testamentary instrument.¹⁷ As a result, in an action at law the plaintiff faces the risk of the Statute of Frauds acting to make the agreement unenforceable.¹⁸ This risk is largely negated at equity through the doctrine of part performance.¹⁹ Additionally, due to the nature of the property involved, the plaintiff often finds it difficult to ascertain damages and prefers to receive title to the property as opposed to the monetary equivalent.²⁰ One advantage an action at law may have over the equitable remedy is a lesser degree of proof required with respect to the existence of a contract.²¹

17. See, e.g., *Wimp v. Collett*, 414 S.W.2d 65 (Mo. 1967); *Plemmons v. Pemberton*, 336 Mo. 45, 139 S.W.2d 910 (1940). Section 2-107 of the *Uniform Probate Code* lessens some problems in this area by providing three exclusive methods of establishing a contract not to revoke a will, all of which require a signed writing. The *Uniform Probate Code* section, now in force in a number of states, has been recommended for enactment by the Board of Governors of the Missouri Bar and has been introduced in the 1976 Missouri General Assembly.

18. The Missouri Statute of Frauds, which is based on section 4 of the English Statute of Frauds of 1676, 29 Car. 2, c. 3, requires a signed writing to support an action "upon any contract made for the sale of lands, tenements, hereditaments, or an interest in or concerning them. . . ." § 432.010, RSMo 1969. It has been held applicable to contracts relating to a devise of land or of land and chattels. See, e.g., *Shaw v. Hamilton*, 346 Mo. 366, 141 S.W.2d 817 (1940); *Buxton v. Huff*, 254 S.W. 79 (Mo. 1923); *Ver Standig v. St. Louis Union Trust Co.*, 228 Mo. App. 1242, 62 S.W.2d 1094 (St. L. Ct. App. 1933). The Statute of Frauds has been held inapplicable to a contract relating to a bequest of chattels only. See generally *Schnebly, Contracts to Make Testamentary Dispositions as Affected by the Statute of Frauds*, 24 MICH. L. REV. 749 (1926). Some states have express provisions relating to contracts to devise or bequeath or to refrain from doing so. MASS. GEN. LAWS. ANN. ch. 259 § 5A (1965); N.Y. GEN. OBLIG. LAW § 5-701 (McKinney Supp. 1975); OHIO REV. CODE ANN. § 2107.04 (1968).

19. See generally J. CALAMARI, CONTRACTS § 296 (1970). For a discussion of the history and basis of the doctrine of part performance, see Moreland, *Statute of Frauds and Part Performance*, 78 U. PA. L. REV. 51 (1929). As to what sort of part performance takes an oral contract to devise or not to revoke a will out of the Statute of Frauds, see *Mills v. Bergbauer*, 452 S.W.2d 237 (Mo. 1970) (son's moving back to farm upon father's oral promise to devise held sufficient); *Shaw v. Hamilton*, 346 Mo. 366, 141 S.W.2d 817 (1940) (husband's execution of will to heirs of wife insufficient where there was an alleged oral contract between husband and wife to make wills in favor of heirs of other); *Ver Standig v. St. Louis Union Trust Co.*, 344 Mo. 880, 129 S.W.2d 905 (1939) (alleged oral contract to devise for services rendered, evidence of services rendered held sufficient performance for enforcement of contract); *Clark v. Cordry*, 69 Mo. App. 6 (K.C. Ct. App. 1897) (oral agreement whereby plaintiff agreed to board and lodge defendant's deceased in return for promise to bequeath \$2000, held sufficient performance to render the Statute of Frauds inapplicable).

20. See *Eagleton, Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing*, 15 CORNELL L.Q. 358, 363 (1930).

21. *Day v. Blackbird*, 331 S.W.2d 658 (Mo. 1960), was a suit in equity seeking specific performance of an alleged contract to make a will. The Missouri Supreme Court held that proof of the existence of such a contract must be *beyond a reasonable doubt*. Within two weeks of the above decision the St. Louis Court of Appeals decided *Reighley v. Fabricius' Estate*, 332 S.W.2d 76 (St. L. Mo. App. 1960), an action at law for breach of contract to bequeath a definite sum. The court required the proof of the contract to be only by a *preponderance of the*

Statutes regulating the time within which claims must be filed against decedents' estates may also frustrate the plaintiff's action at law for damages. It would appear that the type of remedy pursued by the plaintiff can be determinative of the applicability of a nonclaim statute.²² If the beneficiary of a contract not to revoke is seeking damages at law, then the nonclaim statute applies.²³ However, if the remedy sought is specific performance, then the plaintiff is not making a claim against the estate so as to be within the scope of the nonclaim statute; he is claiming title to the property, and in fact, the property he is claiming is itself subject to claims against the estate.²⁴

If the decedent's dispositive scheme, either that contained in a later revoking will or provided by the intestate succession laws, is inconsistent with the terms of the contract, specific performance of the contract may be granted.²⁵ It is the contract that creates the right upon which the contract beneficiary's action is based; the revoked joint and mutual will is relevant only in establishing the terms of the contract.²⁶ In an action for specific performance the contract beneficiary should name as defendants the surviving testator's personal representative, legatees and devisees, or distributees and heirs-at-law.²⁷ A decree of specific performance does not affect the administration of the estate as to the payment of claims and expenses;²⁸ it merely acts at the time of distribution to transfer title to the contract beneficiary.²⁹

evidence. See Fratcher, Trusts and Succession in Missouri, 25 Mo. L. Rev. 417, 425 (1960).

22. SPARKS, *supra* note 4, at 184. The Missouri nonclaim statute provides that a claim is lost if the claim or notice of action is not filed in the probate court within six months after first publication. § 473.360, RSMo 1969.

23. *Abrams v. Schlar*, 27 Ill. App. 2d 237, 169 N.E.2d 583 (1960) (plaintiff beneficiaries of promise to leave them share of decedent's estate had remedy at law in the nature of a claim against the estate and should have filed claim in the probate court within the time set out in the nonclaim statute); *contra*, *O'Connor v. Immele*, 77 N.D. 346, 43 N.W.2d 649 (1950) (claim of a beneficiary under a revoked will is not a claim against the estate).

24. The decree in *Owens* supports this view. 518 S.W.2d at 201. In *Mills v. Bergbauer*, 452 S.W.2d 237 (Mo. 1970), the Missouri Supreme Court held that the title decreed to be in the beneficiary of a contract to devise shall be subject to claims properly allowed by the probate court and costs incurred in the administration of the estate.

25. *See, e.g., Wimp v. Collett*, 414 S.W.2d 65 (Mo. 1967); *Bennington v. McClintick*, 253 S.W.2d 132 (Mo. 1952); *Plemmons v. Pemberton*, 346 Mo. 45, 139 S.W.2d 910 (En Banc 1940). *See generally* SPARKS, *supra* note 4, at 22-38.

26. The most vigorously litigated aspect of such contracts has been the proof requirements to establish the existence, rather than the validity, of the contract. The proof requirements and cases are considered in *Wimp v. Collett*, 414 S.W.2d 65, 76 (Mo. 1967). *See also* note 21 *supra*; *Eagleton, Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing*, 15 CORNELL L.Q. 358, 367 (1930).

27. *See Silvester's Case*, 79 Eng. Rep. 1248 (1619).

28. *See* note 24 and accompanying text *supra*. *See also* SPARKS, *supra* note 4, at 152.

29. *See Adams v. Moberg*, 356 Mo. 1175, 205 S.W.2d 553 (1947) (detailing the proper form of decree to transfer legal title to the beneficiaries).

Relief predicated upon specific performance has not been the exclusive equitable remedy relied upon by Missouri plaintiffs. There is authority to support granting injunctive relief to prevent a surviving testator from disposing of his property in violation of the contractual rights of the contract beneficiaries.³⁰ Pleas invoking the declaratory judgment act have also been recognized. In *Stewart v. Shelton*³¹ the beneficiaries of a joint and mutual will executed by husband and wife sought to set aside deeds executed by the wife after the husband's death. The court held that a "justiciable controversy" within the declaratory judgment statute was presented. It would seem that under proper circumstances equity can also entertain an action for an accounting³² and can award damages.³³

The court in *Owens* held that the joint and mutual will and the codicil thereto constituted a binding and enforceable contract inuring to the benefit of the plaintiffs. Relief was afforded through a decree in the nature of specific performance. The defendants were ordered to "convey, transfer, and deliver" the plaintiffs' shares under the contract as set forth in the joint and mutual will "subject only to the payment of debts, claims, taxes, and costs of administration according to law."³⁴ In the final analysis the plaintiffs received what they would have received but for Samuel's revocation of the joint and mutual will and codicil.

Much of the confusion with respect to joint and mutual wills executed pursuant to or embodying a contract not to revoke stems from a failure to distinguish the testamentary aspects of the instrument from the contractual aspects. Upholding the ambulatory nature of wills while decreeing the contract specifically enforceable retains intact fundamental concepts in both fields of law while affording relief to the injured parties.

Although the wise practitioner may continue to avoid drafting joint and mutual wills,³⁵ the *Owens* holding has removed some of the confusion and added a much-needed degree of certainty as to the effect of a contract not to revoke testamentary dispositions.

JOHN M. MOWRER

30. See *Bower v. Daniel*, 198 Mo. 289, 95 S.W. 347 (1906), *overruled on other grounds*, *Wanger v. Marr*, 257 Mo. 482, 492-93, 165 S.W. 1027, 1030-31 (1914). See generally Comment, *The Interim Nature of Property Passing Under Joint and Mutual Wills*, 20 BAYLOR L. REV. 102, 102-12 (1968).

31. 356 Mo. 258, 201 S.W.2d 395 (1947).

32. Cf. *Von Willmowsky v. Prindle*, 225 App. Div. 597, 234 N.Y.S. 18 (1929).

33. In situations where specific performance would be impossible equity may award monetary damages. This follows from the fact that once equity has taken jurisdiction, full relief will be granted. *Elliott v. Richter*, 496 S.W.2d 860 (Mo. 1973).

34. 518 S.W.2d at 201.

35. See generally PETERSON & ECKHARDT, *Legal Forms*, 7 MO. PRACTICE SERIES, 476 (1960); Fingar, *Joint, Mutual and Reciprocal Wills*, 94 TRUSTS AND ESTATES 782, 786 (1955); Sparks, *Contracts To Devise or Bequeath As An Estate Planning Device*, 20 MO. L. REV. 1, 5 (1958).