

No. 46251-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re PATRICIA L. FORSBERG SPOUSAL TRUST u/w of WALTER A.
FORSBERG, Deceased.

PAULINE FORSBERG and LESLIE FORSBERG,

Appellants,

v.

PATRICIA L. FORSBERG, in her representative capacity as Trustee of
the Patricia L. Forsberg Spousal Trust and in her individual capacity;
REBECCA and JAMES HINKEN, and their marital community; PARRIS
and FRED LUJAN, and their marital community; DEBORAH and
MICHAEL SOMERS, and their marital community; and all persons or
parties unknown claiming any right, title, estate, lien, or interest in the real
estate described in the complaint herein,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR CLALLAM COUNTY

OPENING BRIEF OF APPELLANTS

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FILED
COURT OF APPEALS
DIVISION II
2014 AUG 18 PM 2:53
STATE OF WASHINGTON
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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	3
IV.	STATEMENT OF THE CASE	5
A.	Walter And Patricia Executed A Mutual Estate Plan After Many Years Of Marriage	5
B.	Walter and Patricia Intended Their Children To Inherit Their Respective Shares Of The Combined Estates After Their Deaths. Walter’s Percentage Of Relative Ownership Was To Be Distributed To His Daughters And Patricia’s Percentage Of Relative Ownership Was To Be Distributed To Her Daughters.....	6
C.	At Walter’s Death, The Mutual Wills, FPA And Percentage Of Relative Ownership Became Fixed And Irrevocable	8
D.	Even Though Patricia’s Percentage Of Relative Ownership Was 26.5 Percent Of The Total Estates At Walter’s Death, She Signed An Agreement Dividing The Combined Estates Equally Between Herself And The Trust.....	9
E.	Patricia Filed A Declaration Of Completion To Close Walter’s Probate Stating Walter’s Property Was Distributed To Her As Trustee. Accordingly, Walter’s Daughters Did Not Object	10
F.	One Year After The Probate Concluded, Patricia Reduced The Combined Estates By Giving Her Relatives \$1,416,000 In Real Property And Cash	12
G.	Three Months After Leslie Discovered The Gifts Of Real Property She Filed Claims To Invalidate	

	The Gifts, Vacate The Deeds, And Prohibit Further Gifting. The Trial Court Dismissed These Claims On Summary Judgment..	12
V.	ARGUMENT.....	14
A.	The Standard of Review is De Novo	14
B.	The Trial Court Erred In Ruling The Claims Were Time-Barred Under RCW 11.68.110.....	14
	1. Because the lawsuit did not challenge the contents or operative effect of the Declaration of Completion, RCW 11.68.110 does not apply	15
	2. Because the lawsuit did not challenge the distribution of estate assets, RCW 11.68.110 does not apply	18
	3. Because the lawsuit challenged gifts Patricia made after her discharge, RCW 11.68.110 does not apply	20
	4. The 30-day time bar of RCW 11.68.110 cannot operate to bar claims if the Declaration of Completion contains false information.....	21
C.	The Trial Court Erred In Ruling Patricia’s Gifts of Walter’s Property Were In Accordance With The Mutual Wills, The FPA, And Washington Law	22
	1. The percentage of relative ownership distribution formula became irrevocable when Walter died.	23
	2. Patricia’s <i>inter vivos</i> gifts violate the distribution formula she agreed to when she signed the FPA.....	24
	3. Patricia could not give away property after Walter died without violating the FPA.....	25

4. The recharacterization of the combined estates as community property when Walter died did not exempt any portion of it from the distribution formula required by the mutual wills and the FPA.....	32
5. Patricia could not remove property from the reach of the FPA by transferring it to herself under the Allocation Agreement.....	36
6. Walter’s daughters are irreparably injured by the order allowing Patricia to give away her share of the combined estates prior to her death.	40
D. The Trial Court Erred In Awarding The Respondents Their Attorney Fees And Costs Without Stating Any Reasons For The Award.....	41
E. The Appellants Should Be Awarded Their Attorney Fees And Costs Under RCW 11.96A.150	42
VI. CONCLUSION	43

APPENDIX

TABLE OF AUTHORITIES

State Cases

<i>Bartlett v. Bartlett</i> , 183 Wash. 278, 48 P.2d 560 (1935).....	34-35
<i>deNoskoff v. Scott</i> , 36 Wn. App. 424, 674 P.2d 687 (1984).....	8
<i>Esmieu v. Schrag</i> , 88 Wn.2d 490, 563 P.2d 203 (1977).....	43
<i>Gillespie v. Seattle-First Nat'l Bank</i> , 70 Wn. App. 150, 855 P.2d 680 (1993)	42-43
<i>Holmes v. Holmes</i> , 65 Wn.2d 230, 396 P.2d 633 (1964)	31-32
<i>In re Estate of Bernard</i> , __ Wn. App. __ (Aug. 4, 2014)	23
<i>In re Estate of Black</i> , 153 Wn.2d 152, 102 P.3d 796 (2004)	14
<i>In re Estate of Curry</i> , 98 Wn. App. 107, 988 P.2d 505 (1999)	14, 22, 23
<i>In re Estate of Dunn</i> , 31 Wn.2d 512, 197 P.2d 606 (1948).....	34
<i>In re Estate of Duxbury</i> , 175 Wn. App. 151, 304 P.3d 480 (2013)	42
<i>In re Estate of Evans</i> , __ Wn. App. __, 326 P.3d 755 (2014)	42
<i>In re Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004).....	42
<i>In re Estate of Niehenke</i> , 117 Wn.2d 631, 818 P.2d 1324 (1991)	19, 22
<i>In re Estate of Patton</i> , 6 Wn. App. 464, 494 P.2d 238 (1972)	8
<i>In re Estate of Price</i> , 73 Wn. App. 745, 871 P.2d 1079 (1994)	23
<i>In re Estate of Richardson</i> , 11 Wn. App. 758, 525 P.2d 816 (1974)	23

<i>In re Estate of Taylor</i> , 32 Wn. App. 199, 646 P.2d 776 (1982)	34
<i>In re Marriage of Hadley</i> , 88 Wn.2d 649, 565 P.2d 790 (1977)	39
<i>In re Wash. Builders Benefit Trust</i> , 173 Wn. App. 34, 293 P.3d 1206 (2013)	14, 22, 42, 43
<i>Johnston v. Beneficial Management Corp. of America</i> , 96 Wn.2d 708, 638 P.2d 1201 (1982)	17
<i>Kempf v. Michelbach</i> , 115 Wash. 193, 196 Pac. 661 (1921)	16
<i>Kitsap Bank v. Denley</i> , 177 Wn. App. 559, 312 P.3d 711 (2013)	42
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998)	41
<i>Mezere v. Flory</i> , 26 Wn.2d 274, 173 P.2d 776 (1946)	15, 37
<i>Newell v. Ayers</i> , 23 Wn. App. 767, 598 P.2d 3 (1979).....	24, 28, 29, 30, 35
<i>Olsen v. Olsen</i> , 189 Misc. 1046, 70 N.Y.S.2d 838 (1947)	29-30
<i>Peste v. Peste</i> , 1 Wn. App. 19, 459 P.2d 70 (1969); RCW 26.16.210	43
<i>Pitzer v. Union Bank</i> , 141 Wn.2d 539, 9 P.3d 805 (2000)	21-22
<i>Prince v. Prince</i> , 64 Wash. 552, 117 Pac. 255 (1911).....	24
<i>Raab v. Wallerich</i> , 46 Wn.2d 375, 282 P.2d 271 (1955).....	23
<i>Realm, Inc. v. City of Olympia</i> , 168 Wn. App. 1, 277 P.3d 679 (2012)	23
<i>Tucker v. Brown</i> , 20 Wn.2d 740, 150 P.2d 604 (1944).....	43
<i>Wilkes v. O'Bryan</i> , 98 Wn. App. 411, 989 P.2d 594 (1999).....	35

Washington Statutes

RCW 11.02.070	7, 8, 18, 19, 20
RCW 11.04.250	19
RCW 11.12.010	19
RCW 11.12.230	22
RCW 11.12.250	19
RCW 11.12.265	19
RCW 11.68.100	17
RCW 11.68.110	2, 3, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21
RCW 11.68.110(2)	17
RCW 11.96A.150	41, 42, 43
RCW 11.96A.150(1).....	41, 42
RCW 11.98.002	19
RCW 11.98.078	36, 37, 38
RCW 11.98.078(1)	38
RCW 26.16.210	43

Other Authorities

CR 56(c)	14
CR 60.....	21, 22

CR 60(b)(4).....	22
CR 60(b)(5).....	22
CR 60(b)(11).....	22
<i>Right of Party to Joint or Mutual Will, Made Pursuant to Agreement as to Disposition of Property at Death, to Dispose of Such Property During Life, 85 A.L.R. 3d 8, 15 (1978)</i>	<i>31, 36</i>

I. INTRODUCTION

Walter Forsberg and Patricia Forsberg¹ signed mutual wills and a property agreement (the “Forsberg Property Agreement” or “FPA”) in 2003 after 28 years of marriage. Walter died in 2009. The appellants Pauline Forsberg and Leslie Forsberg (collectively referred to as “Leslie”) filed this lawsuit to enforce the FPA and the mutual wills as third party beneficiaries. CP 282.

As stated in the FPA, Walter and Patricia intended “to provide for each other’s health, support and maintenance in their accustomed manner of living and, after both of their deaths, to dispose of their combined estates, to their respective children or issue in proportion to their relative ownership of property” prior to the death of the first spouse. CP 280-281. Because Walter owned more separate property than Patricia, his percentage of relative ownership of the combined estates was 73.5 percent and Patricia’s percentage of relative ownership was 26.5 percent. CP 218.

One year after closing the probate of Walter’s estate, Patricia gave her relatives cash gifts totaling \$216,000 and real property (formerly Walter’s separate property) worth \$1,200,000. CP 86-88, 219, 223, 265-266. By making these gifts, Patricia reduced the property that will be distributed to Leslie when Patricia dies by over \$1,000,000.

¹ Because several parties share the last name Forsberg, first names are used without intending any disrespect.

Three months after discovering the gifts of real property, Leslie sued Patricia and the recipients of the gifts to enforce the FPA, invalidate the gifts, quiet title, and prohibit Patricia from making future gifts in violation of the FPA and mutual wills. The trial court dismissed the claims on summary judgment, ruling (1) they were time-barred because Leslie did not object to the Declaration of Completion closing Walter's probate, and (2) even if the claims were not time-barred, Patricia's gifts were in accordance with the FPA, the mutual wills and Washington law. CP 19, 24-26. The trial court also ordered Leslie to pay Patricia's attorney fees. Leslie appealed, seeking reversal and summary judgment granting her claims. The parties agree there are no factual issues requiring a trial.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1.

The trial court erred in entering the Order Granting Partial Summary Judgment, Order Denying Partial Summary Judgment and Memorandum Opinion, ruling claims for breach of contract, declaratory judgment, specific performance, injunctive relief, vacation of deeds and quiet title were time-barred by RCW 11.68.110. CP 16 - 26.

Assignment of Error 2.

The trial court erred in entering the Order Granting Partial Summary Judgment, Order Denying Partial Summary Judgment and

Memorandum Opinion, ruling gifts Patricia made to her relatives after Walter died were in accordance with the mutual wills, the FPA and Washington law. CP 16 – 26.

Assignment of Error 3.

The trial court erred in entering the Order Granting Partial Summary Judgment, ruling Leslie shall pay Patricia Forsberg and the other respondents their reasonable attorney fees and costs. CP 19.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1.

In June 2011, Patricia filed a Declaration of Completion in Walter’s probate stating the “residue of estate” passed to “Patricia Forsberg, Trustee [of the] Trust for Patricia Forsberg.” CP 155. After 30 days, the Declaration of Completion became equivalent to a final decree of distribution and Patricia was discharged as personal representative. RCW 11.68.110. In September 2013, Leslie filed a lawsuit claiming gifts made by Patricia to her relatives one year after her discharge in July 2012 violated the FPA and the mutual wills, and seeking judgment quieting title to gifted real property in the name of the trust. CP 275, 276. Were these claims time-barred because Leslie did not object to the Declaration of Completion? Assignment of Error 1.

Issue 2.

In 2003, Walter and Patricia signed mutual wills and the FPA. Their stated mutual intent was “to provide for each other’s health, support and maintenance in their accustomed manner of living, and after both of their deaths, to dispose of their combined estates, to their respective children or issue in proportion to their relative ownership of property” prior to the death of the first spouse. CP 280-281. When Walter died in 2009, the value of the “total estate” owned by Patricia and Walter was \$6,770,886.13. CP 300. Walter’s “Relative Percentage Interest in Total Estate” was 73.5 percent or \$4,915,209.85. *Id.* Patricia’s “Relative Percentage Interest in Total Estate” was 26.5 percent or \$1,732,263.18. *Id.* The FPA states: “Husband’s percentage of relative ownership shall be distributed to his children or issue, and Wife’s percentage of relative ownership shall be distributed to her children or issue.” CP 281, 307-308. The mutual wills and FPA became irrevocable at Walter’s death, CP 282, and expressly “control over any non-probate transfer arrangement[.]” CP 308. After Walter died, Patricia gave her relatives real property and cash valued at \$1,416,000. Were Patricia’s gifts to her relatives in accordance with the FPA, mutual wills and Washington law? Assignment of Error 2.

Issue 3.

The trial court awarded Patricia and the other respondents their

costs and reasonable attorney fees without identifying any legal, equitable, or factual basis for the award. CP 19. Did the trial court properly exercise its discretion when it awarded fees without stating any reasons for the award? Assignment of Error 3.

IV. STATEMENT OF THE CASE

A. Walter And Patricia Executed A Mutual Estate Plan After Many Years Of Marriage.

Patricia and Walter were married in 1975. It was the second marriage for both of them. CP 280. Before Patricia and Walter married, they each amassed large property holdings in Clallam County. CP 280, 289-296. They maintained the separate character of their respective property holdings throughout their lengthy marriage. *Id.*

In 2003, Walter and Patricia engaged in mutual estate planning with the shared goal of providing for each other's "health, support and maintenance" during their lifetimes and ultimately distributing their combined estates to their respective children. CP 280-281. To achieve their mutual estate planning goals, Walter and Patricia executed three documents on December 17, 2003: the Forsberg Property Agreement (FPA), CP 281-296, the Last Will and Testament of Walter L. Forsberg, CP 302-314, and the Last Will and Testament of Patricia A. Forsberg.²

² Patricia's Will is not part of the record. The dispositive provisions of Patricia's Will are stated in the FPA, which became binding on the date signed.

B. Walter and Patricia Intended Their Children To Inherit Their Respective Shares Of The Combined Estates After Their Deaths. Walter's Percentage Of Relative Ownership Was To Be Distributed To His Daughters And Patricia's Percentage Of Relative Ownership Was To Be Distributed To Her Daughters.

After providing for the surviving spouse's "health, support and maintenance," the sole intent of Walter and Patricia's mutual estate plan was to distribute their combined estates to their respective children in proportion to their relative ownership of the property prior to the first spouse's death. CP 280-281. The centerpiece of the estate plan is the "percentage of relative ownership."

Walter and Patricia agreed the death of the first spouse would trigger two events: (1) all of the property owned by Patricia and Walter would be recharacterized as community property, CP 280, 281; and (2) a Trust for Surviving Spouse (the "Trust") would be established by the mutual wills. CP 305-306. The reason for the recharacterization of the property was to avoid estate taxes. CP 317-318. The purpose of the Trust was to provide for the surviving spouse's "health, support and maintenance in her accustomed manner of living." CP 306. The Trust was to be funded with the predeceasing spouse's share of the community property, excluding tangible personal property and several small bequests. CP 305-306.

The nature of the surviving spouse's interest in the recharacterized

community property at the death of the first spouse is not entirely clear. By operation of law, the other half of the property would be “confirmed to the surviving spouse” at the death of the first spouse. *See* RCW 11.02.070. But the agreements do not expressly say this. What is clear, however, is that Walter and Patricia agreed the survivor would not receive testamentary power over the property. The FPA imposes the following mandatory distribution formula at the death of the second spouse:

The ultimate distribution of Husband and Wife’s combined estates to their children or issue **shall be completed** in a manner that is proportionate to Husband and Wife’s relative ownership of all property prior to the time it becomes community property ... Husband’s percentage of relative ownership **shall be distributed** to his children or issue, and Wife’s percentage of relative ownership **shall be distributed** to her children or issue. Husband and Wife’s percentage of relative ownership **shall be determined** upon the death of the first spouse to die, and it **shall be based upon** the value of the property included in their combined estates as of the date of the death of the first spouse to die[.]

CP 281 (emphasis supplied).

Walter and Patricia also agreed the surviving spouse’s right to dispose of his or her property after the death of the first spouse would be limited to the survivor’s percentage of relative ownership:

Husband and Wife shall not modify or revoke the terms of this Agreement or their last Will and Testament after the death of the other; provided, however, the surviving spouse may dispose of his or her percentage of relative ownership as he or she chooses, so long as the Forsberg Farm is distributed to Walter A. Forsberg’s children or issue and the Teepee property is distributed to Patricia L. Forsberg’s children [or] issue.

CP 282. Walter and Patricia also agreed the dispositive provisions of the FPA and mutual wills would control over any joint tenancy agreements, CP 282 (FPA §4), or “non-probate transfer arrangement[.]” CP 308.

C. At Walter’s Death, The Mutual Wills, FPA And Percentage Of Relative Ownership Became Fixed And Irrevocable.

Walter predeceased Patricia on July 1, 2009. At Walter’s death, Walter and Patricia’s combined estates became community property and their mutual estate plan became irrevocable. *See supra*. Walter’s half of the community property went into the Trust. CP 306. Patricia’s half of the community property was confirmed to her as surviving spouse pursuant to RCW 11.02.070, subject to the restrictions imposed by the FPA discussed *supra*. Patricia was not free to dispose of her one half of the newly created community property, but could only dispose of her percentage of relative ownership, which as personal representative of Walter’s estate, she determined to be 26.5 percent of the total. CP 281-282, 300. Because Washington follows the item theory of community property,³ after Walter’s death, the Trust and Patricia each owned one half of each item of property she and Walter owned prior to his death, CP 328, subject to the restrictions of the FPA.

³ *See deNoskoff v. Scott*, 36 Wn. App. 424, 427, 674 P.2d 687 (1984); *In re Estate of Patton*, 6 Wn. App. 464, 494 P.2d 238 (1972).

At Walter's death, the value of the "total estate" owned by Patricia and Walter was \$6,770,886.13. CP 300. Walter's "Relative Percentage Interest in Total Estate" was 73.5 percent or \$4,915,209.85. *Id.* Patricia's "Relative Percentage Interest in Total Estate" was 26.5 percent or \$1,732,263.18. *Id.* Patricia calculated these percentages and values as personal representative of Walter's estate. CP 298-300, 317. Patricia affirmatively alleged "at Walter's death, his percentage of relative ownership of the combined estates was 73.5% and Patricia's percentage of relative ownership of the combined estates was 26.5%." CP 218.

D. Even Though Patricia's Percentage Of Relative Ownership Was 26.5 Percent Of The Total Estates At Walter's Death, She Signed An Agreement Dividing The Combined Estates Equally Between Herself And The Trust.

Patricia signed an Allocation Agreement on March 16, 2011 in her capacity as personal representative of the probate estate and individually as surviving spouse. CP 328-338. The Allocation Agreement recited the Estate and Patricia each owned "an undivided one-half interest in various estate assets, and they each wish to allocate assets between them to the end that they each will own certain assets free and clear of any claims of the other[.]" CP 328. Without mentioning the FPA or the percentage of relative ownership, the Allocation Agreement purported to transfer assets valued at \$3,442,058.50 to the Estate, CP 333, and assets of \$3,442,058.50

to Patricia. CP 334. The Allocation Agreement did not mention the Trust, and Patricia did not sign the Agreement as Trustee. Patricia provided Leslie with a copy of the Allocation Agreement in June 2011, but did not file the Agreement in the probate or notify the court overseeing the probate of the Agreement. CP 92-93, CP 154-155.

E. Patricia Filed A Declaration Of Completion To Close Walter's Probate Stating Walter's Property Was Distributed To Her As Trustee. Accordingly, Walter's Daughters Did Not Object.

In June 2011, Patricia filed and served a Declaration of Completion of Probate ("Declaration of Completion") to close Walter's probate. CP 154-157. The Declaration of Completion identified the "[s]ignificant facts, events and dates in connection with the Decedent and the probate of this estate[.]" CP 154. The Declaration of Completion stated the "residue of estate" was distributed to "Patricia Forsberg, Trustee [of the] Trust for Patricia Forsberg." CP 155. In the list of significant events, the Declaration of Completion referred to the probate of Walter's Will (which expressly incorporates and affirms the FPA), CP 302, but not the Allocation Agreement. CP 154. Except for the recipients of two small specific bequests totaling \$2000, the only recipient of any portion of Walter's estate identified in the Declaration of Completion was Patricia solely in her capacity as Trustee. CP 155. The Declaration of Completion

did not mention, refer to, or incorporate any writing or written instrument other than Walter's Will. CP 154-157.

Along with the Declaration of Completion, Patricia filed and served a Notice of Filing of Declaration of Probate (the "Notice of Filing"). CP 158-159. The Notice of Filing stated in pertinent part:

Unless you file a petition with the Court requesting the Court to approve the reasonableness of the fees, or for an accounting, or both, and serve a copy of the petition upon the Personal Representative or the attorney for the Personal Representative within thirty (30) days after the above filing date:

(ii) The Declaration of Completion of Probate will be final and deemed the equivalent of a decree of distribution entered under Chapter 11.76 RCW; [and]

(iii) The acts that the Personal Representative performed before the Declaration of Completion of Probate was filed will be deemed approved, and the Personal Representative will be automatically discharged without further order of the Court with respect to all such acts[.]

CP 158.

Leslie did not file an objection to the Declaration of Completion. After 30 days, the Declaration of Completion became equivalent to a final decree of distribution to Patricia as Trustee, and Patricia was discharged as personal representative. RCW 11.68.110. Leslie agrees the Declaration of Completion operates as a final decree of distribution and has not asked to reopen the probate estate. *See infra* at 15-16.

F. One Year After The Probate Concluded, Patricia Reduced The Combined Estates By Giving Her Relatives \$1,416,000 In Real Property And Cash.

More than a year after Patricia filed the Declaration of Completion, she gave her relatives real property valued at \$1.2 million and cash gifts of \$216,000. CP 86-88, 219, 265-266. The gifted real property consisted of three parcels of valuable farmland Walter owned as separate property before he died. CP 219, 265, 266. Patricia and the other respondents admitted “no consideration was given” and the recipients of the gifted property were “not bona fide purchasers for value.” CP 223. Leslie did not receive notice of the gifts and discovered them by accident after seeing the real property listed for sale. CP 97.

By making these *inter vivos* gifts, Patricia removed assets valued at \$1,416,000 from the combined estates that are to be distributed pursuant to the terms of the FPA and mutual wills when Patricia dies. Had these gifts not occurred, Leslie would be entitled to 73.5 percent of the gifted assets when Patricia dies. Thus, the loss to Leslie exceeds \$1 million (73.5 percent of \$1,416,000 = \$1,040,760).

G. Three Months After Leslie Discovered The Gifts Of Real Property She Filed Claims To Invalidate The Gifts, Vacate The Deeds, And Prohibit Further Gifting. The Trial Court Dismissed These Claims On Summary Judgment.

In September 2013, Leslie filed a lawsuit claiming gifts made by

Patricia to her relatives one year after her discharge in July 2012 violated the FPA and mutual wills. CP 275, 276. The lawsuit was filed three months after Leslie discovered the gifts of real property. CP 86-88. After filing the lawsuit, Leslie learned through formal discovery of Patricia's cash gifts totaling \$216,000. *Id.*

The lawsuit named Patricia as a respondent in her capacity as trustee of the spousal trust and in her individual capacity. CP 256, 258. The other respondents to the lawsuit are Patricia's family members who received the gifts of real property. CP 258-259.

The parties filed cross motions for summary judgment. On April 14, 2014, the trial court granted Patricia's motion for summary judgment, denied Leslie's motion for summary judgment, and ordered Leslie to pay costs and reasonable attorney fees to Patricia and the other respondents. CP 19-26.

The trial court gave two reasons for dismissing the claims with prejudice as a matter of law. First, the trial court ruled the claims were time-barred under RCW 11.68.110 because Leslie did not object to the Declaration of Completion within 30 days. CP 19, 24. Second, it ruled Patricia's actions were in accordance with the FPA, mutual wills and Washington law, even if the claims were not time-barred. CP 24- 26.

Leslie timely appealed, CP 14-15, and voluntarily dismissed without prejudice claims alleging mismanagement of the Trust that were not disposed of by summary judgment. CP 11-13.

V. ARGUMENT

A. The Standard of Review is De Novo.

The appellate court reviews *de novo* the grant or denial of a summary judgment motion, engaging in the same inquiry as the trial court and viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *In re Wash. Builders Benefit Trust*, 173 Wn. App. 34, 57, 293 P.3d 1206 (2013) (citing *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004)). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Wash. Builders Benefit Trust*, 173 Wn. App. at 57.

The appellate court also reviews *de novo* the interpretation of a will or trust instrument. *Wash. Builders Benefit Trust*, 173 Wn. App. at 75; *In re Estate of Curry*, 98 Wn. App. 107, 112-113, 988 P.2d 505 (1999).

B. The Trial Court Erred In Ruling The Claims Were Time-Barred Under RCW 11.68.110.

The trial court erroneously ruled:

Petitioners' claims were filed more than two years after the Estate of Walter Forsberg was settled and closed. **These claims involve the manner in which Patricia Forsberg distributed the estate**

assets and are, therefore, barred by the 30-day limit imposed by RCW 11.68.110.

CP 24 (emphasis supplied).

RCW 11.68.110 authorizes and governs the closing of nonintervention probates by the filing of a declaration of completion of probate. Parties are foreclosed from challenging estate administration, distribution and closure if they fail to file a petition within 30 days after receiving a declaration of completion conforming to RCW 11.68.110.

The trial court erroneously applied the 30-day limit of RCW 11.68.110 to Leslie's claims, which 1) do not challenge the contents or operative effect of the Declaration of Completion, 2) do not pertain to the distribution of the **estate** assets, and 3) do not challenge actions Patricia took as personal representative.

1. Because the lawsuit did not challenge the contents or operative effect of the Declaration of Completion, RCW 11.68.110 does not apply.

Leslie agreed with both the contents and the operative effect of the Declaration of Completion; therefore, it was error to apply the 30-day time limit of RCW 11.68.110 to bar her claims. The function of a decree of distribution is to determine heirship, distribute the decedent's property interests to the decedents' heirs and beneficiaries, and declare title to the property previously owned by the decedent. *Mezere v. Flory*, 26 Wn.2d 274, 279, 173 P.2d 776 (1946). A decree of distribution declares title, but

it does not create title. *Id.* at 280.⁴

In the present case, the Declaration of Completion identified “Patricia Forsberg, Trustee [of the] Trust of Patricia Forsberg” as the sole heir and beneficiary entitled to the residue of Walter’s estate, after payment of two small specific bequests. CP 155. Leslie agreed with this statement, as well as the rest of the Declaration’s contents. She also agrees the Declaration became equivalent to a decree of final distribution after 30 days. Therefore, the 30-day time limit of RCW 11.68.110 that applies when a party seeks to challenge a declaration of completion does not apply to Leslie’s claims.

It was legal error to equate the Allocation Agreement with the Declaration of Completion for purposes of applying the time-bar of RCW 11.68.110. The Allocation Agreement should not be considered part of the Declaration of Completion because it was never filed in the probate, CP 92-93, and it is not mentioned in the Declaration of Completion that was filed in the probate. CP 154-159.

A document not filed in the probate proceedings cannot satisfy the statutory definition of a declaration of completion under RCW 11.68.110. RCW 11.68.110(1) states in pertinent part: “If a personal representative

⁴ See also *Kempf v. Michelbach*, 115 Wash. 193, 200, 196 Pac. 661 (1921) (“Nor does a decree of distribution create a title in any event. It only declares who has acquired the title of the deceased.”).

who has acquired nonintervention powers does not apply to the court for either of the final decrees provided for in RCW 11.68.100 as now or hereafter amended, the personal representative **shall, when the administration of the estate has been completed, file a declaration[.]**” (Emphasis supplied.)

Furthermore, a document not filed in the probate proceedings cannot trigger the 30-day time limit that the trial court ruled barred Leslie’s claims. The 30-day time limit runs “from the **date of filing a declaration of completion of probate[.]**” RCW 11.68.110(2) (emphasis supplied). Thus, the plain meaning of RCW 11.68.110 was violated when the unfiled Allocation Agreement was construed to meet the statutory prerequisites for the 30-day time bar.

Finally, as a matter of law, the Allocation Agreement cannot be deemed part of the Declaration of Completion that triggered the 30-day time limit of RCW 11.68.110, because it was not incorporated or even mentioned by the Declaration. Court orders or decrees cannot be construed to incorporate other documents absent an express reference. *Johnston v. Beneficial Management Corp. of America*, 96 Wn.2d 708, 712-713, 638 P.2d 1201 (1982) (holding strict construction of a court order is required and admonishing against expanding a court order beyond the meaning of its terms). There is no question in this case from

the plain language of the Declaration of Completion that it did not refer to the Allocation Agreement or the purported effect of the Allocation Agreement, which was to transfer title to Patricia individually. The only distribution mentioned in the Declaration of Completion was to Patricia as *trustee*, except for two small specific bequests. CP 154-155.

2. Because the lawsuit did not challenge the distribution of estate assets, RCW 11.68.110 does not apply.

The trial court premised its dismissal of Leslie's claims on the erroneous finding they "involve the manner in which Patricia Forsberg distributed the estate assets." CP 24. The subject matter of Leslie's claims is not the manner in which Patricia distributed the probate estate, which is all that RCW 11.68.110 regulates. Leslie sued Patricia in her capacity as Trustee for giving away property that belonged to the Trust and in her individual capacity for giving away the community property she received by operation of law when Walter died. CP 258, 265-275. RCW 11.68.110 does not govern trust administration or the discharge of trustees. Nor does the statute govern the distribution of community property that passes by operation of law outside the probate pursuant to RCW 11.02.070. Therefore, it was error to rule the 30-day time limit of RCW 11.68.110 applied to Leslie's claims.

Claims relating to Patricia's gifts of trust assets are beyond the scope of RCW 11.68.110. When Walter died, the FPA recharacterized all

of the couple's property as community property, and, as correctly stated in the Declaration of Completion, Walter's residuary passed to Patricia as Trustee. Title vested in the Trustee at the moment Walter died pursuant to RCW 11.04.250.⁵ "This statute operates to vest title to certain property in the deceased person's heirs or devisees immediately upon death." *In re Estate of Niehenke*, 117 Wn.2d 631, 643-644, 818 P.2d 1324 (1991). Wills and trusts are separate legal documents governed by separate statutes. RCW 11.12.010-.265 (wills); RCW 11.98.002-.930 (trusts). When the testator gifts assets to a trust, the terms of the trust and trust statutes govern disposition of the assets, not the statutory provisions governing wills. RCW 11.12.250. Although in this case Patricia acted as both personal representative and trustee, the roles are legally distinct. Any discharge relating to the performance of her duties as Personal Representative, pursuant to RCW 11.68.110, did not and cannot extend to her actions as trustee.

Claims relating to Patricia's gifts of community property passing to her at Walter's death are also beyond the scope of RCW 11.68.110. By

⁵ RCW 11.04.250 states: "When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, his or her title shall vest immediately in his or her heirs or devisees, subject to his or her debts, family allowance, expenses of administration, and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent[.]"

operation of RCW 11.02.070,⁶ the half of the community property that did not pass to the Trust when Walter died was confirmed to Patricia as the surviving spouse. As discussed *infra*, Patricia violated the FPA by giving away the property that passed to her outside probate when Walter died. This claim cannot be foreclosed by RCW 11.68.110 because it relates to property interests that passed outside the probate process. The Declaration of Completion does not mention or govern the distribution of property to Patricia in her individual capacity, only as Trustee. CP 155. Because claims concerning the disposition of Patricia's individual property interests passing to her pursuant to RCW 11.02.070 fall outside the scope of the probate and RCW 11.68.110, it was error for the trial court to apply the 30-day limitations period to these claims.

3. Because the lawsuit challenged gifts Patricia made after her discharge, RCW 11.68.110 does not apply.

The challenged gifts occurred long after the probate concluded; therefore, RCW 11.68.110 no longer had any application. RCW 11.68.110 cannot bar claims arising after the personal representative was discharged, simply because they relate to property that once was part of the probate estate. The premise of the lawsuit is that Patricia violated the FPA and

⁶ RCW 11.02.070 provides that “upon the death of a decedent, a one-half share of the community property shall be confirmed to the surviving spouse or surviving domestic partner, and the other one-half share shall be subject to testamentary disposition by the decedent[.]”

mutual wills by giving away property during her lifetime to remove it from the reach of the testamentary instruments she accepted the benefit of and promised to abide by. Essentially, because Patricia could not change the terms of her will after Walter died, she could not remove assets from the reach of her will by giving them away before she dies. *See infra* at 25-32. This claim does not challenge the distribution of property to Patricia occurring when Walter died that was governed by RCW 11.68.110. The claim challenges what Patricia did with the property *after* she received it. Consequently, the 30-day time limit that applies to the distribution of nonintervention probate estates does not apply to this case.

4. The 30-day time bar of RCW 11.68.110 cannot operate to bar claims if the Declaration of Completion contains false information.

The triggering event for the 30-day time limit of RCW 11.68.110 is the filing of the Declaration of Completion. If the Declaration of Completion contained false information, this would be grounds to vacate the decree and toll any time limits arising from the fraudulent Declaration of Completion. Washington's Supreme Court in *Pitzer v. Union Bank*, 141 Wn.2d 539, 552, 9 P.3d 805 (2000), held decrees of distribution may be vacated pursuant to CR 60 for any of the grounds identified in the rule, including fraud, misrepresentation, or other equitable grounds:

These historical rules [for reopening estates] are set against the fact that the law of reopening estates is derived from the law of

vacating judgments. With the advent of CR 60, additional justifications upon which to reopen an estate may exist. Specifically, CR 60(b)(4) allows the court to vacate a judgment procured through 'fraud..., misrepresentation, or other misconduct of an adverse party.' Of course, a 'void' judgment is also unenforceable. CR 60(b)(5). CR 60 also contains a catchall provision, which permits the court to vacate a judgment for 'any other reason justifying relief from the operation of the judgment.' CR 60(b)(11).

Pitzer, 141 Wn.2d at 552 (internal citations omitted).

In the present case, the Declaration of Completion on its face is not objectionable. It states Patricia distributed Walter's estate pursuant to the terms of his Will and Patricia received the residuary of Walter's estate as Trustee. CP 154-155. If Patricia's distribution of Walter's estate in fact varied from what she stated in the Declaration of Completion, this would be grounds to vacate the decree of distribution pursuant to CR 60 and toll the 30-day statute of limitations.

C. The Trial Court Erred In Ruling Patricia's Gifts of Walter's Property Were In Accordance With The Mutual Wills, The FPA, And Washington Law.

"The primary duty of a court when interpreting a will is to determine the intent of the testator." *Estate of Curry*, 98 Wn. App. at 113 (quoting *Estate of Niehenke*, 117 Wn.2d 631, 639, 818 P.2d 1324 (1991)). See also RCW 11.12.230; *Wash. Builders Benefit Trust*, 173 Wn. App. at 75 ("In construing the terms of a trust, the settlor's intent controls"). "This intent should, if possible, be garnered from the language of the will itself.

The will should be considered in its entirety and effect given to every part.” *Estate of Curry*, 98 Wn. App. at 113 (internal quotations and citations omitted); *In re Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994). “Similarly, the touchstone of contract interpretation is the parties’ intent.” *In re Estate of Bernard*, __ Wn. App. __ (Aug. 4, 2014), Slip Op. p. 10⁷ (quoting *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 4-5, 277 P.3d 679 (2012)). Washington follows “the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used.” *Id.*

1. The percentage of relative ownership distribution formula became irrevocable when Walter died.

Patricia and Walter made a mutual agreement (the FPA) to devise their property to their respective children pursuant to a specified formula. CP 281 (FPA at 2 ¶3). The FPA took effect on the date it was executed, December 17, 2003, creating fixed obligations that can be specifically enforced. *See Raab v. Wallerich*, 46 Wn.2d 375, 383, 282 P.2d 271 (1955) (agreement to make mutual wills is effective the date of execution); *In re Estate of Richardson*, 11 Wn. App. 758, 760-761, 525 P.2d 816 (1974) (“When such contracts exist they impose fixed obligations which will be specifically enforced”). The FPA expressly prohibits the surviving spouse from modifying or revoking the agreed upon distribution after the death of

⁷ The Slip Op. appears in the appendix at 1-41.

the first spouse. CP 282 (FPA at 3 ¶6).

Even without the express statement of irrevocability appearing in the FPA, the terms of a mutual will become irrevocable after the first testator dies:

If the will is not revoked during the joint lives of the testators, he who dies first has a right to rely upon the promise of the survivor. He has fulfilled his part of the agreement, and it is not just to his representatives to permit a revocation when he has been prevented from revoking his will by a reliance upon the other's promise. It is too late for the survivor, after receiving the benefit, to change his mind, because the first will is then irrevocable.

Prince v. Prince, 64 Wash. 552, 558, 117 Pac. 255 (1911). See also *Newell v. Ayers*, 23 Wn. App. 767, 769, 598 P.2d 3 (1979) (“Once the survivor elects to take under the provisions of such a will, he is not free to avoid the obligation to dispose of his property as previously agreed”).

2. Patricia’s *inter vivos* gifts violate the distribution formula she agreed to when she signed the FPA.

Patricia agreed Walter’s daughters shall receive their father’s percentage of relative ownership of the property she and Walter owned:

Husband’s percentage of relative ownership shall be distributed to his children or issue, and Wife’s percentage of relative ownership shall be distributed to her children or issue. Husband and Wife’s percentage of relative ownership shall be determined upon the death of the first spouse to die, and it shall be based upon the value of the property included in their combined estates as of the date of the death of the first spouse to die [.]

CP 281. There is no dispute that Walter’s percentage of relative ownership, as calculated by Patricia, was 73.5 percent. CP 215, 218.

Because of Patricia's large *inter vivos* gifts, Walter's daughters will receive less than Walter's percentage of relative ownership. Patricia admitted this fact. CP 77. Therefore, the trial court erred in denying appellants' motion for summary judgment.

3. Patricia could not give away property after Walter died without violating the FPA.

The trial court erroneously ruled Patricia's gifts were the permissible exercise of her dominion and control over the property she received when Walter died. CP 26. To reach this conclusion, the trial court incorrectly found: "the combining of the estates and the 73.5%/26.5% allocations (reflecting the relative ownership interests of the parties prior to when it became community property) occurs [sic] only after Patricia Forsberg's death." This finding violates the plain meaning of the FPA and mutual wills, binding Washington precedent, and the weight of authority from other jurisdictions.

a. The trial court's ruling violates plain meaning.

The trial court's reading of the FPA and mutual wills disregards their text, inserts terms that do not appear in the text, and relies on isolated words taken out of context.

First, it was clear error for the trial court to find that "the combining of the estates ... occurs only after Patricia Forsberg's death." CP 25. The FPA uses the term "combined estates" to refer not only to the

property owned by the Trust and the surviving spouse at the death of the second spouse, but also at the death of the first spouse. It states “Husband and Wife’s percentage of relative ownership shall be determined upon the death of the first spouse to die, and it shall be based upon the value of the property included in their **combined estates** as of the date of the death of the first spouse to die[.]” CP 281 (FPA ¶3; emphasis supplied).

Second, the trial court’s interpretation of the distribution formula violates the clear statement of purpose appearing in the mutual wills:

I have entered into the Forsberg Property Agreement with my spouse dated December 17, 2003. The terms of the Agreement provide that all property owned by me and my spouse shall be community property upon the death of the first one of us to die. We have also agreed to execute mutual wills which include a specific plan for ultimate distribution of **all of our combined property** as set forth in our wills. The distribution plan set forth in this will cannot be modified or revoked, unless both my spouse and I mutually agree to a modification or revocation in writing.

CP 302 (emphasis supplied.) This language indicates Walter and Patricia intended the distribution formula to extend to all property they owned without limitation. Thus, it was error for the trial court to exempt the property Patricia received from the formula.

Third, the trial court impermissibly added limitations to the distribution formula that do not appear in the text of the FPA. The FPA states:

The ultimate distribution of Husband and Wife's combined estates to their children or issue shall be completed in a manner that is proportionate to Husband and Wife's relative ownership of all property prior to the time it becomes community property ... (hereinafter referred to as the 'percentage of relative ownership'). Husband's percentage of relative ownership shall be distributed to his children or issue, and Wife's percentage of relative ownership shall be distributed to her children or issue. Husband and Wife's percentage of relative ownership shall be determined upon the value of the property included in their combined estates as of the date of the death of the first spouse to die[.]”

CP 281. The FPA does not state the distribution formula only applies to property owned at the death of the second spouse, as the trial court held.

CP 25. The FPA states, without exception: “Husband's percentage of relative ownership shall be distributed to his children or issue[.]” It was error for the trial court to add limiting language to this term.

Fourth, the trial court's interpretation fails to consider the FPA and mutual wills as a whole or to give effect to every part of these agreements. Allowing the surviving spouse to give away the 50 percent share received at the first spouse's death disregards the part of the agreement stating: “Husband and Wife shall not modify or revoke the terms of this Agreement or their last Will and Testament after the death of the other; provided, however, the surviving spouse may dispose of his or her percentage of relative ownership as he or she chooses[.]” CP 282. This part of the agreement indicates the surviving spouse does not have the right to dispose of 50 percent of the combined estates, as the trial

court ruled, but retains the right to dispose only of his or her percentage of relative ownership, which in Patricia's case was 26.5% of the total estates. The trial court erred by adopting an interpretation of the FPA that makes portions of the agreement meaningless.

Interpreting the FPA and mutual wills to allow *inter vivos* gifting of 50 percent of the combined estates also contradicts the part of the agreement stating: "The terms of this will and the Forsberg Property Agreement shall control over any non-probate transfer arrangement, including but not limited to, any accounts held as joint tenants with right of survivorship." CP 308. *Inter vivos* gifting is a "non-probate transfer." Thus, the trial court erred by allowing what the FPA expressly prohibited.

b. The trial court's ruling ignores binding precedent and analogous cases from other jurisdictions.

The trial court ignored settled case law on mutual wills. *Newell v. Ayers*, 23 Wn. App. 767, 598 P. 2d 3 (1979), invalidated *inter vivos* gifts by a surviving spouse and should have been followed by the trial court. In *Newell*, a married couple executed mutual wills that gave all of the couple's property to the survivor who agreed to devise the property owned at death to the couple's children from prior marriages in equal shares. *Id.* at 768. At the death of the wife, husband inherited all of her property, which became his separate property. The husband then gave away most of the property to his children shortly before his death. The trial court set

aside the husband's gifts. The court of appeals affirmed, holding "the decedent's *inter vivos* transfers were in effect testamentary dispositions contrary to the disposition called for by the agreement, those transfers were void and were properly set aside." *Newell*, 23 Wn. App. at 770 (citing *Olsen v. Olsen*, 189 Misc. 1046, 70 N.Y.S.2d 838 (1947)). There is no basis for distinguishing *Newell* from the present case.

Newell, *supra* at 770, relied on a case from New York, *Olsen v. Olsen*, 189 Misc. 1046, 1051-1052, 70 N.Y.S.2d 838 (1947), which like *Newell* involved facts indistinguishable from the present case. In *Olsen*, Husband and Wife executed mutual wills after 25 years of marriage. They each had children from their first marriages. They each devised to the other their respective residuary estates, and after the death of the first spouse, to Wife's daughter and Husband's three sons in equal shares. After Wife died, Husband remarried, transferred assets, and made a new will in which he left nothing to his Wife's daughter. *Olsen* awarded Daughter one-quarter of Husband's estate, holding the property agreement applied to all property Husband and Wife owned, including the property Husband owned separately after Wife died:

It may be observed that all property held by Olava [Wife], by Harry [Husband], by them jointly, or by either in trust for the other, was embraced in the agreement, for the parties provided therein for the disposition of "our property." This term would include the property of either as well as the property which they held together. ... **Of course when Olava died Harry acquired**

the joint property for himself, bound, however, by the terms of their common agreement. Moreover, while Harry had the right to use as much of the assets of their joint estates during his lifetime as he required, he did not have the right to "make a gift in the nature, or in lieu, of a testamentary disposition or to defeat the purpose of the agreement."

Olsen v. Olsen, 189 Misc. at 1052 (emphasis supplied).

The holdings of *Newell* and *Olsen* reject the trial court's premise that the agreed upon distribution formula was not intended to apply to property the surviving spouse received at the death of the first spouse. In the portion of the decision quoted above, the *Olsen* Court expressly held the distribution agreement applied to the separate holdings of the surviving spouse, because the parties referred to the disposition of "our property." *Olsen*, 189 Misc. at 1052. In the present case, the mutual wills are even clearer, expressing "a specific plan for ultimate distribution of **all of our combined property** as set forth in our wills." CP 302 (emphasis supplied).

The *Newell* and *Olson* decisions follow the majority of courts considering whether parties to mutual wills may make contradictory *inter vivos* gifts:

Regardless of the wording of a joint or mutual will, or the accompanying agreement, if property is left to third-party beneficiaries who are to take upon the death of the survivor, most courts consider any *inter vivos* transfer made by the survivor with an intent to avoid the agreement, to be improper. ... Gratuitous transfers, especially when they involve sizeable portions of the estate, have also been viewed as efforts to avoid the agreement.

Right of Party to Joint or Mutual Will, Made Pursuant to Agreement as to Disposition of Property at Death, to Dispose of Such Property During Life, 85 A.L.R. 3d 8, 15 (1978) (citations omitted).⁸ This Court should follow the precedent set by *Newell* and the majority of other courts nationwide that have set aside *inter vivos* gifts violating the contractual obligations of mutual wills.

Washington cases discussing the authority of trustees and life tenants to give away property also support setting aside Patricia's *inter vivos* gifts. In *Holmes v. Holmes*, 65 Wn.2d 230, 231, 396 P.2d 633 (1964), the husband devised his entire estate to his wife, for her "care and maintenance as she finds necessary," with the balance and residue at her death passing to 11 remaindermen in equal shares. After the husband's death, the surviving spouse initiated a lawsuit to determine whether she could sell a parcel of property. The remaindermen opposed the sale, unless necessary for the wife's care and maintenance. Ruling the wife could dispose of property by sale, *Holmes*, 65 Wn.2d at 237, also held the wife did not have the authority to give away property:

[T]he wife does not have an entirely free hand to deal with the property. Just as we cannot ignore the full power given to Mrs. Holmes, we cannot ignore the limitation placed upon her estate. She is not given a fee interest. She does not have testamentary power over the balance of the estate. As appellants contend, she

⁸ This article appears in the appendix.

cannot ‘pauperize herself for the purpose of defeating the remaindermen.’

In the present case, Patricia admits she received no value for the gifts of real property and cash totaling \$1,416,000. CP 86-88, 223. In the absence of these gifts, Leslie would receive 73.5 percent of the gifted property when Patricia dies. Patricia’s conduct is an impermissible attempt to “pauperize” herself in order to defeat the testamentary bequest to Leslie that Patricia and Walter both agreed to when they signed the FPA.⁹

4. The recharacterization of the combined estates as community property when Walter died did not exempt any portion of it from the distribution formula required by the mutual wills and the FPA.

The trial court erred by treating the property Patricia received when Walter died as a fee simple estate owned without restrictions on Patricia’s right to dispose of the property. This interpretation violated the plain meaning of the FPA. The FPA states: “All of the property as now owned and hereafter acquired by the Husband and Wife shall be community property of Husband and Wife ... upon the death of the first spouse to die.” CP 281. But the agreements never refer to the property passing to the surviving spouse as a fee simple estate or grant the surviving spouse testamentary power over the property. To the contrary, the FPA regulates and restricts the authority of the surviving spouse to

⁹ In the hearing transcript, the word “pauperize” was mistakenly transcribed as “popularize.” VRP at 12.

dispose of his or her property, requiring the “ultimate distribution of Husband and Wife’s combined estates to their children or issue shall be completed in a manner that is proportionate to Husband and Wife’s relative ownership of all property prior to the time it becomes community property[.]” CP 281. This term governs all property owned by Walter and Patricia, not just Walter’s recharacterized one half of the community property.

In the present case, the restrictions imposed by the FPA limit the property interest passing to the surviving spouse to less than fee simple and preclude *inter vivos* gifting. By mandating an “ultimate distribution” in proportion to the “relative ownership of all property prior to the time it becomes community property[.]” CP 281, and prohibiting the survivor from modifying or revoking the mutual wills or the FPA, CP 282, the FPA limits the survivor’s power to dispose of the property by will or gift. The FPA indicates the only property the survivor may dispose of as he or she chooses is his or her percentage of relative ownership. CP 282 (discussed *supra* at 27). The distribution formula mandated by the FPA and mutual wills also expressly controls over any joint tenancy agreement or “non-probate transfer arrangement[.]” CP 282, 308.

Few Washington cases discuss the interplay between community property and mutual wills, and none of the Washington decisions construe

agreements as restrictive as the FPA and mutual wills. *In re Estate of Dunn*, 31 Wn.2d 512, 197 P.2d 606 (1948), involved a community property agreement that was also intended to serve as a will, which provided “the survivor shall have all of said property ... to use, own, enjoy, sell, lease or encumber and dispose of, during his or her life as the case may be, and upon the death of the survivor of us the unused and undisposed of portion of such property only shall go to the Trustee hereinafter named” *Id.* at 513. After noting the instrument was both a contract and a will, the court construed it “according to the rules applicable to mutual wills” and held that the instrument left the husband a life estate in his wife's share of the community property, with a vested remainder in the property to their children after the husband's death. *Id.* at 526. *See also In re Estate of Taylor*, 32 Wn. App. 199, 201, 646 P.2d 776 (1982) (reversing trial court finding that will conferred fee simple interest despite the observation that the testator “made an obvious attempt to give Alice [the survivor] an estate over which she had almost total control”).

Contrasting the restrictions contained in the FPA and mutual wills with instruments found to create unlimited testamentary powers illustrates the trial court’s error. *Bartlett v. Bartlett*, 183 Wash. 278, 280, 48 P.2d 560 (1935) interpreted a community property agreement which provided that upon the death of either spouse, their community property would “at once

vest ... in fee simple" and at the time of the survivor's death be equally divided among the couple's children. *Bartlett* held that the community property agreement could not restrict the right of alienation by the surviving spouse, because of the unlimited nature of the fee simple interest and because such restriction on alienation could only be accomplished by a will. *Bartlett*, 183 Wash. at 283-284. *Wilkes v. O'Bryan*, 98 Wn. App. 411, 417, 989 P.2d 594 (1999), interpreted a nearly identical agreement finding *Bartlett* dispositive. *Wilkes* and *Bartlett* both rely heavily on the testators' use of the term "fee simple" to describe the nature of the property interest received by the surviving spouse. Moreover, neither *Wilkes* nor *Bartlett* involved true mutual wills, but an attempt by the spouses to insert testamentary restrictions into community property agreements.

In the present case, by contrast, the FPA and mutual wills do not define the surviving spouse's property interest as "fee simple," but merely recharacterize the combined estates as community property at the first spouse's death. The FPA and mutual wills are completely silent as to the nature of the interest passing to the surviving spouse at the death of the first spouse. Moreover, the present case also undeniably involves mutual wills executed in accordance with Washington law and governed by the *Newell* case discussed *supra*.

Finally, according to commentary, the majority of courts considering the interplay between community property and mutual wills disfavor the trial court's interpretation:

[I]t is ordinarily held that property held in severalty by one of the parties, and property held in joint tenancy, by the entireties, and community property held by both spouses, may all be subjected to the restrictions of a joint or mutual will. **Thus, property which the survivor would otherwise hold in fee simple may be reduced to a life estate or less by a joint or mutual will agreement, thereby imposing a corresponding restriction upon the survivor's authority to make an *inter vivos* disposition of that property.**

Right of Party to Joint or Mutual Will, Made Pursuant to Agreement as to Disposition of Property at Death, to Dispose of Such Property During Life, 85 A.L.R. 3d 8, 15 (1978) (emphasis supplied).

5. Patricia could not remove property from the reach of the FPA by transferring it to herself under the Allocation Agreement.

It now appears that the purpose of the Allocation Agreement was to consolidate title to certain properties with Patricia so she could give away the property to her relatives. The Allocation Agreement could not consolidate title with Patricia, however, because Walter's property vested with the Trust when he died, and Patricia did not sign the Allocation Agreement as Trustee, nor could she have conveyed Trust property to herself without violating the fiduciary duty of loyalty codified at RCW 11.98.078. Moreover, even if the Allocation Agreement is construed to

have consolidated Patricia's title to certain properties, her consolidated interests were still subject to the FPA restrictions on her right to dispose of the property by will or gift. The Allocation Agreement may have addressed the fact that at Walter's death each parcel of property was co-owned by the Trust and Patricia, but Patricia still could not make testamentary or *inter vivos* gifts of the property in violation of the mandatory distribution formula she agreed to when she signed the FPA.

Patricia had no authority to convey title to property to herself by signing the Allocation Agreement as personal representative. A testatrix cannot convey title to property that the estate does not own. *See Mezere v. Flory*, 26 Wn.2d at 278-279 (invalidating decree of distribution purporting to distribute property the testatrix did not own). At Walter's death, title to his share of the recharacterized community property vested in Patricia as trustee. *See supra* at 19-20. Patricia did not sign the Allocation Agreement as trustee. She executed the document pursuant to her legally distinct status as personal representative. The document was ineffective to transfer any interest in the property from the Trust to Patricia individually.

But even assuming Patricia's signature on the Allocation Agreement as personal representative could bind the Trust, any actions Patricia undertook as trustee were subject to the fiduciary duty of loyalty

codified at RCW 11.98.078. Patricia could not enter into a “sale, encumbrance, or other transaction” involving the trust property for her “own personal account,” unless:

(a) The transaction was authorized by the terms of the trust; (b) The transaction was approved by the court or approved in a nonjudicial binding agreement in compliance with RCW 11.96A.210 through 11.96A.250; (c) The beneficiary did not commence a judicial proceeding within the time allowed by RCW 11.96A.070; (d) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with RCW 11.98.108; or (e) The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

RCW 11.98.078(1).

None of the exceptions to RCW 11.98.078(1) apply. The terms of the Trust created in Walter's will do not authorize the Trustee to enter into an agreement with herself in her individual capacity. The Allocation Agreement was not approved by the probate court, which had no notice of it. The Allocation Agreement did not meet the requirements for a nonjudicial binding agreement under TEDRA because Walter's daughters who are third party beneficiaries under the mutual wills that created the Trust were not parties to the Agreement. CP 302, 338. Leslie complied with the three-year statute of limitations for actions against a trustee for breach of trust. She learned of the Allocation Agreement in June 2011, CP 97, and commenced this lawsuit in September 2013. CP 349. Leslie

did not consent to or ratify the Allocation Agreement.¹⁰ Finally, Patricia did not enter into the Allocation Agreement before she became Trustee. She became Trustee at Walter's death in 2009, and signed the Allocation Agreement in March, 2011.

Moreover, to the extent the Allocation Agreement purported to confer fee simple title to Patricia, it would be an impermissible modification of the FPA after Walter's death. If the Allocation Agreement transferred 50 percent of the property to Patricia for her disposal in whatever manner she chooses, the Allocation Agreement violated the provisions of the mutual wills and the FPA that created a "specific plan for ultimate distribution of all of our [their] combined property," CP 302, and "controlled over any non-probate transfer arrangement". CP 308.

In summary, Patricia was not free to disregard or modify the distribution formula she agreed to when she signed the FPA. The trial court's ruling that Patricia was free to give away half of the combined estates after Walter's death is not supported by the plain or reasonable meaning of the words used in the FPA. The only property the surviving

¹⁰ Ratification of a contract requires "full knowledge of material facts[.]" *In re Marriage of Hadley*, 88 Wn.2d 649, 669, 565 P.2d 790 (1977). Leslie did not learn that Patricia had given away property she allocated to herself until June 2013. CP 97.

spouse is free to dispose of is her 26.5 percent of relative ownership. CP 282.

6. Walter's daughters are irreparably injured by the order allowing Patricia to give away her share of the combined estates prior to her death.

Under the mutual wills, Patricia's children shall receive 26.5 percent of the combined estates and Leslie shall receive 73.5 percent when Patricia dies. CP 307-308. Patricia's gifts will distort this mandatory distribution formula in favor of Patricia's relatives by removing property from the reach of the mutual wills prior to Patricia's death. Under the trial court's ruling, Patricia can give away the community property she received when Walter died, leaving just Walter's half for distribution when Patricia dies. Thus, the ultimate distribution going to Patricia's daughters could be as high as 63.25 percent,¹¹ and the ultimate distribution passing to Walter's daughters' could be as low as 36.75 percent.¹² This result clearly violates the FPA, which states: "The ultimate distribution of Husband and Wife's combined estates to their children or issue shall be completed in a manner that is proportionate to Husband and Wife's relative ownership of all property prior to the time it becomes community

¹¹ Patricia's 50% + 26.5% of Walter's 50% = 63.5%.

¹² 73.5% of Walter's 50% = 36.75%.

property[.]”¹³ CP 281. Leslie will be irreparably harmed if this Court does not set aside the gifts of \$1,416,000 and enjoin Patricia from making future gifts in violation of the FPA.

D. The Trial Court Erred In Awarding The Respondents Their Attorney Fees And Costs Without Stating Any Reasons For The Award.

The fee award entered in this case should be vacated because the appellate court does not have an adequate record upon which to review the award. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) held findings of fact and conclusions of law are required to establish an adequate record for review of an attorney fee award. Although RCW 11.96A.150 provides a statutory basis for awarding attorney fees in estate and trust matters, it does not guarantee an award to the prevailing party. “RCW 11.96A.150(1) gives a trial or appellate court discretionary authority to award attorney fees and costs to any party to the proceedings and ‘in such amount and ... manner as the court determines to be equitable.’” *In re Estate of Duxbury*, 175 Wn. App. 151, 173, 304 P.3d 480 (2013). In making an award under RCW 11.96A.150, the court must engage in an exercise of discretion to determine whether the fee award is “equitable.”

¹³ Conversely, if Patricia had died first, under the trial court’s ruling, Walter could have given away the community property he received at her death to his children, leaving just Patricia’s share for distribution at his death, resulting in an ultimate distribution ratio of just 13.25% of total property to Patricia’s children and 86.75% to Walter’s daughters.

RCW 11.96A.150. “A trial court abuses its discretion if its decision to award or deny attorney fees under RCW 11.96A.150 is manifestly unreasonable or based on untenable grounds or reasons.” *Kitsap Bank v. Denley*, 177 Wn. App. 559, 581-582, 312 P.3d 711 (2013) (citing *Wash. Builders*, 173 Wn. App. at 85). In the present case, it is impossible to determine on review whether the trial court based its award on “untenable grounds or reasons,” because it failed to articulate any grounds or reasons. Therefore, the fee award should be vacated.

E. The Appellants Should Be Awarded Their Attorney Fees And Costs Under RCW 11.96A.150.

The appellants should be awarded their attorney fees and costs pursuant to RCW 11.96A.150 for both the superior court and appellate court proceedings because this litigation was necessitated by Patricia’s breach of the FPA and her fiduciary duty of loyalty. RCW 11.96A.150(1) allows a court to consider “any relevant factor” in awarding fees. RCW 11.96A.150(1); *In re Estate of Evans*, ___ Wn. App. ___, 326 P.3d 755, 763 (2014). Breach of fiduciary duty and fault are recognized grounds for awarding attorney fees under RCW 11.96A.150. *See, e.g., In re Estate of Jones*, 152 Wn.2d 1, 20-21, 93 P.3d 147 (2004) (award of attorney fees against a fiduciary/beneficiary was upheld “because the litigation was necessitated by his multiple breaches of fiduciary duty”); *Gillespie v. Seattle-First Nat’l Bank*, 70 Wn. App. 150, 177-78, 855 P.2d 680 (1993)

(even absent bad faith or self-dealing, attorney fees may be equitably assessed against the trustee where, but for its breach of fiduciary duty, the beneficiaries would not have needed to incur the fees).

Patricia violated her fiduciary duty of loyalty as spouse to Walter and as trustee by making gifts that unfairly benefitted her relatives to the detriment of her deceased husband's daughters. "A trustee, as a fiduciary, owes beneficiaries the 'highest degree of good faith, care, loyalty and integrity.'" *Wash. Builders Benefit Trust*, 173 Wn. App. at 63 (quoting *Esmieu v. Schrag*, 88 Wn.2d 490, 498, 563 P.2d 203 (1977)). "It is the duty of a trustee to administer the trust in the interest of the beneficiaries." *Id.* (quoting *Tucker v. Brown*, 20 Wn.2d 740, 768, 150 P.2d 604 (1944)). The fiduciary duty of loyalty also applies to all transactions between spouses due to the confidential relationship existing between them. *Peste v. Peste*, 1 Wn. App. 19, 22-23, 459 P.2d 70 (1969); RCW 26.16.210.¹⁴ These breaches justify an award of fees pursuant to RCW 11.96A.150.

VI. CONCLUSION

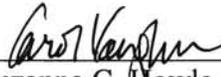
This Court should reverse the trial court's Order Granting Partial Summary Judgment [to Patricia Forsberg], Order Denying Partial Summary Judgment [to Leslie and Pauline Forsberg], and Memorandum

¹⁴ RCW 26.16.210 states "In every case, where any question arises as to the good faith of any transaction between spouses or between domestic partners, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith."

Opinion. Summary judgment should be entered declaring Patricia in violation of the FPA, declaring Patricia's *inter vivos* gifts void, setting aside the deeds, prohibiting Patricia from making future gifts of property inconsistent with the FPA and mutual wills and awarding appellants Leslie Forsberg and Pauline Forsberg their attorney fees and costs in the superior court and appellate court proceedings.

Respectfully submitted this 18th day of August, 2014.

THOMPSON & HOWLE



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Carol Vaughn, WSBA No. 16579

Attorneys for Appellants Pauline
Forsberg and Leslie Forsberg

APPENDICES

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Estate of)	No. 69608-4-1
)	(Consolidated with
J. THOMAS BERNARD,)	No. 69702-1-1)
)	
Deceased.)	DIVISION ONE
)	
)	PUBLISHED
)	
)	FILED: <u>August 4, 2014</u>
)	

Cox, J. — A court’s paramount duty in construing a testamentary instrument is to give effect to the maker’s intent.¹ We determine that intent from the instrument as a whole.² Similarly, “[t]he ‘touchstone of contract interpretation is the parties’ intent.’”³ We follow “the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used.”⁴

Generally, a personal representative of an estate has the right to appeal an adverse decision in a will contest, as it is the duty of the executor to take all

¹ In re Estate of Riemcke, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972).

² Id.

³ Realm, Inc. v. City of Olympia, 168 Wn. App. 1, 4-5, 277 P.3d 679 (quoting Durand v. HIMC Corp., 151 Wn. App. 818, 829, 214 P.3d 189 (2009)), review denied, 175 Wn.2d 1015 (2012).

⁴ Id. at 5.

legitimate steps to uphold the testamentary instrument.⁵ Likewise, a trustee may appeal an adverse ruling that goes to the validity of the trust itself.⁶

Here, a trial court judge decided on reconsideration of a motion for partial summary judgment that the First Codicil to the Will of J. Thomas Bernard, dated August 27, 2009, and the First Amendment to the J. Thomas Bernard Revocable Trust Agreement of even date were null and void as a matter of law. We conclude from our de novo review of these and other material documents that this was error.

We also conclude that a different trial court judge erred in deciding that the personal representative of the estate and the trustees of the trust did not have the right to appeal the adverse ruling we described in the previous paragraph. The circumstances of this case do not warrant that ruling.

We reverse and remand for further proceedings.

In 2008, James Bernard filed a petition for guardianship of his father, J. Thomas Bernard, and his father's estate. James alleged in the petition that Tom suffered from dementia and short-term memory loss.⁷ James also alleged that Tom's reasoning and judgment were impaired and that Tom was vulnerable to financial exploitation.

The following year, Tom executed the Will of J. Thomas Bernard and the J. Thomas Bernard Revocable Trust Agreement, both of which are dated March

⁵ See In re Klein's Estate, 28 Wn.2d 456, 475, 183 P.2d 518 (1947).

⁶ See In re Ferrall's Estate, 33 Cal. 2d 202, 205-06, 200 P.2d 1 (Cal. 1948).

⁷ For clarity, we refer to father and son by their first names.

25, 2009. On advice of counsel, Tom used a revocable living trust “to avoid any negative tax consequences along with a notice requirement to [James] if Tom wanted to modify the Trust.”⁸

On March 27, 2009, the superior court dismissed the guardianship petition that James filed the previous year.

The trust agreement provided that the residue of Tom’s estate would pass to James or his issue. It also provided that if James predeceased Tom and left no issue, the estate would pass to Tom’s niece and nephews, Rose Linger, Larry Emery, and Richard Emery (the “Linger Beneficiaries”), and to various organizations. Under this instrument, each of the Linger Beneficiaries was to receive a 20 percent share.

Tom reserved in this revocable trust the power to revoke, withdraw property from, or modify the trust. These rights are stated in Article 3.1 of the trust instrument. Additionally, the instrument included provisions about exercising these rights:

3.2 Effectiveness. Any revocation, withdrawal of property, or *modification* shall be valid and fully effective whenever Trustee shall receive from Trustor written notice thereof, except that the powers and duties of Trustee shall not be changed without Trustee’s written consent. In the case of revocation or withdrawal of property, Trustee shall have a reasonable time to transfer or deliver the property.

3.3 Rights Personal to Trustor Subject to Binding Non-Judicial Agreement. The rights reserved by the Trustor are personal to Trustor and may not be exercised by Trustor’s attorneys-in-fact appointed under a duly executed durable power of attorney or by any guardian of Trustor’s estate absent court order of

⁸ Clerk’s Papers at 423.

a court of competent jurisdiction. Notwithstanding any other provision of this Agreement, such rights are **subject to** that certain Non-Judicial Agreement regarding the J. Thomas Bernard Revocable Living Trust Agreement ("TEDRA") of even date herewith and are not exercisable by Trustor unless and until Trustor obtains the court order required by such agreement and otherwise satisfies all of the requirements imposed by the TEDRA. If and to the extent such TEDRA is determined to be unenforceable for any reason, the restrictions on Trustor's right to revoke, modify, and/or withdraw property from this Trust as stated therein shall be incorporated in this Agreement by reference and shall remain fully enforceable against the Trustor.⁹

Tom and James also executed the "Non-Judicial Agreement Re Trust Pursuant to RCW 11.96A," effective as of March 27, 2009 (the "March TEDRA agreement").¹⁰ They were the only parties to this agreement.

The agreement stated that it was "a compromise to certain disputes that have arisen between Tom and James regarding the current management and future disposition of Tom's assets."¹¹ It also stated that the parties "agree that establishing the Trust and agreeing to the terms of this Agreement is a mutually acceptable less restrictive alternative to a guardianship of the estate and James will forgo filing for a guardianship of Tom's estate so long as this Trust is in force and functional."¹²

The agreement further provided three requirements to be met before Tom exercised his modification powers:

⁹ Id. at 208 (emphasis added).

¹⁰ Id. at 427-32.

¹¹ Id. at 428.

¹² Id.

[A]lthough both the Trust and the Will remain revocable and/or modifiable by Tom during his lifetime, the Parties agree that no exercise of Tom's Modification Powers over either or both of the Trust and/or the Will shall be effective unless and until:

i. Tom files a petition for a hearing under RCW 11.96A in King County Superior court which clearly and specifically sets forth a particular proposal for an exercise of his Modification Powers,

ii. timely provides James with a summons for such hearing pursuant to RCW 11.96A.100 (and otherwise complies with the substantive and procedural provisions of RCW 11.96A), and

iii. as a result of such a hearing, the court issues an order approving the exercise of some or all of the particular Modification Power(s) expressly requested in Tom's petition.

Accordingly, the Parties expressly acknowledge and agree that any exercise by Tom of his Modification Powers over the Trust and/or the Will without first obtaining such a court order (and otherwise complying with the terms of this Agreement) shall be null and void.^[13]

In June 2009, Tom's attorney filed with the superior court a memorandum summarizing the terms of the March TEDRA agreement.

Tom's relationship with his niece, Rose Linger, deteriorated. In July 2009, the trustees for the trust sued Linger and her husband to collect outstanding loans.

In August 2009, Tom and his son, James, executed a second "Non-Judicial Agreement Pursuant to RCW 11.96A," effective as of August 27, 2009 (the "August TEDRA agreement"). They were the only parties to this second agreement.

¹³ Id. at 429.

This August TEDRA agreement acknowledged the three modification requirements set out in the March TEDRA agreement. It also stated that “this Amended Agreement will satisfy the [March TEDRA] Agreement’s requirement to obtain a court order prior to any exercise of Tom’s Modification Powers.”

The August TEDRA agreement included, as attached exhibits, unexecuted copies of the First Amendment to the J. Thomas Bernard Revocable Trust Agreement and the First Codicil to the Will of J. Thomas Bernard.

The first amendment to trust and the first codicil state that they are also effective as of August 27, 2009.

The substance of the changes from the March 2009 trust was to reduce the shares of the Linger Beneficiaries from 20 percent each to \$20,000 each. Moreover, the first amendment to trust added additional contingent beneficiaries: Leah Karp, Diane Viars, and Daniel Reina (collectively the “Karp Beneficiaries”). These beneficiaries are also to receive shares of the trust estate, two of them receiving 15 percent shares each, and one receiving a 25 percent share.

This record indicates that the trust estate is substantial. Thus, the distributive scheme—shares of \$20,000 or percentages of the trust estate—has a substantial impact on the amounts that the contingent beneficiaries may receive from the estate.

In February 2010, Tom’s attorney filed with the superior court a memorandum summarizing the terms of the August TEDRA agreement.

James predeceased Tom in September 2010, leaving no issue. Tom died in January 2011.

After the filing of Tom's testamentary documents with the court, the Linger Beneficiaries, by amended petition, contested the March TEDRA agreement, the Will of J. Thomas Bernard dated March 25, 2009, the J. Thomas Bernard Revocable Trust Agreement dated March 25, 2009, the First Codicil to the Will of J. Thomas Bernard, dated August 27, 2009,¹⁴ and the First Amendment to the J. Thomas Bernard Revocable Trust Agreement, dated August 27, 2009.

The Linger Beneficiaries moved for partial summary judgment. They requested that the court invalidate the "March Agreement." They identified this agreement as including the March TEDRA agreement, the will, and the revocable trust. They also sought to invalidate the "August Agreement." They identified this agreement as including the August TEDRA agreement, the first codicil, and the first amendment to trust.

Alternatively, the Linger Beneficiaries argued that the "August 2009 Amendment"—the first amendment to trust and the first codicil—was void. The personal representative of the estate, the trustees of the trust, and the Karp Beneficiaries opposed the motion.

The trial court denied the motion for partial summary judgment, concluding that there were genuine issues of material fact related to the March TEDRA agreement. The court deferred making any decision "involving the validity and

¹⁴ The parties erroneously stated that these documents were dated August 22, 2009. The record indicates that the first amendment to trust and the first codicil were executed on August 27, 2009 and that the effective date of the August TEDRA agreement was also August 27, 2009. See Clerk's Papers at 11, 239-42, 422, 440.

effectiveness of subsequent agreements reached between the testator, [Tom], and his son [James], specifically the August TEDRA agreement.”

The Linger Beneficiaries moved for reconsideration of the denial of summary judgment. They requested the court to reconsider its deferral of the legal issues related to the validity of the August TEDRA agreement, the first amendment to trust, and the first codicil.

By its order dated October 19, 2012, the trial court granted the motion for reconsideration. It concluded that the first codicil, effective as of August 27, 2009, and the first amendment to trust of even date were “null and void as a matter of law.” This order incorporated the court’s oral ruling of October 12, 2012.

The Karp Beneficiaries moved for reconsideration of the October 19, 2012 order. The personal representative of the estate and the trustees joined in their motion. The court ultimately denied reconsideration.

The personal representative of the estate and the trustees of the trust petitioned for instructions. They sought a determination whether they had a right to appeal the October 19, 2012 order. The Karp Beneficiaries supported this petition. A court commissioner decided that the personal representative and the trustees “have an absolute right to appeal” this order.

The Linger Beneficiaries moved for revision of the commissioner’s order, and the matter came before a different superior court judge than the one who entered the October 19, 2012 order. The revision judge granted this motion,

concluding that the personal representative and trustees “do not have the right to appeal” the October 19, 2012 order.

The Karp Beneficiaries appeal. The personal representative of the estate and trustees of the trust also appeal.

THE FIRST AMENDMENT TO TRUST AND FIRST CODICIL TO WILL

The Karp Beneficiaries argue that the trial court erred when it concluded that the first amendment to trust, effective August 27, 2009, and first codicil to will of even date are null and void as a matter of law. We agree.

We review de novo the grant or denial of a summary judgment motion.¹⁵ Summary judgment is appropriate only if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.¹⁶ The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party.¹⁷

We review de novo the interpretation of a will or trust instrument.¹⁸ “Where the meaning of an instrument evidencing a trust is unambiguous, the

¹⁵ Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 230, 119 P.3d 325 (2005).

¹⁶ CR 56(c).

¹⁷ Yakima Fruit & Cold Storage Co. v. Cent. Heating & Plumbing Co., 81 Wn.2d 528, 530, 503 P.2d 108 (1972).

¹⁸ In re Wash. Builders Benefit Trust, 173 Wn. App. 34, 75, 293 P.3d 1206 (citing In re Estate of Curry, 98 Wn. App. 107, 112-13, 988 P.2d 505 (1999)), review denied, 177 Wn.2d 1018 (2013).

instrument is not one requiring judicial construction or interpretation”¹⁹

When construing a testamentary instrument, our paramount duty is to give effect to the maker’s intent.²⁰ That intent must be gathered from the instrument as a whole, and specific provisions must be construed in light of the entire document.²¹

Similarly, “[t]he ‘touchstone of contract interpretation is the parties’ intent.”²² “Washington courts follow the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used.”²³

Here, the trial court did not address whether Tom had the capacity to make any of the testamentary documents or the two TEDRA agreements that are before us. Neither do we. The question of his capacity is not properly before us at this time, despite this argument in the appellate briefing by the Linger Beneficiaries. Likewise, the question of whether Tom was subjected to undue influence is not before us.

¹⁹ Templeton v. Peoples Nat’l Bank of Wash., 106 Wn.2d 304, 309, 722 P.2d 63 (1986).

²⁰ Riemcke, 80 Wn.2d at 728.

²¹ Id.

²² Realm, 168 Wn. App. at 4-5 (quoting Durand, 151 Wn. App. at 829).

²³ Id. at 5.

Rather, the focus of our review is limited to the trial court's decision declaring the first codicil to will, effective as of August 27, 2009, and the first amendment to trust of even date void as a matter of law.

Terms of the March 25, 2009 Trust and Will

In order to determine whether Tom complied with the specific method of modification when he executed the first amendment to trust, we first determine the modification requirements imposed by the trust itself.

The following articles in the trust instrument are relevant to this inquiry:

3.2 Effectiveness. Any revocation, withdrawal of property, or modification shall be valid and fully effective whenever Trustee shall receive from Trustor written notice thereof, except that the powers and duties of Trustee shall not be changed without Trustee's written consent. In the case of revocation or withdrawal of property, Trustee shall have a reasonable time to transfer or deliver the property.

3.3 Rights Personal to Trustor Subject to Binding Non-Judicial Agreement. The rights reserved by the Trustor are personal to Trustor and may not be exercised by Trustor's attorneys-in-fact appointed under a dully executed durable power of attorney or by any guardian of trustor's estate absent court order of a court of competent jurisdiction. Notwithstanding any other provision of this Agreement, such rights are **subject to** that certain Non-Judicial Agreement regarding the J. Thomas Bernard Revocable Living Trust Agreement ("TEDRA") of even date herewith and are not exercisable by Trustor unless and until Trustor obtains the court order required by such agreement and otherwise satisfies all of the requirements imposed by the TEDRA. **If and to the extent such TEDRA is determined to be unenforceable for any reason**, the restrictions on Trustor's right to revoke, modify, and/or withdraw property from this Trust as stated therein **shall be incorporated in this Agreement by reference** and shall remain fully enforceable against the Trustor.^[24]

²⁴ Clerk's Papers at 208 (emphasis added).

Article 3.2 of this trust makes clear that Tom could modify the March 2009 trust and that such modifications “shall be valid and fully effective” on written notice to the trustee.²⁵ Of course, this provision is subject to other material provisions of this trust.

Article 3.3 imposes additional conditions on modification of the trust beyond written notice to the trustee. Specifically, the Trust instrument states that modification is “**subject to**” the March TEDRA agreement.²⁶

The Linger Beneficiaries point to Article 3.3 to assert that this provision incorporates the terms of the March TEDRA agreement into the trust instrument. We disagree.

“Considerable caution must be exercised in applying the doctrine of incorporation by reference.”²⁷ The reference “must show an intention on the part of the testator to incorporate or adopt the document referred to. The intention of the testator to incorporate into a will a paper or document must clearly appear. . . .”²⁸ Additionally, it “must clearly and definitely describe or identify the documents intended to be incorporated, or render them capable of identification by extrinsic evidence, so that no room for doubt can exist as to what papers were meant.”²⁹

²⁵ Id.

²⁶ Id. (emphasis added).

²⁷ Baarslag v. Hawkins, 12 Wn. App. 756, 763, 531 P.2d 1283 (1975).

²⁸ Id. (quoting 94 C.J.S. WILLS § 163 (1956)).

²⁹ Id.

Here, Tom's decision to use the term "subject to" in Article 3.3 is significant. It shows that he intended the primary relationship between the trust instrument and the March TEDRA agreement to be conditional, not one of incorporation.

This conclusion is supported by examining the definitions of these terms. "Incorporate" is defined as "[t]o combine with something else" and "[t]o make the terms of another (esp. earlier) document part of a document by specific reference."³⁰ "Subject" is defined as "[c]ontingent or dependent."³¹

Further, the plain words of this article also show that Tom intended that incorporation of the provisions of the March TEDRA agreement into the trust was conditioned on the happening of future events. The first clause of the last sentence of this article conditions incorporation of the March agreement on "*if* and to the extent such TEDRA is determined to be unenforceable."³² And the use of the words "***shall be incorporated*** in this Agreement by reference . . ." further conditions incorporation on a future event following the effective date of the trust.³³

Thus, the plain language of the trust shows that the substantive requirements of the March TEDRA agreement would not be combined *into* the

³⁰ BLACK'S LAW DICTIONARY 834 (9th ed. 2009).

³¹ AMERICAN HERITAGE DICTIONARY 1788 (3d ed. 1992).

³² Clerk's Papers at 208 (emphasis added).

³³ Id. (emphasis added).

trust instrument itself, absent a determination that the March TEDRA agreement was unenforceable.

Accordingly, when we apply the plain meaning of “subject to” in this context, we conclude that modification of this March 2009 trust was also contingent on compliance with the provisions of the March TEDRA agreement as it then existed or was later amended. Tom’s intent in Article 3.3 was to require compliance with such provisions of this agreement as a condition to modifying the trust.

A necessary implication of this wording and structure is that the March TEDRA agreement could be modified without modifying the terms of the trust. The terms of the trust itself would only be modified upon incorporation, only triggered by a determination that the agreement was unenforceable.

Our conclusion is consistent with Tom’s counsel’s, one of the drafting attorneys, explanation of the reason for preparing these two instruments in the ways stated:

The Three Steps [stated in the March TEDRA agreement] were intentionally **not incorporated** into the [March 2009] Revocable Living Trust agreement, **except** in the unlikely event [that] the March TEDRA Agreement was determined to be unenforceable (see Revocable Trust agreement, Paragraph 3.3). This was done so that, provided the March TEDRA Agreement was not determined to be unenforceable, the delivery by Tom to his trustees of “written notice thereof” would be all that was required for Tom to unequivocally manifest his intention to revoke or modify the Estate Planning Documents (see Revocable Trust agreement, Paragraph 3.2), provided that any such amendment would be **“subject to”** the contractual rights (if any) conferred upon James in the March TEDRA Agreement, as it may be amended.^[34]

³⁴ Clerk’s Papers at 786 (some emphasis added).

A related question is whether the March 2009 will incorporates the provisions of the March 2009 TEDRA agreement. We conclude that the will does not incorporate these provisions.

Tom's March 2009 will contains a similar provision to that in the March 2009 trust. Specifically, it states:

This Will is **subject to** that certain Non-Judicial Agreement regarding the J. Thomas Bernard Revocable Living Trust Agreement of even date herewith.^[35]

Noticeably absent is any mention of incorporation of the provisions of the Non-Judicial Agreement Re Trust Pursuant to RCW 11.96A, effective as of March 27, 2009. For the reasons we already discussed with respect to the March 2009 trust, the provisions of the March TEDRA agreement were never incorporated into the will itself. We conclude that modification of the March 2009 will was also "subject to" compliance with the terms of the March 2009 TEDRA agreement.

Terms of the March TEDRA Agreement

As just discussed, modification of both the trust and will is conditioned on satisfying the provisions of the separate March TEDRA agreement as it then existed or was later modified. Accordingly, we must determine the terms of the March TEDRA agreement at the time that Tom executed the first amendment to trust and the first codicil.

The plain language of the March TEDRA agreement states:

³⁵ Id. at 7 (emphasis added).

[A]lthough both the Trust and the Will remain revocable and/or modifiable by Tom during his lifetime, the Parties agree that ***no exercise of Tom's Modification Powers over either or both of the Trust and/or the Will shall be effective unless and until:***

i. Tom files a petition for a hearing under RCW 11.96A in King County Superior court which clearly and specifically sets forth a particular proposal for an exercise of his Modification Powers,

ii. timely provides James with a summons for such hearing pursuant to RCW 11.96A.100 (and otherwise complies with the substantive and procedural provisions of RCW 11.96A), and

iii. as a result of such a hearing, the court issues an order approving the exercise of some or all of the particular Modification Power(s) expressly requested in Tom's petition.

Accordingly, the Parties expressly acknowledge and agree that any exercise by Tom of his Modification Powers over the Trust and/or Will without first obtaining such a court order (and otherwise complying with the terms of this Agreement) shall be null and void.^[36]

This agreement imposes three further requirements for modification of the trust beyond the requirement of written notification to the trustees imposed by Article 3.2 of the trust. Namely, the March TEDRA agreement requires that Tom petition for a hearing (specifically stating the proposed modifications), serve James with a summons for that hearing, and obtain a court order as a result of that hearing.

The next question is whether these terms were later modified by the August TEDRA agreement. This inquiry involves two questions. First, whether the March TEDRA ***could be*** modified by a second TEDRA agreement. Second,

³⁶ Id. at 429 (emphasis added).

if so, whether the August TEDRA agreement modified the March TEDRA agreement's three requirements.

First, we must determine whether the March TEDRA *could be* modified by another TEDRA agreement. The Karp Beneficiaries argue that the trial court erred when it concluded that the March TEDRA agreement expressly required a court order to modify it and that the March TEDRA agreement could not be nonjudicially amended. We agree.

As the trial court correctly recognized in its oral decision, "The case law is clear that parties to an agreement setting forth restrictions or limitations on modifications to a contract are free to later waive, supersede or revoke those limitations and restrictions."³⁷ The court cited to Smyth Worldwide Movers, Inc. v. Whitney for the following proposition: "If the parties to an action made by stipulation consent to the entry of a judgment, we know of no reason why they cannot also consent to its vacation or modification"³⁸

But after acknowledging these general principles, the court commented, "[T]hat is not the scenario here."³⁹ It concluded that the March TEDRA agreement could not be modified, stating:

The March TEDRA agreement expressly provided that the parties could not modify that agreement without prior court approval. Under TEDRA, upon filing the agreement, the agreement is equivalent to a final court order, binding on all persons interested in the estate or trust. Thus, this Court can only

³⁷ Clerk's Papers at 810-11.

³⁸ Id. at 810 (citing 6 Wn. App. 176, 179, 491 P.2d 1356 (1971)).

³⁹ Id. at 811.

construe the March agreement as a court order mandating that the March agreement could not be modified or rescinded without prior court approval. By invoking the jurisdiction and authority of the court, the parties could not waive or rescind the court order requiring prior court approval for modification.^[40]

But the March TEDRA agreement is silent on whether the parties could modify that agreement without prior court approval. The court misread this agreement to say otherwise.

The plain language of the March TEDRA agreement provides that the three requirements apply to an exercise of Tom's "Modification Powers" over "*either or both of the Trust and/or the Will.*"⁴¹ The March TEDRA agreement is not either of these two.

The term "Modification Powers" is expressly defined in the March TEDRA agreement:

b. **Power to Revoke.** Pursuant to Article 3 of the Trust, Tom has reserved the right (a) to revoke the Trust in its entirety, (b) to partially revoke or modify the Trust, and (c) to withdraw from the operation of the Trust any part or all of the Trust estate. Moreover, under Washington State law, Tom reserves the right at any time to amend or revoke the will. ***Collectively, the rights described in the immediately two preceding sentences shall be referred to as Tom's "Modification Powers."***^[42]

Accordingly, Tom's "Modification Powers" include: (1) the right to revoke the Trust in its entirety, (2) the right to partially revoke or modify the Trust, (3) the right to withdraw part or all of the Trust estate, and (4) the right to amend or

⁴⁰ Id. (emphasis added).

⁴¹ Id. at 429 (emphasis added).

⁴² Id. 428-29 (emphasis added).

revoke the will.⁴³ Thus, modification of the underlying March TEDRA agreement was not an exercise of these “Modification Powers.”

Consequently, the plain language of the March TEDRA agreement indicates that the three requirements do not apply to modification of the March TEDRA agreement itself.

As the Karp Beneficiaries point out, this conclusion is consistent with the purpose and policies of the TEDRA statute and Washington common law.

The legislature expressly stated that the “overall purpose” of TEDRA is “to provide nonjudicial methods for the resolution of matters, such as mediation, arbitration, and agreement.”⁴⁴ Moreover, this appears to be consistent with the practice in trusts and estate, as illustrated by the following declaration from Professor Karen E. Boxx of the University of Washington School of Law:

Allowing the parties who initially reached a non-judicial resolution to a matter involving a trust or estate to subsequently change their agreement regardless of whether the original agreement or a memorandum of the agreement was filed with the court is without question within the intent and purpose of TEDRA.^[45]

The trial court erred when it concluded that the March TEDRA agreement could not be modified by the August TEDRA agreement.

The Linger Beneficiaries argue that the express language placing restrictions on modification also encompasses the March TEDRA agreement itself. They focus on the words “**any exercise**” to argue that the March TEDRA

⁴³ See id.

⁴⁴ RCW 11.96A.010.

⁴⁵ Clerk’s Papers at 537.

agreement “explicitly restricted ‘any exercise’ of Tom’s modification powers without complying with the modification restrictions.” But, as discussed previously, the plain language of the March TEDRA agreement indicates that the three-step process applies only to Tom’s “Modification Powers” over the trust or the will. The Linger Beneficiaries’ argument to the contrary is not persuasive.

Second, because we conclude that the March TEDRA agreement could be modified by a second TEDRA agreement, we look to the August TEDRA agreement to determine if it modified the March TEDRA agreement’s modification requirements.

The August TEDRA agreement acknowledged the three requirements imposed by the March TEDRA Agreement. It also recognized that TEDRA permits parties to execute a written agreement and that upon filling the agreement will be the equivalent of a final court order. It then stated:

5. Amendment. Tom desires, and James desires for Tom, to modify Article 8 [of the March 2009 trust instrument] in the form of the attached Exhibit A [first amendment to trust] and his Will in the form of the attached Exhibit B [first codicil to will]. The Parties agree and acknowledge that because the Modification Restrictions are imposed solely by virtue of the Agreement between the Parties, the Parties agree and represent that they are the sole necessary parties and have the power to modify such restrictions by further agreement. Additionally, and in any event, by virtue of RCW 11.96A.230, once this Amended [August TEDRA] Agreement (or a summary memorandum of such agreement) is filed, ***this Amended [August TEDRA] Agreement will satisfy the [March TEDRA] Agreement’s requirement to obtain a court order prior to any exercise of Tom’s Modification Powers. Accordingly, the Parties agree that this Amended [August TEDRA] Agreement is a more efficient method of enabling Tom to exercise such powers.***^[46]

⁴⁶ Id. at 437 (emphasis added).

Another provision stated:

b. Amendment. The Parties agree that the [March TEDRA] Agreement is hereby amended to provide that notwithstanding any provision of the Agreement, Trust or Will, the Parties agree that the Trust and Will are hereby amended as of the effective dates of such documents in the manner provided in the attached Exhibits A and B, respectively. Following the execution of the First Amendment and the First Codicil, the Modification Restrictions shall remain in full force, subject to further unanimous amendment of the Parties.^[47]

Overall, these provisions do not substantively change the three requirements in the March TEDRA agreement. Rather, the use of the term “satisfy” in the first of the two previous provisions shows that Tom and James were not trying to change the March TEDRA agreement’s requirements but instead, were trying to comply with them. Thus, we consider whether they did so.

Substantial Compliance

The next question that we decide is whether Tom substantially complied with the modification requirements set forth in the trust and in the March TEDRA agreement. By executing the August TEDRA agreement and filing a memorandum of this agreement, we hold that he did.

“The rule is that the settlor of a trust has the power to revoke the trust if and to the extent that, by the terms of the trust, he reserved such a power. Where the trust instrument specifies the method of revocation, only that method can be used.”⁴⁸

⁴⁷ *Id.* at 438.

⁴⁸ *In re Estate of Button*, 79 Wn.2d 849, 852, 490 P.2d 731 (1971) (citations omitted).

In Williams v. Bank of California N.A., the supreme court held that the doctrine of substantial compliance may be sufficient to validate a trust amendment.⁴⁹ The supreme court defined substantial compliance to mean “closely in conformance.”⁵⁰

There, the supreme court concluded that there was substantial compliance to uphold the trust amendment in question.⁵¹ The court stated that “the procedure used in adopting the amendment followed rather closely the method provided in the trust agreement.”⁵² It also stated that “there is no question concerning intent, requiring unyielding conformance to [the amendment provision] in this instance would only frustrate intent.”⁵³

This court also considered the validity of an amendment under the doctrine of substantial compliance in the case In re Estate of Tosh.⁵⁴ There, the trust provided that it could be amended by the trustor “by a duly executed instrument filed with Trustee.”⁵⁵ The parties attempted to amend the trust by “simply inserting a new page six into the previously executed document.”⁵⁶

⁴⁹ 96 Wn.2d 860, 867-68, 639 P.2d 1339 (1982).

⁵⁰ Id. at 866.

⁵¹ Id. at 868.

⁵² Id.

⁵³ Id. at 866-67.

⁵⁴ 83 Wn. App. 158, 920 P.2d 1230 (1996).

⁵⁵ Id. at 161-62.

⁵⁶ Id. at 161.

This court acknowledged that “[t]he record establishe[d] the clear intent of the trustor to effect an amendment to the trust document, and a reasonable belief on his part that he had done so.”⁵⁷ But it also stated:

[W]e are satisfied that merely substituting a page of a trust agreement is not a ‘duly executed instrument.’ A more formal procedure is required. The substituted page was not initialed, signed, or witnessed in writing. The date at the bottom of the substituted page remained unchanged. No addendum or attachment was added to the trust instrument. Indeed, nothing on the face of the document indicated that it had been amended.^[58]

In concluding that the amendment in that case was invalid, this court distinguished Williams on the basis that “no close conformity occurred” and on the basis that in Williams, “the requirements were eventually complied with.”⁵⁹ This court stated that “[c]lear evidence of both intent and belief cannot substitute for actually, or substantially, doing what is required.”⁶⁰

Here, as we previously discussed in this opinion, Article 3.2 of the trust required Tom to give written notice to the trustees. In this case, there is no dispute that Tom gave proper written notice of modification of this trust to the trustees. Thus, Article 3.2 is not at issue here.

Article 3.3 of the trust and the will both provide that Tom’s right to modify was also subject to the requirements of the March TEDRA agreement. This agreement expressly required Tom to do three things. First, he had to petition

⁵⁷ Id.

⁵⁸ Id. at 162.

⁵⁹ Id.

⁶⁰ Id.

the court for a hearing under RCW 11.96A and “clearly and specifically” set forth a particular proposal to exercise his reserved power to modify the March 2009 trust or will.⁶¹ Second, Tom was to provide James with a summons for the hearing.⁶² This included otherwise complying with RCW 11.96A. Third, Tom was required to obtain an order approving his exercise of his right to modify.⁶³ Tom’s compliance with these requirements is at issue.

Rather than utilizing the exact procedures set forth in the March TEDRA agreement, Tom and James substantially complied with these requirements by executing the August TEDRA agreement and later filing a memorandum of this agreement. The record indicates that Tom deemed the procedures utilized in August to be a more efficient method for him to modify the trust and will under the circumstances.

In the August TEDRA agreement, the parties expressly acknowledged “that Article 3.3 of the Trust and the [March TEDRA] Agreement require Tom to [follow the three-step process] in order to exercise his retained right to modify the terms of the Trust or Will.”⁶⁴ The August TEDRA agreement also stated:

5. Amendment. Tom desires, and James desires for Tom, to modify Article 8 [of the March 2009 trust] in the form of the attached Exhibit A [first amendment to trust] and his Will in the form of the attached Exhibit B [first codicil]. The Parties agree and acknowledge that because the Modification Restrictions are

⁶¹ Clerk’s Papers at 429.

⁶² Id.

⁶³ Id.

⁶⁴ Id. at 436.

imposed solely by virtue of the Agreement between the Parties, the Parties agree and represent that they are the sole necessary parties and have the power to modify such restrictions by further agreement. Additionally, and in any event, by virtue of RCW 11.96A.230, once this Amended [August TEDRA] Agreement (or a summary memorandum of such agreement) is filed, ***this [August TEDRA] Agreement will satisfy the [March TEDRA] Agreement's requirement to obtain a court order prior to any exercise of Tom's Modification Powers. Accordingly, the Parties agree that this Amended [August TEDRA] Agreement is a more efficient method of enabling Tom to exercise such powers.***^[65]

The emphasized language in this provision shows the parties' clear intent to satisfy the modification requirements in the March TEDRA agreement. It also shows that they believed this to be a more efficient method than petitioning the court, conducting a hearing, and obtaining an order entered by a judge. This election is completely consistent with the policy of TEDRA, which promotes efficiency through nonjudicial methods for resolution of matters.⁶⁶

Most importantly, the procedures stated in the August TEDRA agreement and followed by the parties substantially comply with those stated in the March TEDRA agreement.

First, Tom elected not to petition for a hearing under RCW 11.96A to obtain approval to modify the trust and his will of March 25, 2009. Instead, he and James agreed, in writing, to the express terms of the modifications to each, as evidenced by both signing the August TEDRA agreement. This agreement

⁶⁵ *Id.* at 437 (emphasis added).

⁶⁶ *See* RCW 11.96A.010 ("The overall purpose of this chapter is . . . to provide nonjudicial methods for the resolution of matters, such as mediation, arbitration, and agreement.").

includes as attachments unsigned copies of the first codicil and the first amendment to trust, specifying the exact modification to each sought.

Second, Tom did not provide James with a summons for the hearing described in the prior paragraph of this opinion. Instead, Tom and James agreed, in writing, that both the will and the trust should be modified in accordance with the express terms of the August TEDRA agreement. Because the only parties to the agreement stipulated to the result, it is unclear what purpose the hearing that the Linger Beneficiaries argue should have occurred would have accomplished. We see none.

Third, there was no hearing and no court order entered by a judge approving the modifications. Instead, the parties stipulated, in writing, that the procedures of the August TEDRA agreement were sufficient to satisfy the requirements of the March TEDRA agreement.

Significantly, counsel for Tom filed with the court a memorandum summarizing this agreement. RCW 11.96A.230(2) states, "On filing the agreement or memorandum, the agreement ***will be deemed approved by the court and is equivalent to a final court order . . .***"⁶⁷ Although this memorandum is not in the record, the parties do not dispute that it was filed.

The filing with the superior court of the memorandum made the August TEDRA agreement, by operation of law, one "deemed approved by the court" and "equivalent to a final court order."⁶⁸ Accordingly, the final requirement of the

⁶⁷ (Emphasis added.)

⁶⁸ RCW 11.96A.230.

March TEDRA agreement, obtaining a court order, was fulfilled by this filing under the plain words of RCW 11.96A.230.

In sum, the August TEDRA agreement between Tom and James substantially complied with the provisions of the March TEDRA agreement. Although Tom utilized a different method than the one expressed in the March TEDRA agreement, the method he utilized closely followed the March TEDRA agreement's process. The first amendment to trust, effective as of August 27, 2009, and the first codicil of even date were not void as a matter of law.

The Linger Beneficiaries argue that there was no substantial compliance with the provisions of the March TEDRA agreement. They are wrong.

First, they argue that the first requirement to petition a court for a hearing was not substantially complied with because "Tom desired that a court would review the modifications sought to be made." That is possible.

But even if we agreed that Tom desired a court to review the proposed modifications, it is clear that James reviewed and approved the changes. Why court intervention under these circumstances would be required is left unexplained. This is particularly true in view of the fact that TEDRA, to which Tom specifically referred in both TEDRA agreements, permits an agreement to be "deemed approved" on the filing with the court of the memorandum of the agreement.⁶⁹ In short, TEDRA contemplates that court review of all agreements is not required.

⁶⁹ See RCW 11.96A.230(2).

Second, the Linger Beneficiaries correctly concede that it “is conceivable that James’ execution of the August TEDRA agreement was substantial compliance with the notice provision to James.” But they then argue that the notice requirement was not met because “all interested parties” must also receive notice.

But the notice requirement in the March TEDRA agreement was imposed solely by virtue of the March TEDRA agreement, and it only required notice to James. It did not require notice to anyone else. It states that Tom must “timely provide[] James with a summons for such hearing pursuant to RCW 11.96A.100 (and otherwise compl[y] with the substantive and procedural provisions of RCW 11.96A).” The Linger Beneficiaries fail to explain how the notice requirement of the March TEDRA agreement requires notice to them. Thus, their argument is not persuasive.

Third, they argue that the third requirement in the March TEDRA agreement was not substantially complied with because the court did not issue an order before the amendments occurred. They also argue that “equivalent” to a court order is not the same as “obtaining a court order.” This argument makes little sense in the context of this discussion about the application of the doctrine of substantial compliance. But as we already discussed, there was substantial compliance with the court order requirement by the filing of the memorandum of the August TEDRA agreement.

Fourth, the Linger Beneficiaries argue that substantial compliance requires “near perfect compliance” and that the changes to the trust “substantially

changed Tom's estate plan." But substantial compliance does not look to the substantive changes resulting from the amendment. Rather, it focuses on the procedures used to institute those changes.⁷⁰ Thus, this argument is not analytically relevant.

Lastly, the Linger Beneficiaries make a number of arguments that the August TEDRA agreement did not comply with the procedural and substantive requirements of TEDRA. For the reasons that follow, we reject these arguments.

These arguments involve interpretation of the TEDRA statute. When interpreting a statute, we seek to determine and follow the legislature's intent.⁷¹ "If the statute's meaning is plain, we give effect to that plain meaning as the expression of the legislature's intent."⁷²

First, the Linger Beneficiaries argue that the August TEDRA agreement did not resolve a "matter" as defined by TEDRA. This is incorrect.

RCW 11.96A.030(2) states:

"Matter" includes *any* issue, question, or dispute involving:

...

(c) The determination of any question arising in the administration of an estate or trust . . . that may include, without limitation, questions relating to: (i) The construction of wills, trusts . . . and other writings

⁷⁰ See Williams, 96 Wn.2d at 866.

⁷¹ See Bostain v. Food Express, Inc., 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

⁷² Id.

The plain words of this definition of “matter” make clear the broad scope of this term. There simply is no persuasive argument here that the subject of the TEDRA agreement did not fall within this definition.

Even if we were required to go beyond the plain words that define the very broad scope of this term, comments to the Senate Bill by the Washington State Bar Association Real Property, Probate & Trust Section support this conclusion:

The term “matter” establishes the issues, questions and disputes involving trusts and estates that can be resolved by judicial or nonjudicial action under the Act. This term is meant to apply broadly and is intended to encompass matters traditionally within the exclusive province of the courts. This is consistent with the overall purpose of the Act, which is to foster nonjudicial resolution of issues confronting estates and trusts.^[73]

Second, the Linger Beneficiaries argue that Tom did not give notice to or obtain the signatures of “all parties” as required by TEDRA. Specifically, the Linger Beneficiaries argue that they were entitled to notice under RCW 11.96A.110 and that their signatures were required to create a TEDRA agreement under RCW 11.96A.220. They are again wrong.

RCW 11.96A.110 provides that in judicial proceedings requiring notice, the notice must be personally served on all parties or the parties’ virtual representatives.

⁷³ WSBA REAL PROPERTY, PROBATE & TRUST SECTION, COMMENTS TO THE TRUST AND ESTATE DISPUTE RESOLUTION ACT TEDRA § 104(1) (RCW 11.96A.030) – Matter at 1, (1999), [available at](http://www.wsbarpvt.com/comments/tedra99.pdf) www.wsbarpvt.com/comments/tedra99.pdf.

RCW 11.96A.220 through 11.96A.250 provide “a binding nonjudicial procedure to resolve matters through written agreements among the parties interested in the estate or trust.”⁷⁴

Whether the Linger Beneficiaries were “parties” for purpose of the August TEDRA agreement is the issue. We hold they were not.

TEDRA defines a “party” as any member of a listed category who “has an interest in the subject of the particular proceeding”⁷⁵ One of the listed categories is “trust beneficiaries.”⁷⁶

In In re Estate of Becker, the supreme court looked to the definition of “party” in TEDRA and observed that was limited to one “who has an interest in the subject of the particular proceeding.”⁷⁷ There, the supreme court concluded that a surviving spouse who received nothing under the decedent’s will was a person interested in the decedent’s estate for purposes of TEDRA.⁷⁸

Here, the Linger Beneficiaries are contingent trust beneficiaries. This appears to fall within the category of “trust beneficiaries.” But in order to be a “party,” the Linger Beneficiaries must also “[*have*] *an interest* in the subject of

⁷⁴ RCW 11.96A.210.

⁷⁵ RCW 11.96A.030(5).

⁷⁶ RCW 11.96A.030(5)(e).

⁷⁷ In re Estate of Becker, 177 Wn.2d 242, 247, 298 P.3d 720 (2013) (quoting RCW 11.96A.030(5)).

⁷⁸ Id.

the particular proceeding.”⁷⁹ The statutory language indicates that the interest must be a present interest. It further indicates that the interest is specific to the “particular proceeding” at issue. The Linger Beneficiaries had no such interest at the time of the August TEDRA agreement, which was prior to James’s death and Tom’s death.

In Pond v. Faust, the supreme court concluded that a court has no authority to inquire into the validity of a will prior to the death of the maker, to determine the competency of the maker.⁸⁰ A Florida court cited Pond in concluding that a guardian cannot contest the validity of a revocable trust during the settlor’s lifetime based on undue influence.⁸¹ This is because “a revocable trust is a unique instrument which has no legal significance until the settlor’s death.”⁸² This result arises from the same principle announced in Pond.

Further, California courts have noted a difference in a beneficiary’s interest in revocable and irrevocable trusts.⁸³ “With the creation of an irrevocable trust, trust beneficiaries acquire a vested and present beneficial interest in the trust property, and their interests are not subject to divestment as with a

⁷⁹ RCW 11.96A.030(5).

⁸⁰ 90 Wash. 117, 120-21, 155 P. 776 (1916).

⁸¹ Ullman v. Garcia, 645 So. 2d 168, 170 (Fla. Dist. Ct. App. 1994).

⁸² Id.

⁸³ See, e.g., Empire Props. v. County of Los Angeles, 44 Cal. App. 4th 781, 787, 52 Cal. Rptr. 2d 69 (Cal. Ct. App. 1996).

revocable trust. Thus, the nature of a beneficiary's interest differs materially depending on whether the trust is revocable or irrevocable.”⁸⁴

Here, it is undisputed that the subject of the August TEDRA agreement dealt with Tom's first amendment to trust and his first codicil. It is also undisputed that the trust was revocable and that this transaction was conducted while the trustor was still alive. Accordingly, the Linger Beneficiaries did not then have a legally cognizable interest at the time of the August TEDRA agreement. Moreover, because the subject of the proceeding was modification of the trust and will, the Linger Beneficiaries fail to show that they had an interest in this particular proceeding.

For these reasons, they were not proper parties for purpose of this agreement.

Finally, we address two other specific concerns that the trial court identified when it invalidated the first amendment to trust and the first codicil as a matter of law. The court stated: (1) “If this court gives full effect to Tom's intent as set forth in the March TEDRA agreement, then it cannot enforce that August agreement entered in contravention of the terms of the prior agreement”; and (2) “[T]he modifications to the trust and will were made prior to the entry of the TEDRA agreement allegedly giving the authority to modify or revoke.”⁸⁵ Each of these concerns will be addressed in turn.

⁸⁴ Id. at 787.

⁸⁵ Clerk's Papers at 814-15, 811.

First, as discussed earlier in this opinion, the August TEDRA agreement stated that it “will satisfy” the March TEDRA agreement requirements. The plain language of the August TEDRA agreement indicates that Tom recognized the process set out in March and intended to comply with it, using a more efficient method. This is not a contradictory intent.

Second, the trial court concluded that the modifications to the trust and will were invalid because they were made prior to the filing of the August TEDRA agreement. In reaching this conclusion, the court noted that the memorandum of the binding agreement was not filed with the court until February 2, 2010.⁸⁶ The trial court also noted that James did not sign the agreement until September 23, 2009.⁸⁷ Neither reason supports the court’s conclusion.

RCW 11.96A.230(1) states that any party “*may* file the written agreement or a memorandum summarizing the written agreement with the court” It also states that “[f]ailure to complete any action authorized or required under this subsection does not cause the written agreement to be ineffective and the agreement is nonetheless binding and conclusive on all persons interested in the estate or trust.”⁸⁸

Accordingly, filing is permissive, not mandatory. But even if the agreement was not filed until a later date, the plain language of TEDRA shows that the filing date is irrelevant to the effectiveness of the agreement.

⁸⁶ Id. at 812.

⁸⁷ Id.

⁸⁸ RCW 11.96A.230(1).

Further, although James did not sign the agreement until September 23, by its express terms, the August TEDRA agreement expressly states that it is effective as of August 27, 2009. The August TEDRA agreement, the first amendment to the trust, and first codicil were all effective on the same day—August 27, 2009.

In sum, the August TEDRA agreement substantially complied with the modification process set out in the March TEDRA agreement. Further, it complied with the relevant provisions of TEDRA.

The Karp Beneficiaries argue in the alternative that the August TEDRA agreement modified the terms of the March TEDRA agreement and that Tom strictly complied with the modification requirements. Because we conclude that the August TEDRA agreement between Tom and James substantially complied with the provisions of the March TEDRA agreement, we need not address this argument.

RIGHT TO APPEAL

The Karp Beneficiaries, on behalf of themselves, the estate and the trust, argue that the trial court erred when it concluded that the personal representative and trustee cannot appeal a summary judgment ruling invalidating the first codicil and first amendment to the trust. We agree.

As a threshold issue, the Linger Beneficiaries argue that the Karp Beneficiaries do not have standing to appeal this ruling because it was the trust and estate that petitioned for instructions from the court. But this argument ignores several facts.

First, the Karp Beneficiaries supported the petition for instructions by the personal representative of the estate and the trustees of the trust. Thus, they are aggrieved parties by virtue of the superior court's order vacating the commissioner's ruling.⁸⁹ Second, their briefing on appeal covers their arguments and those of the personal representative and trustees, who also timely appealed the orders before us.⁹⁰ Thus, the standing argument carries no weight.

For a ruling on a motion for revision, the superior court reviews the commissioner's decisions de novo based on the evidence and issues before the commissioner.⁹¹ On appeal, this court reviews the trial court's ruling, not the commissioner's.⁹²

Generally, a personal representative has a right to appeal an adverse decision in a will contest. The supreme court has stated, "Where a will is contested, whether before or after its probate, it is the duty of the executor to take all legitimate steps to uphold the testamentary instrument"⁹³

⁸⁹ See State v. Taylor, 150 Wn.2d 599, 603, 80 P.3d 605 (2003) (An "aggrieved party" entitled to appeal is "one whose personal right or pecuniary interests have been affected.").

⁹⁰ See RAP 10.1(g) "In cases consolidated for the purpose of review and in a case with more than one party to a side, a party may (1) join with one or more other parties in a single brief, or (2) filed a separate brief and adopt by reference any part of the brief of another."

⁹¹ In re Marriage of Moody, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999).

⁹² In re Marriage of Fairchild, 148 Wn. App. 828, 831, 207 P.3d 449 (2009).

⁹³ In re Klein's Estate, 28 Wn.2d at 475.

Additionally, the supreme court has held, “A trustee, in his fiduciary or representative capacity, is aggrieved by a judgment which threatens the continuance of the trust in the form directed by the trustor, whether or not the beneficiaries appeal. He is more than a mere stakeholder.”⁹⁴ Trustees “have standing and indeed a duty to appeal to protect the integrity and fundamental purpose of the trust.”⁹⁵ Further, “A trustee who is a party to an action in representative capacity need not have a personal interest in the controversy to have a right to appeal if it is his duty to appeal in order to protect the interest of those whom he represents.”⁹⁶

In re Ferrall's Estate, a case from the Supreme Court of California, is also instructive.⁹⁷ There, Faye F. Hamilton petitioned the probate court for an order requiring the trustees to pay her certain sums.⁹⁸ The probate court ordered the trustees to pay from the income and corpus of the trust until further notice, and the trustees appealed.⁹⁹ On appeal, the supreme court considered whether the trustee could appeal such an order.¹⁰⁰

⁹⁴ Retail Store Emps. Union, Local 1001 Chartered By Retail Clerks Int'l Ass'n, AFL-CIO v. Wash. Surveying & Rating Bureau, Wash. Bureau, 87 Wn.2d 887, 893, 558 P.2d 215 (1976).

⁹⁵ Id. at 894.

⁹⁶ Id.

⁹⁷ 33 Cal. 2d 202, 200 P.2d 1 (1948).

⁹⁸ Id. at 203.

⁹⁹ Id. at 204.

¹⁰⁰ Id.

The court cited the general rule that “trustees acting in their representative capacities cannot by an appeal litigate the conflicting claims of beneficiaries.”¹⁰¹ But it stated that the rule “has generally been limited, however, to prohibiting appeals by a trustee from orders merely determining which beneficiaries are entitled to share in a particular fund.”¹⁰² The court then stated:

The trustee is permitted to appeal from an order of termination in order to give effect to trust purposes that can be served only by the continued administration of the trust. An appeal by a trustee may be necessary in order to determine whether the trial court properly ordered its termination. If such an appeal were not allowed, the trial court, when all beneficiaries consent, could completely disregard the provisions of the trust, even though there is no justification for a deviation from its terms. There is no substantial difference in this respect between an order that terminates a trust and an order that modifies it contrary to a specific provision. ***In either case the litigation does not involve merely the conflicting claims of beneficiaries to a particular fund, but concerns the performance of a duty by the trustees to protect the trust against an attack that goes to the very existence of the trust itself.***^{103]}

Finally, the court concluded, “To deny the trustees an appeal under these circumstances would render them helpless to prevent invasions of the corpus that might defeat the plan of the trustor or even destroy the trust itself.”¹⁰⁴

Here, under Washington law, it is the duty of the personal representative of Tom’s will to take legitimate steps to uphold the testamentary instrument, including the first codicil.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id. at 205-06.

¹⁰⁴ Id. at 206.

Additionally, the motion for summary judgment was not litigation involving conflicting claims of beneficiaries. Rather, the motion for summary judgment sought to invalidate the first amendment to the trust as a matter of law. Accordingly, the trustee had a similar duty—to protect the plan of the trustor and protect the trust itself.

In sum, both the personal representative and the trustee had a right to appeal the order that declared the first amendment to the trust and the first codicil null and void as a matter of law.

The Karp Beneficiaries also rely on TEDRA for the proposition that the personal representative and trustee have a right to appeal, but we need not rely on this argument to conclude that they had this right.

The Linger Beneficiaries argue that “if the Trust were permitted to appeal the trial court’s grant of summary judgment, it would place the Trustees in direct conflict with the beneficiaries of the Trust.” But, as discussed previously, the trustee has a right to protect the plan of the trustor or defend the trust itself.

The Linger Beneficiaries rely on In re Cannon’s Estate to argue that “where the dispute is about who has a right to receive, and there is no impairment of the estate, the estate itself does not have a right to appeal.”¹⁰⁵ But this is not a dispute about who has the right to receive. Rather, it is a dispute about the validity of the first amendment to trust, a testamentary instrument. The Linger Beneficiaries’ argument is not persuasive.

¹⁰⁵ Respondent’s Brief at 46 (citing In re Cannon’s Estate, 18 Wash. 101, 50 P. 1021 (1897)).

ATTORNEY FEES

The Linger Beneficiaries request an award of attorney fees based on RCW 11.96A.150.

RCW 11.96A.150(1) states that “any court on an appeal may, in its discretion, order costs, including reasonable attorneys’ fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings.” Additionally, the court may consider any factors it deems relevant and appropriate which may include “whether the litigation benefits the estate or trust involved.”¹⁰⁶

Here, the Linger Beneficiaries do not provide any persuasive reason for an award in their favor. Accordingly, we deny this request.

SUMMARY

To summarize, neither the first amendment to the trust effective on August 27, 2009 nor the first codicil of even date is void as a matter of law for the reasons before us. Tom substantially complied with the modification provisions of the trust and the March TEDRA agreement. Moreover, Tom filed a memorandum of the August TEDRA agreement, making the agreement one deemed approved by the court and equivalent to a court order. This agreement also complied with the relevant provisions of TEDRA.

We do not address the capacity of Tom to either enter into the two TEDRA agreements or make the testamentary instruments at issue in this case. Neither

¹⁰⁶ RCW 11.96A.150(1).

his capacity nor whether he was subject to undue influence at any relevant time is properly before us at this time. These and other issues are to be determined, in the first instance, by the trial court on remand.

We reverse the orders that are before us and remand for further proceedings.

Cox, J.

WE CONCUR:

Leach, J.

Dwyer, J.

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Right of party to joint or mutual will, made pursuant to agreement as to disposition of property at death, to dispose of such property during life

Phillip E. Hassman, J.D.

TABLE OF CONTENTS

Article Outline

Index

Table of Cases, Laws, and Rules

Research References

ARTICLE OUTLINE

I Prefatory Matters

§ 1[a] Introduction—Scope

§ 1[b] Introduction—Related matters

§ 2[a] Summary and comment—Generally

§ 2[b] Summary and comment—Practice pointers

II Factors determining validity of transfers made during lifetime of all parties

A Express terms of agreement or will

§ 3 Provision restricting transfers by survivor

§ 4 Provision preserving ownership rights during lifetime

§ 5 Provision limiting agreement to property owned at time of death

B Other factors

§ 6 Transfers made with intent to defeat agreement

§ 7 Previous breach of agreement by other party

§ 8 State statute governing contracts between husband and wife

C Application to specific transfers

§ 9[a] Gift—Held proper

§ 9[b] Gift—Held improper

§ 10[a] Transfer to joint survivorship bank accounts or bonds—Held proper

§ 10[b] Transfer to joint survivorship bank accounts or bonds—Held improper

§ 11 Other transfers

III Factors determining survivor's power to make inter vivos transfers

A Express terms of agreement or will

§ 12 Survivor given fee simple title

§ 13 Survivor given life estate

§ 14 Transfer expressly authorized

§ 15 Transfer expressly forbidden

§ 16[a] Power to transfer not defined—Considered authority to freely transfer property

§ 16[b] Power to transfer not defined—Considered restriction on authority to transfer

§ 17[a] Beneficiary granted only that which survivor "may own at time of death," or the like—Considered authority to freely transfer property

§ 17[b] Beneficiary granted only that which survivor "may own at time of death," or the like—Considered authority to transfer only for necessities and the like

§ 18 Beneficiary granted specifically designated property

B Other factors

§ 19 Transfers for survivor's support and maintenance

§ 20 Transfers to beneficiaries as advance or settlement of legacy

IV Restrictions on survivor's power to make inter vivos transfers

§ 21 Transfers in avoidance of contract or will

§ 22 Undue influence on part of transferee

§ 23 Relevance of survivor's original property interest

V Application to specific transfers by survivor

A Transfers without valuable consideration; joint will

§ 24[a] Transfer of full interest—to children or grandchildren—Held proper

§ 24[b] Transfer of full interest—to children or grandchildren—Held improper

§ 25[a] To new spouse—Held proper

§ 25[b] To new spouse—Held improper

§ 26[a] To others—Held proper

§ 26[b] To others—Held improper

§ 27[a] Transfer reserving life estate—Held proper

§ 27[b] Transfer reserving life estate—Held improper

§ 28[a] Transfer to self and another jointly—Held proper

§ 28[b] Transfer to self and another jointly—Held improper

B Transfers Without Consideration; separate mutual wills

§ 29[a] Transfer of full interest—to children or grandchildren—Held proper

§ 29[b] Transfer of full interest—to children or grandchildren—Held improper

§ 30 To new spouse

§ 31[a] To others—Held proper

§ 31[b] To others—Held improper

§ 32[a] Other transfers—Held proper

§ 32[b] Other transfers—Held improper

C Transfer for valuable consideration

§ 33[a] Sale or lease—Held proper

§ 33[b] Sale or lease—Held improper

§ 34[a] Mortgage—Held proper

§ 34[b] Mortgage—Held improper

§ 35[a] In exchange for care of survivor or estate—Held proper

§ 35[b] In exchange for care of survivor or estate—Held improper

Research References

INDEX

Absolutely and without reservations § 19
Absolute will § 15
Advance or settlement of legacy, transfers to beneficiaries as § 20
Authorized transfer § 14
Avoidance of contract or will, transfers in § 21
Bank accounts §§3,10
Bonds §§10,28[b]
Care of survivor or estate, transfer in exchange for § 35
Children, transfers to §§24,29,31[b]
Church, transfer of property to §§26,32[a]
Comment § 2
Competency at time of conveyance § 35[a]
Consideration, transfers with or without §§24-35
Constructive trust upon property §§7,16[b]
Creditors, conveyance made with intent to defraud § 10[a]
Date of gift executed to new wife § 25[b]
Designated property, beneficiary granted § 18
Divorce, interlocutory divorce decree §§7,11
Equitable division of residue § 28[b]
Exchange for care of survivor or estate § 35
Express terms of agreement or will §§3-5,12-18
Factors determining survivor's power to make inter vivos transfers §§12-20
Factors determining validity of transfers made during lifetime of all parties §§3-11
Fee simple title, survivor given § 12
Forbidden transfer § 15
Fraudulent intent or scheme §§6,10[a],22,25[a],29[b]
Freely transferred property §§16[a],17[a]
Full interest, transfer of §§24,29
Gift §§9,26[a]
Government bonds, purchase of § 28[b]
Grandchildren, transfer to §§24,29,31[b]
Gratuitously transferred property to new spouse § 25[a]
Housekeeper, deeding house to § 26[b]
Husband and wife, transfers to or between §§8,19,25,30,31[b]
Intent to defeat agreement, transfers made with § 6
Interlocutory divorce decree §§7,11
Introduction § 1
Joint survivorship bank accounts or bonds, transfer to § 10
Lease § 33
Legacy, transfer to beneficiary as settlement of § 20
Life estates §§13,17[b],27
Limitation or defeasible fee simple title § 14
Limiting agreement to property owned at time of death, provisions for § 5

Love and affection as sufficient consideration § 27[a]
"May own at time of death" § 17
Mentally competent at time of conveyance § 35[a]
Mortgage §§13,23,34
Necessities, considered authority to transfer only for § 17[b]
New spouse, transfer of full interest to §§25,30
Niece, transfer of property to § 31[b]
Other transfers § 11
Ownership of property at time of death, provision limiting agreement to § 5
Ownership rights during lifetime, provision preserving § 4
Power to transfer not defined § 16
Practice pointers § 2[b]
Prefatory matters §§1,2
Previous breach of agreement by other party § 7
Property settlement § 11
Related matters § 1[b]
Relatives, sufficient consideration of intent to give shares of estate to § 26[b]
Relevance of survivor's original property interest § 23
Remaindermen, surviving wife as quasi trustee for § 19
Reserving life estate, transfer of § 27
Residuary beneficiary § 20
Restriction on transfer §§16[b],21-23
Revoking will secretly and without the knowledge of the other § 6
Sale of property §§14,33
Savings accounts transferred under joint tenancy accounts § 28[a]
Savings bonds, purchase of § 28[b]
Scope of annotation § 1[a]
Self and another jointly, transfer to § 28
Separate mutual wills, transfers without consideration §§29-32
Settlement of legacy, transfers to beneficiaries as § 20
Sister, transfer of property to § 31[a]
Specifically designated property, beneficiary granted § 18
Specific transfers, application to §§9-11,24-35
State statutes governing contracts between husband and wife § 8
Substantial consideration, lack of § 18
Summary § 2
Support and maintenance, transfers for survivors § 19
Third party beneficiary § 20
Totten trust accounts § 26[b]
Undue influence on part of transferee § 22
Unexpended residue § 17[b]
University, transfer of property to § 31[b]
Valuable consideration, transfer for or without §§24-28,33-35

Table of Cases, Laws, and Rules

Fifth Circuit

Scales v. Scales, 297 F.2d 219 (5th Cir. 1961) — 33[a]

Seventh Circuit

Newman v. U.S., 176 F. Supp. 364 (S.D. Ill. 1959) — 2[b]

Arkansas

Dotson v. Dotson, 2009 Ark. App. 819, 372 S.W.3d 398 (2009) — 3

Iwerson v. Dushek, 260 Ark. 771, 543 S.W.2d 942 (1976) — 16[b], 19, 28[b]

California

Behrendt v. Abraham, 64 Cal. 2d 182, 49 Cal. Rptr. 292, 410 P.2d 828 (1966) — 33[a]

Brewer v. Simpson, 53 Cal. 2d 567, 2 Cal. Rptr. 609, 349 P.2d 289 (1960) — 2[b], 30

Brown v. Superior Court in and for Los Angeles County, 34 Cal. 2d 559, 212 P.2d 878 (1949) — 6, 30

Chase v. Leiter, 96 Cal. App. 2d 439, 215 P.2d 756 (1st Dist. 1950) — 3, 10[b]

Halldin v. Usher, 49 Cal. 2d 749, 321 P.2d 746 (1958) — 19, 33[a]

Mitchell v. Bagot, 48 Cal. App. 2d 281, 119 P.2d 758 (1st Dist. 1941) — 15

Mitchell v. Marklund, 238 Cal. App. 2d 398, 47 Cal. Rptr. 756 (5th Dist. 1965) — 7, 11

Mulholland, Estate of, 20 Cal. App. 3d 392, 97 Cal. Rptr. 617 (3d Dist. 1971) — 17[b], 26[b]

Colorado

Doerfer's Estate, In re, 100 Colo. 304, 67 P.2d 492 (1937) — 15, 21, 31[b]

McLean v. Jones, 90 Colo. 213, 8 P.2d 261 (1932) — 7

Murphy v. Glenn, 964 P.2d 581 (Colo. App. 1998) — 11

Florida

Boyle v. Schmitt, 578 So. 2d 367 (Fla. 3d DCA 1991) — 6

Georgia

Callaway v. Faust, 212 Ga. 596, 94 S.E.2d 379 (1956) — 12, 25[a]

Caudell v. Caudell, 260 Ga. 802, 401 S.E.2d 2 (1991) — 12

Idaho

Ohms v. Church of the Nazarene, Weiser, Idaho, 64 Idaho 262, 130 P.2d 679 (1942) — 16[a], 32[a]

Illinois

Baughman's Estate, In re, 20 Ill. 2d 593, 170 N.E.2d 557 (1960) — 2[b]

Bell's Estate, In re, 6 Ill. App. 3d 802, 286 N.E.2d 589 (1st Dist. 1972) — 21, 23, 28[b]

Dekker v. U.S., 245 F. Supp. 255 (S.D. Ill. 1965) (applying Illinois law) — 17[a]

Erickson, In re Estate of, 363 Ill. App. 3d 279, 299 Ill. Dec. 372, 841 N.E.2d 1104 (4th Dist. 2006) — 21

First United Presbyterian Church v. Christenson, 64 Ill. 2d 491, 1 Ill. Dec. 344, 356 N.E.2d 532, 85 A.L.R.3d 1 (1976) — 15, 16[b], 23, 26[b]

Jusko v. Grigas, 26 Ill. 2d 92, 186 N.E.2d 34 (1962) — 23

Newman v. U.S., 176 F. Supp. 364 (S.D. Ill. 1959) (applying Illinois law) — 12

Rucker v. Harris, 91 Ill. App. 2d 208, 234 N.E.2d 392 (1st Dist. 1968) — 13, 23, 26[b]

Suwalski v. Suwalski, 112 Ill. App. 2d 98, 251 N.E.2d 279 (1st Dist. 1969) — 12, 33[a]

Tontz v. Heath, 20 Ill. 2d 286, 170 N.E.2d 153 (1960) — 2[b], 21, 23, 24[b], 28[b], 33[b]

Indiana

Cramer v. Echelbarger, 142 Ind. App. 374, 234 N.E.2d 864 (1968) — 18, 32[b]

Lawrence v. Ashba, 115 Ind. App. 485, 59 N.E.2d 568 (1945) — 19, 21, 23, 30

Leighty v. Walker, 136 Ind. App. 152, 193 N.E.2d 138 (1963) — 35[a]

Moore v. Harvey, 406 N.E.2d 354 (Ind. Ct. App. 1980) — 16[a]

Sample v Butler University (1936) 211 Ind 122, 4 NE2d 545, 108 ALR 857 — 17[b], 21, 31[b]

Iowa

Bird v. Jacobus, 113 Iowa 194, 84 N.W. 1062 (1901) — 5, 6, 11

Campbell v. Dunkelberger, 172 Iowa 385, 153 N.W. 56 (1915) — 23, 24[b], 31[a]

Culver v. Hess, 234 Iowa 877, 14 N.W.2d 692 (1944) — 12, 33[a]

DeJong v. Huysler, 233 Iowa 1315, 11 N.W.2d 566 (1943) — 21, 27[b]

Jennings v. McKeen, 245 Iowa 1206, 65 N.W.2d 207 (1954) — 2[b], 18, 23, 24[b], 27[b], 31[a]

Lenders' Estate, In re, 247 Iowa 1205, 78 N.W.2d 536 (1956) — 2[b], 12, 17[a], 21, 28[a], 31[a]

Logan's Estate, In re, 253 Iowa 1211, 115 N.W.2d 701 (1962) — 12, 27[b]
McCuen v. Hartsock, 159 N.W.2d 455 (Iowa 1968) — 12, 23, 28[a]
Nettz v. Phillips, 202 F. Supp. 270 (S.D. Iowa 1962) (applying Iowa law) — 12
Ramthun's Estate, In re, 249 Iowa 790, 89 N.W.2d 337 (1958) — 33[a]
Tiemann v. Kampmeier, 252 Iowa 587, 107 N.W.2d 689 (1961) — 13, 19, 23, 25[b]
U.S. v. 1,453.49 Acres of Land, More or Less, in Marion, Polk, Warren, and Jasper Counties, State of Iowa, 245 F. Supp. 582 (S.D. Iowa 1965) (applying Iowa law) — 21, 27[b]

Kansas

Beall v. Hardie, 177 Kan. 353, 279 P.2d 276 (1955) — 14, 33[a]
Berry v. Berry's Estate, 168 Kan. 253, 212 P.2d 283 (1949) — 23
Buckner's Estate, In re, 186 Kan. 176, 348 P.2d 818 (1960) — 21, 26[b], 28[b]
Eikmeier v. Eikmeier, 174 Kan. 71, 254 P.2d 236 (1953) — 13, 30
Fourth Nat. Bank v. First Presbyterian Church, 134 Kan. 643, 7 P.2d 81 (1932) — 14, 19, 26[a]
Johnson v. Soden, 152 Kan. 284, 103 P.2d 812 (1940) — 16[b], 29[b]
Jones' Estate, In re, 189 Kan. 34, 366 P.2d 792 (1961) — 12, 18, 19
Klooz v. Cox, 209 Kan. 347, 496 P.2d 1350 (1972) — 21, 28[b]
National Life Ins. Co. of Montpelier, Vt., v. Watson, 141 Kan. 903, 44 P.2d 269 (1935) — 23, 34[a]
Seal v. Seal, 212 Kan. 55, 510 P.2d 167 (1973) — 21, 23, 26[b]
Tompkins' Estate, In re, 195 Kan. 467, 407 P.2d 545 (1965) — 19, 21, 26[b], 28[b]
Weidman's Estate, In re, 181 Kan. 718, 314 P.2d 327 (1957) — 16[b]

Kentucky

Boner's Adm'x v. Chesnut's Ex'r, 317 S.W.2d 867 (Ky. 1958) — 16[a], 33[a]
Hatfield v. Jarrell, 433 S.W.2d 346 (Ky. 1968) — 21, 25[b]
McGuire v. McGuire, 74 Ky. 142, 11 Bush 142, 1875 WL 11465 (1875) — 22, 29[b]
Price v. Aylor, 258 Ky. 1, 79 S.W.2d 350 (1935) — 16[b], 19, 25[b]
Wright v. Wright, 215 Ky. 394, 285 S.W. 188 (1926) — 6, 9[b]

Maine

McKusick, Estate of, 629 A.2d 41 (Me. 1993) — 28[b]

Michigan

Carmichael v. Carmichael, 72 Mich. 76, 40 N.W. 173 (1888) — 22, 29[b]

Getchell v. Tinker, 291 Mich. 267, 289 N.W. 156 (1939) — 26[b]

Kozyra v. Jackman, 60 Mich. App. 7, 230 N.W.2d 284 (1975) — 20, 24[a]

Leix Estate, In re, 289 Mich. App. 574, 797 N.W.2d 673 (2010) — 4, 16[a]

Phelps v. Pipher, 320 Mich. 663, 31 N.W.2d 836 (1948) — 14, 29[a]

Sage v. Sage, 230 Mich. 477, 203 N.W. 90 (1925) — 14, 21, 35[a]

Schondelmayer v. Schondelmayer, 320 Mich. 565, 31 N.W.2d 721 (1948) — 33[b]

Smith v. Caswell, 278 Mich. 209, 270 N.W. 270 (1936) — 20, 24[a]

Mississippi

Monroe v. Holleman, 185 So. 2d 443 (Miss. 1966) — 21, 28[b], 33[a]

Morman v. Thornhill, 240 So. 2d 258 (Miss. 1970) — 16[a], 33[a]

Missouri

Bower v. Daniel, 198 Mo. 289, 95 S.W. 347 (1906) — 21, 27[b]

Glueck v. McMehen, 318 S.W.2d 371 (Mo. Ct. App. 1958) — 21, 26[b]

Gurniak v. Liszewski, 411 S.W.2d 84 (Mo. 1967) — 24[b]

Shackleford v. Edwards, 278 S.W.2d 775 (Mo. 1955) — 19, 29[b], 33[a]

Stewart v. Shelton, 356 Mo. 258, 201 S.W.2d 395 (1947) — 23, 26[b]

Union Nat. Bank v. Jessell, 358 Mo. 467, 215 S.W.2d 474 (1948) — 21, 28[b]

Nebraska

Anderson v. Benson, 117 F. Supp. 765 (D. Neb. 1953) (applying Nebraska law) — 6, 10[b]

Sheldon v. Watkins, 188 Neb. 599, 198 N.W.2d 455 (1972) — 28[a]

Nevada

Waters v. Harper, 69 Nev. 315, 250 P.2d 915 (1952) — 21, 26[b]

New Jersey

- Galloway v. Eichells, 1 N.J. Super. 584, 62 A.2d 499 (Ch. Div. 1948) — 16[a], 33[a]
Sick v. Weigand, 123 N.J. Eq. 239, 197 A. 413 (Ct. Err. & App. 1938) — 2[a], 21, 31[b]

New Mexico

- Lindley v. Lindley, 67 N.M. 439, 356 P.2d 455 (1960) — 12, 26[a]
Schauer v. Schauer, 43 N.M. 209, 89 P.2d 521 (1939) — 16[a], 21, 33[a]

New York

- Azzara v. Azzara, 1 A.D.2d 1012, 151 N.Y.S.2d 458 (2d Dep't 1956) — 23
Di Lorenzo v. Ciancio, 49 A.D.2d 756, 373 N.Y.S.2d 167 (2d Dep't 1975) — 16[b], 19, 29[b]
Glen, In re, 247 A.D. 518, 288 N.Y.S. 24 (1st Dep't 1936) — 5, 6, 10[a]
Nelson's Will, In re, 200 Misc. 3, 106 N.Y.S.2d 427 (Sur. Ct. 1951) — 26[b]
O'Boyle v. Brenner, 273 A.D. 683, 79 N.Y.S.2d 84 (1st Dep't 1948) — 19, 33[a]
Phillip v. Phillip, 96 Misc. 471, 160 N.Y.S. 624 (Sup 1916) — 21, 22, 30
Pierce, Matter of Estate of, 135 Misc. 2d 610, 516 N.Y.S.2d 406 (Sur. Ct. 1987) — 19, 34[a]
Ralyea v. Venners, 155 Misc. 539, 280 N.Y.S. 8 (Sup 1935) — 15, 25[b]
Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915) — 13, 19, 21, 23, 24[a], 31[b]
Rothwachs' Estate, In re, 57 Misc. 2d 152, 290 N.Y.S.2d 781 (Sur. Ct. 1968) — 16[b], 23
Rubenstein v. Mueller, 19 N.Y.2d 228, 278 N.Y.S.2d 845, 225 N.E.2d 540 (1967) — 16[b], 23, 28[b]
Rubin's Will, In re, 48 Misc. 2d 539, 265 N.Y.S.2d 407 (Sur. Ct. 1965) — 14, 19, 21
Salisbury's Estate, In re, 242 A.D. 645, 272 N.Y.S. 135 (2d Dep't 1934) — 4, 6, 9[a]
Schwartz v. Horn, 31 N.Y.2d 275, 338 N.Y.S.2d 613, 290 N.E.2d 816 (1972) — 18, 19, 21, 31[b]
Wagner v. Wagner, 58 A.D.2d 7, 395 N.Y.S.2d 641 (1st Dep't 1977) — 16[b], 25[b]
Weisman, In re Estate of, 251 A.D.2d 112, 674 N.Y.S.2d 33 (1st Dep't 1998) — 16[a]

North Carolina

- Ginn v. Edmundson, 173 N.C. 85, 91 S.E. 696 (1917) — 2[b]
Olive v. Biggs, 276 N.C. 445, 173 S.E.2d 301 (1970) — 8, 18

Ohio

Barnes' Estate, In re, 64 Ohio L. Abs. 6, 108 N.E.2d 88 (C.P. 1950) — 14, 19

Fitch v. Oesch, 30 Ohio Misc. 15, 59 Ohio Op. 2d 16, 281 N.E.2d 206 (C.P. 1971) — 16[b], 31[b], 32[b]

Oregon

Ankeny v. Lieuallen (1941) 169 Or 206, 113 P.2d 1113 — 2[a], 13, 34[b]

McGinn v. Gilroy, 178 Or. 24, 165 P.2d 73 (1946) — 16[b], 31[b]

Schramm v. Burkhart, 137 Or. 208, 2 P.2d 14 (1931) — 21, 31[b]

Wells v. Wells, 252 Or. 400, 449 P.2d 434 (1969) — 33[b]

Rhode Island

Daniels v. Aharonian, 63 R.I. 282, 7 A.2d 767 (1939) — 16[b], 19, 29[b]

Tennessee

Ashley v. Volz, 218 Tenn. 420, 404 S.W.2d 239 (1966) — 16[b], 17[b], 19, 25[b]

Harris v. Morgan, 157 Tenn. 140, 7 S.W.2d 53 (1928) — 32[b]

Texas

Bailey v. Bailey, 212 S.W.2d 189 (Tex. Civ. App. Waco 1948) — 12, 24[a]

Cammack v. George, 377 S.W.2d 687 (Tex. Civ. App. Beaumont 1964) — 14, 33[a]

Curtis v. Aycock, 179 S.W.2d 843 (Tex. Civ. App. Waco 1944) — 20, 24[a]

Dickerson v. Keller, 521 S.W.2d 288 (Tex. Civ. App. Texarkana 1975) — 14, 35[a]

Dickerson v. Yarbrough, 212 S.W.2d 975 (Tex. Civ. App. Dallas 1948) — 13, 23, 26[b]

Ellis v. First Nat. Bank in Dallas, 311 S.W.2d 916 (Tex. Civ. App. Dallas 1958) — 14, 29[a]

Foust v. Coyne, 331 S.W.2d 386 (Tex. Civ. App. Amarillo 1959) — 14, 27[a]

Fuqua v. Fuqua, 528 S.W.2d 896 (Tex. Civ. App. Houston 14th Dist. 1975) — 33[a]

Garland v. Meyer, 169 S.W.2d 531 (Tex. Civ. App. San Antonio 1942) — 2[b]

Gibson, In re Estate of, 893 S.W.2d 749 (Tex. App. Texarkana 1995) — 16[b]

Hamilton v. Hamilton, 154 Tex. 511, 280 S.W.2d 588 (1955) — 20, 21

- Harrell v. Hickman, 147 Tex. 396, 215 S.W.2d 876 (1948) — 17[a], 25[a]
- Heller v. Heller, 233 S.W. 870 (Tex. Civ. App. Galveston 1921) — 14, 24[b], 35[a]
- Holmes v. Holmes, 447 S.W.2d 423 (Tex. Civ. App. Waco 1969) — 20
- Johnson v. Johnson, 306 S.W.2d 780 (Tex. Civ. App. Amarillo 1957) — 12, 24[a], 28[a]
- Larrabee v. Porter, 166 S.W. 395 (Tex. Civ. App. Austin 1914) — 25[b]
- Martindale v. Martindale, 366 S.W.2d 665 (Tex. Civ. App. Amarillo 1963) — 24[b]
- McFatter, In re Estate of, 94 S.W.3d 729 (Tex. App. San Antonio 2002) — 12
- McKamey v. McKamey, 332 S.W.2d 801 (Tex. Civ. App. San Antonio 1960) — 14, 21, 24[a]
- Moore v. Moore, 198 S.W. 659 (Tex. Civ. App. San Antonio 1917) — 13, 23, 34[b]
- Nye v. Bradford, 144 Tex. 618, 193 S.W.2d 165, 169 A.L.R. 1 (1946) — 14, 24[b], 25[a]
- Odell v. Odell, 306 S.W.2d 914 (Tex. Civ. App. Fort Worth 1957) — 12, 28[a]
- Orsburn v. Miller, 521 S.W.2d 140 (Tex. Civ. App. San Antonio 1975) — 23
- Richardson v. Lingo, 274 S.W.2d 883 (Tex. Civ. App. Galveston 1955) — 12, 33[a]
- Russell v. Garrett, 392 S.W.2d 375 (Tex. Civ. App. Fort Worth 1965) — 13
- Scales v. Scales, 297 F.2d 219 (5th Cir. 1961) (applying Texas law) — 12, 21, 24[a]
- Thomas v. Thomas, 446 S.W.2d 590 (Tex. Civ. App. Eastland 1969) — 15, 24[b]
- Tillman v. Mahaffey, 252 S.W.2d 255 (Tex. Civ. App. Texarkana 1952) — 14
- Turner v. Merchants & Planters Nat. Bank of Sherman, 392 S.W.2d 889 (Tex. Civ. App. Texarkana 1965) — 21, 28[b]
- Wallace v. Peoples, 89 S.W.2d 1030 (Tex. Civ. App. Galveston 1935) — 23
- Wenzel v. Menchaca, 354 S.W.2d 635 (Tex. Civ. App. El Paso 1962) — 12, 33[a]

Virginia

- Williams v. Williams, 123 Va. 643, 96 S.E. 749 (1918) — 24[b]

Wisconsin

- Allen v. Ross, 199 Wis. 162, 225 N.W. 831, 64 A.L.R. 180 (1929) — 19, 35[b]
- Chayka's Estate, In re, 47 Wis. 2d 102, 176 N.W.2d 561 (1970) — 21, 25[b], 28[b]

Wyoming

Flohr v. Walker, 520 P.2d 833 (Wyo. 1974) — 19, 21, 23

I. Prefatory Matters

§ 1[a] Introduction—Scope

This annotation[FN1] collects and analyzes the judicial decisions in which the courts have considered the authority of a party to a joint or mutual will agreement to make an inter vivos disposition of property[FN2] which would otherwise be disposed of by the will. Although some inter vivos dispositions have been considered "testamentary in character"—for example, the conveyance of property reserving a life estate therein—such dispositions are within the scope of this annotation. The authority of a surviving party to change the will, however, is beyond its scope.

Since it does not deal with the question of what agreements or wills constitute joint or mutual wills, this annotation does not include those cases where the outcome depends upon the invalidity of the agreement.

Except where it appears in quotation marks to indicate court usage, the term "mutual" will or wills is used throughout this annotation to refer to a joint will or separate wills executed pursuant to an agreement to dispose of the parties' property in a particular manner. Thus, if a will is referred to as a "mutual will," it either indicates that the court has referred to it in that manner, or that the court has found that it was based upon a contract. The use of the term "mutual will" is not uniform in all jurisdictions, some courts using the term even though it has been determined that no contract supports the will and that it is revocable at any time by either party the same as an ordinary will.[FN3]

The issue presented in estate tax cases where the Internal Revenue Service contends that the surviving party to a joint or mutual will has received a terminable interest and is therefore not entitled to the marital deduction claimed by the survivor (who claims to have full power of disposition) is essentially the same as that involved in this annotation. However, because the power to dispose of the property is only collaterally involved in those cases, this annotation includes only illustrative cases of that kind, no attempt having been made to be exhaustive.

Since relevant statutory provisions are considered herein only to the extent that they are reflected in the reported cases discussed in this annotation, the reader is advised to consult the latest enactments in the jurisdiction of interest.

§ 1[b] Introduction—Related matters

Related Annotations are located under the heading of this Annotation.

Research References

§ 2[a] Summary and comment—Generally

The authority of parties to a joint or mutual will agreement to make an inter vivos disposition of the property which would otherwise be disposed of by the will is ordinarily governed by the parties' intentions,[FN4] and if those intentions were always clearly stated in the will or agreement, there would be few cases on the subject and this annotation would be unnecessary. Litigation involving this issue is common because the parties frequently fail to consider the problem when they execute contractual wills. Thus, in most of

the cases discussed herein, the courts are merely attempting to determine the parties' intentions with respect to that issue.

The power to revoke a joint or mutual will, of course, is also a power to dispose of property in a manner contrary to that provided for in the will itself. It appears that in most jurisdictions, if not all, a joint or mutual will executed in accordance with a contract may be revoked by either party while the other is still living, at least upon notice to the other party.[FN5] Thus, there have been relatively few cases contesting the authority of a party to a joint or mutual will agreement to make, during the lifetime of all parties, a contrary disposition of property included in the will.[FN6] Of course, if the agreement expressly provides for a revocation procedure and it is followed, or if the agreement expressly gives the parties complete freedom to dispose of their property during their lifetime, dispositions can be freely made. But where the will, or the agreement supporting the will, expressly prohibits the *survivor* from making any inter vivos disposition, it has been held that the restriction also applies during the lifetime of both parties, at least where the other party is near death and unable to look out for his own interests.[FN7] On the other hand, if the parties expressly retain ownership of their separate property during their lifetime, it has been held that this authorizes one of the parties to give property away during the lifetime of both parties.[FN8] And it has also been held that a party to a joint or mutual will may, during the lifetime of all parties, freely dispose of property otherwise disposed of in the will, if the will or agreement limited the devises or bequests to that property which belonged to the party at the time of his or her death.[FN9]

In determining the validity of transfers made during the lifetime of all parties to the joint or mutual will agreement, the courts have considered other factors[FN10] in addition to the express provisions of the will or its agreement.[FN11] Fraudulent conveyances have been considered improper. Thus, where one party to a mutual will has, without informing the other party, disposed of property in a manner different than that prescribed by the will, the disposition being made to defeat the rights of the other party under the agreement, it has been held that the disposition was invalid, and that after the death of the defaulting party a trust for the benefit of the innocent party would be impressed upon the property improperly conveyed.[FN12] And a breach of the agreement by one party has been considered authority for the other to dispose of property in violation of the agreement. Thus, where one party has violated a mutual agreement by making inter vivos dispositions of property, it has been held that such dispositions constituted a repudiation of the agreement, allowing the other party to make dispositions at variance with the agreement.[FN13]

Some states impose, by statute, special requirements on the execution, between husband and wife, of any contract involving real estate belonging to the wife.[FN14] Where such requirements are imposed, and where the contract is not executed as prescribed by statute, a joint or mutual will agreement involving the wife's real estate is not binding upon the wife. Thus, since there is no consideration for his promise, the agreement is not binding upon the husband either.[FN15] This leaves both parties free to dispose of the property as they wish.

Most of the cases discussed in this annotation involved the authority of the surviving party to make an inter vivos disposition of the property after the death of the other party. It is a general rule that the surviving party to a joint or mutual will agreement, having accepted the benefits thereof upon the death of the other party or parties, has no right to dispose of the property differently than contemplated by the agreement.[FN16] As stated above, the survivor's power to dispose of the property is ordinarily a question of the parties' intentions in this regard.

Where the joint or mutual will, or the agreement executed in connection therewith, leaves the property to the survivor in fee simple, giving whatever might remain at the survivor's death to others, the survivor is

ordinarily allowed to make any good-faith inter vivos disposition of the property which he may desire.[FN17] But even though the property is expressly given to the survivor in fee simple or words to that effect, if specific property is then given, upon the death of the survivor, to named beneficiaries, it has been held that the survivor has no authority to make any other disposition of that property.[FN18]

In keeping with their desire to carry out the intention of the parties, where the survivor has been expressly given a mere life estate, the courts have considered it improper for the survivor to dispose of the property in such a manner as to prevent the beneficiaries from taking at the death of the survivor.[FN19] Similarly, where the survivor is expressly authorized to dispose of the property as he or she desires, even though the survivor is not expressly given a fee simple title to the property, the courts have respected the parties' desires.[FN20] And where the parties to a joint or mutual will expressly prohibit the survivor from disposing of the property during his or her lifetime, the survivor is bound thereby and may not make an inter vivos disposition contrary to that agreed upon, it has been held.[FN21]

If a joint or mutual will, or its agreement, does not expressly prohibit the survivor from making inter vivos dispositions of the property (the property being left to the survivor, then to named beneficiaries, without further explanation of the survivor's interests), and the will does not leave specific property to the beneficiaries, some courts have held that the survivor is free to dispose of the property as the survivor may see fit, at least if done in good faith, even though it may leave nothing for the third-party beneficiaries.[FN22] But other courts consider the failure to define the survivor's power to dispose of the property as a restriction upon the survivor's authority to make an inter vivos disposition.[FN23] It must be emphasized, however, that those cases in which the courts permitted the survivor to freely transfer the property did not involve devises or bequests of specific property which the survivor had attempted to dispose of differently than contemplated by the agreement.[FN24]

In addition to those joint or mutual wills which give the survivor a fee simple title, leaving whatever remains to named beneficiaries,[FN25] and those wills in which the survivor is expressly authorized to make inter vivos dispositions, leaving the beneficiaries only that which remains at the survivor's death,[FN26] those wills, or mutual will agreements, which leave to the designated beneficiaries only that property which the survivor "may own at the time of the survivor's death, " or the like, have been construed by some courts as indicating a desire on the part of the testators to give the survivor full authority to dispose of the property during the survivor's lifetime.[FN27] But other courts have rejected the idea that the survivor was intended to be given full power of disposition by such a provision, concluding, instead, that the provision was intended only to authorize the transfer of property for necessities and the like.[FN28]

Where a joint or mutual will, after leaving all property to the survivor, grants specific property to specific beneficiaries upon the death of the survivor, it would seem that the testators did not intend for the survivor to dispose of that property otherwise. This is the interpretation adopted by the courts where the question has arisen.[FN29]

It is generally held that regardless of the interest given to the survivor in a joint or mutual will, as long as there is no express provision to the contrary, the survivor has power to dispose of the property for necessities, support, and maintenance.[FN30] And there seems to be no reason why a survivor could not transfer property to the beneficiaries as an advance on the beneficiaries' devise or legacy, or in settlement of the beneficiary's interest in the estate. Such transfers have been upheld by the courts.[FN31] However, a partition of property jointly held by the survivor and the sole beneficiary, the transaction being described as in settlement of the beneficiary's interest in the property, did not serve to release the survivor from restrictions on the transfer of

property imposed by the mutual will agreement, according to the court in one case.[FN32] And in another case where the survivor had a life estate and his son the remainder, it was held that the transfer of the father's interest to the son gave the son a life estate for the life time of his father, and not the fee.[FN33]

Regardless of the wording of a joint or mutual will, or the accompanying agreement, if property is left to third-party beneficiaries who are to take upon the death of the survivor, most courts consider any inter vivos transfer made by the survivor with an intent to avoid the agreement, to be improper.[FN34] In this regard the good faith behind transfers of a testamentary nature—such as the conveyance to another reserving a life estate—have been treated with skepticism by most courts. Gratuitous transfers, especially when they involve sizeable portions of the estate, have also been viewed as efforts to avoid the agreement. And, of course, a gift of property from the survivor obtained by undue influence on the part of the transferee has been considered to be improper.[FN35]

In approving or disapproving a survivor's inter vivos transfers of property, the courts have frequently emphasized that the property in question did or did not belong to the survivor prior to the execution of the joint or mutual will.[FN36] Thus, the relative size of each party's contribution to the survivor's estate has undoubtedly been a contributing factor to the outcome of some cases, even though the courts have not expressly indicated as much. But the survivor's prior interest in the property has played another role in determining his authority to make inter vivos transfers of the property. Property owned by two parties in joint tenancy, by the entirety, or as community property, goes to the survivor under ordinary circumstances.[FN37] And property which a husband or wife owns in severalty remains that person's property on the death of the spouse. But when two parties who own property in severalty, by joint tenancy, by the entirety, or as community property, join in executing a joint or mutual will under an agreement whereby all property is to go to the survivor and upon the death of the survivor to named beneficiaries, just what the survivor takes is not settled. If the parties make their intentions clear in the agreement or in the wills, the courts will abide by their intentions. But the parties frequently do not make their intentions clear, using language such as leaving "all of our property," or the like, to the survivor with the remainder to others. Such wording lends itself to various interpretations. It can be taken to mean that the parties want all of the property that each holds individually and both hold collectively to be held by the survivor subject to the restrictions imposed by the will. Or it may be interpreted to mean that only the interests of the first to die, which he or she could otherwise dispose of by an individual will, are to be held by the survivor in accordance with the will, the survivor retaining full ownership of that property which he or she held in severalty, and that which he or she gained by right of survivorship. Or such wording may be interpreted to mean that the parties intended to dispose of their individual interests as held just before the death of the first party—that is, an undivided half interest in the property held jointly or by the entirety, half of all community property, and all property held in severalty. Each of these interpretations has been adopted at one time or another. However, regardless of the interpretation, it is ordinarily held that property held in severalty by one of the parties, and property held in joint tenancy, by the entirety, and community property held by both parties, may all be subjected to the restrictions of a joint or mutual will.[FN38] Thus, property which the survivor would otherwise hold in fee simple may be reduced to a life estate or less by a joint or mutual will agreement, thereby imposing a corresponding restriction upon the survivor's authority to make an inter vivos disposition of that property.

Although surviving parties to joint or mutual wills have attempted to dispose of property from the estate in a variety of ways,[FN39] their right to do so, it is held, depends upon the intentions of the parties to the agreement. The basic question, therefore, remains the same, no matter how the issue is raised. As has been said by one court, assuming the validity of a mutual will contract, the question becomes one primarily of the intention of the parties. Did they intend by the agreement, and the joint or mutual will executed pursuant thereto,

to impose a limitation upon their right, or that of the survivor, to dispose of the property during life, or was their intention merely that ownership and control should remain unaffected thereby during their lifetimes, and that the property remaining at their death should pass in a designated way?[FN40]

§ 2[b] Summary and comment—Practice pointers

Since the courts will ordinarily carry out the intention of the testators, the problem involved in the cases discussed in this annotation is a problem of draftsmanship. At the time the joint or mutual will or its agreement was drafted, either the question of inter vivos disposition was not considered, or if it was considered, the desires of the parties on that point were not clearly stated. But this is of little help to the counsel who is presently faced with a case involving the right of a party to transfer property that would otherwise go according to the terms of the joint or mutual will. The will is already written and counsel must take it as he finds it.

Counsel for the party initiating the action has considerable choice available to him. Litigation involving the authority of a party to a joint or mutual will to make an inter vivos disposition of property which would otherwise be disposed of by the will may be raised in a variety of ways. One party may attempt to transfer property during the lifetime of both parties, and the other party may institute action to prevent it. Or the transfer may have taken place and the other party may institute action to cancel the transaction. Litigation may also arise upon the death of one party when the other discovers that the deceased party has made inter vivos transfers of property and the survivor, or the executor of the estate, institutes action to recover the property for the estate. On the other hand, the survivor himself may institute action seeking a declaration of his right to dispose of the property. Then too, the survivor may dispose of some property or attempt to dispose of it, and the third-party beneficiaries may institute action to prevent the transfer or to recover the property. Finally, it may be discovered upon the survivor's death that the survivor had transferred property, and the beneficiaries, or the executor, may then institute action to recover the property. The last two situations have been most common. Thus, a case of this type may involve a variety of parties, may be an action at law or in equity, in tort or on the contract, for damages, specific performance, or any other remedy.

In almost all cases discussed in this annotation, the injured party resorted to a suit in equity. Where the property has already been transferred, equity may impress a trust upon the property for the benefit of the rightful beneficiaries.[FN41] The injured party may also seek an accounting.[FN42] And where the property has not yet been transferred, the beneficiary may seek an injunction.[FN43] The proper or necessary parties to these actions ordinarily include third persons, either as beneficiaries or as persons who assert a claim to the property transferred or to be transferred. The third-party beneficiary to a joint or mutual will may maintain a suit to enforce the contract,[FN44] and in most of the cases involved in this annotation it was the beneficiary who instituted the action.

A probate court whose jurisdiction is limited to determining whether the instrument propounded is the last will of the decedent ordinarily lacks power to enforce a joint or mutual will agreement. Thus, generally speaking, the remedy of a person injured by the violation of a joint or mutual will contract containing reciprocal bequests with the remainder to third persons is not ordinarily to be had by contesting the probate of a will.[FN45] But beneficiaries have been known to establish, in a probate court, a claim against the estate based on a joint will agreement.[FN46]

Where the surviving party to a joint or mutual will agreement conveys property in violation of the agreement, the beneficiaries may institute action to enforce the contract. But when should the action be

instituted—at the time the conveyance is made, or at the death of the survivor when the beneficiaries are to take the property? Counsel should consider the effect of any applicable statute of limitations in this regard. If the jurisdiction holds that the statute begins to run at the time they can challenge the conveyance, the statutory period may have expired by the time the survivor dies.[FN47] On the other hand, counsel may note that some jurisdictions hold that the statute does not begin to run until the death of the survivor.[FN48] Since equity may protect the beneficiary's interests by impressing a trust upon the property where the beneficiaries are not yet entitled to possession, there seems to be no reason why they should wait until the death of the survivor to assert their rights.

Claiming that the surviving party to a joint or mutual will has taken only a terminable interest without power to transfer the property, the Internal Revenue Service has frequently questioned the estate tax deduction taken by the survivor.[FN49] These cases collaterally involve the question of a survivor's right to make inter vivos transfers of property that would otherwise go to third-party beneficiaries. Thus, counsel would be well advised to consult these cases as well as those discussed in this annotation.

It is not uncommon, in the cases discussed in this annotation, for the courts to point out that the will had been prepared by "able counsel of wide experience,"[FN50] or the like, to bolster their conclusion that if the parties had intended a particular thing, it would have been made clear. Where counsel is contending that a particular thing is not authorized by a joint or mutual will agreement, he may do well to use this argument—that is, that the will and agreement had been prepared by able counsel with wide experience and that if the parties had intended a particular thing, it would have been made clear in the will or agreement.

Although some jurisdictions consider the reciprocal provisions of a married couple's joint will to be sufficient evidence of an agreement between the testators,[FN51] and this seems to be the better-reasoned view, some courts refuse to hold the survivor to the terms of any joint will unless there is some independent evidence of an agreement between the parties.[FN52] Thus, where such a will is involved, counsel for both sides should immediately check for the existence of a contract, although it does not seem to be necessary for the contract to expressly provide that the agreement is irrevocable.[FN53]

If there is no written contract, counsel for the survivor is provided with the argument that the will is revocable at any time, the same as an ordinary will.[FN54] Counsel for the third-party beneficiaries must prepare to meet this argument—obtaining evidence of an oral agreement if possible. Failure to do this could be fatal to his case.[FN55] It should also be kept in mind that in some jurisdictions the statute of frauds specifically includes joint or mutual will agreements, thereby making it necessary that the agreement be in writing.[FN56] But in the absence of such provision, these contracts need not be in writing, and the counsel may even be able to establish the contract by implication from the circumstances.[FN57]

For the amount of attorneys' compensation in proceedings involving wills and administration of decedents' estates, see 58 A.L.R.3d 317.

II. Factors determining validity of transfers made during lifetime of all parties

A. Express terms of agreement or will

§ 3. Provision restricting transfers by survivor

[Cumulative Supplement]

Because it has been held[FN58] that where there is no consideration other than mutual promises, either party may revoke a joint or mutual will during the lifetime of both parties upon due notice to the other party, it would seem that under the same conditions either party could make an inter vivos disposition of property otherwise disposed of in the joint or mutual will, since this would simply amount to a revocation. However, apart from such general considerations, the courts have been called upon to determine the right of a party to a joint or mutual will, during the lifetime of all parties to the will, to dispose of property otherwise disposed of by the will. Where the will, or the agreement supporting the will, expressly prohibits the *survivor* from making any inter vivos disposition, it was held in the following case that the restriction also applies during the lifetime of both parties, at least where the other party is near death and unable to look out for his own interests.

Thus, where 12 days before her husband's death a wife withdrew \$94,800 from a bank account held jointly with her husband, and redeposited the money in joint tenancy accounts in the name of herself and her daughter, it was held in *Chase v Leiter* (1950) 96 Cal App 2d 439, 215 P2d 756, that the wife had violated the contract contained in the joint and mutual will previously executed by the husband and wife, under which the husband and wife had agreed that the survivor would not dispose of any of the corpus or principal of any of the property, and it was further held that the money was still community property subject to the terms of the will. Under the joint will the parties had agreed that all of their property was to be deemed community property, and that upon the death of one of them the property was to go to named trustees, who were to pay the net income to the survivor for life and then to named beneficiaries. The court said that although the will provided that the "survivor" would not dispose of any of the corpus or principal, thus referring to the period of survivorship, it was apparent from the whole will that it was the intention and the agreement of the parties that this restriction on the disposition of their property was also to apply to the period prior to the death of the first one to die.

CUMULATIVE SUPPLEMENT

Cases:

Generally, when a reciprocal will exists, the surviving spouse is required to dispose of the collective property according to the joint will or mutual wills. *Dotson v. Dotson*, 2009 Ark. App. 819, 372 S.W.3d 398 (2009).

[Top of Section]

[END OF SUPPLEMENT]

§ 4. Provision preserving ownership rights during lifetime

[Cumulative Supplement]

Where the parties to a joint will expressly retain ownership of their separate property during their lifetime, it was held in the following case, a party may properly make inter vivos gifts of that party's property during the lifetime of both parties.

The joint will of a husband and wife which provided that each during his or her life should remain the owner of his or her property, with all ownership rights and with limitation only on the disposition by any other will or codicil, was held, in *Re Salisbury's Estate* (1934) 242 App Div 645, 272 NYS 135, affd 265 NY 536, 193 NE 308, not to prevent the wife, who predeceased the husband, from making inter vivos gifts, since she acted in good faith under the advice of counsel and without any deliberate and fraudulent purpose to defeat the will. Furthermore, the court said, there were no equities in favor of the surviving husband, since it appeared that he had no property at the time the joint will was made, that the wife was suffering from a fatal disease, that he

persuaded or constrained her to convey the residence property so that the parties were tenants by the entirety and to execute the will, that it was morally certain that he would be the survivor, and that he stood solely as the one to benefit by the arrangement. The court went on to say that it would be a simple matter to provide in the will that ownership of individual property should be limited to ordinary use, that the avails and income were to be used only for current expenses, and that no gift of property thereafter should be valid. This was not done, the court said, so it construed the will as speaking of the disposition of property owned by the wife at the time of her death, without restraint on her right to make gifts to her own relatives during her lifetime.

CUMULATIVE SUPPLEMENT

Cases:

An agreement to make mutual wills, or the execution of wills in pursuance of such an agreement, does not bind the testators to keep the property, covered thereby, for the intended beneficiaries under such wills, or prevent them from making such other disposition of it, either inter vivos or by will, as they may desire and mutually agree, while both or all still live; however, upon the death of one of the parties, the agreement, not the will, is irrevocable. *In re Leix Estate*, 289 Mich. App. 574, 797 N.W.2d 673 (2010).

[Top of Section]

[END OF SUPPLEMENT]

§ 5. Provision limiting agreement to property owned at time of death

According to the courts in the following cases, a party to a joint or mutual will may, during the lifetime of both parties, freely dispose of property which would otherwise be disposed of in the will if the will or agreement limited the devises or bequests to that property which belonged to the party at the time of his or her death.

Where a mother (the plaintiff) and daughter-in-law, pursuant to an agreement, executed mutual wills whereby the daughter-in-law left her entire estate to her husband (son of the plaintiff), with the remainder over in fee to the mother if she survived her son, and the mother left her property to her son and her daughter (not daughter-in-law), it was held in *Bird v Jacobus* (1901) 113 Iowa 194, 84 NW 1062, that there was nothing in the agreement which prevented the daughter-in-law from disposing of her interest in the real estate at any time during her life, that the agreement was not to devise to the mother any specific property, but only such as the daughter-in-law might have at her death, and that she could not give away the property merely to defeat her obligation, but that otherwise her free use of it was not restricted by the agreement.

In *Re Glen* (1936) 247 App Div 518, 288 NYS 24, *affd* without op 272 NY 530, 4 NE2d 433, *reh den* 272 NY 640, 5 NE2d 371 and (disapproved on a collateral matter *Re Granwell* 20 NY2d 91, 281 NYS2d 783, 228 NE2d 779), where a joint and mutual will, executed by a husband and wife, left to a trustee the "estate belonging to me at the time of my death," for the benefit of the survivor, it was held that the instrument did not give the wife any interest in or control of her deceased husband's property during his lifetime, or restrict in any way his right to use or dispose of it as he might wish while he lived, and that she thus had no right, as widow and executrix of her husband's estate, to an equitable lien in favor of the estate on a joint bank account opened during the lifetime of her husband in the names of himself and his brother, payable to either, or the survivor. The court said that, even assuming that the husband opened the joint bank account with the design and intent of reducing the amount that his wife would receive under his will, still such design and intent would not make the opening of the account a fraud on her, that an irrevocable title to the joint bank account vested in the brother at the time it was opened, and that the account was not a part of the husband's estate at the time of his death.

B. Other factors

§ 6. Transfers made with intent to defeat agreement

[Cumulative Supplement]

Where one party to a joint or mutual will agreement, without informing the other party, gratuitously disposed of property in a manner calculated to defeat the party's testamentary obligation under the agreement, the dispositions were considered improper by the courts in the following cases.

A husband's secret conveyance of property to other persons without consideration, but with the intention of fraudulently defeating his wife's rights under a mutual will contract, was held invalid in *Anderson v Benson* (1953, DC Neb) 117 F Supp 765 (applying Nebraska law), where the husband and wife, acting in accordance with an oral contract, had executed reciprocal wills and upon the husband's death it was discovered that the husband, without informing his wife, had conveyed the property to third persons without consideration, had purchased United States savings bonds with money earned by their joint efforts, the bonds being purchased in his name and that of a relative as co-owners, and had secretly executed another will making a different disposition of his property. The court said that since both the husband and wife executed written wills pursuant to their oral agreement, and since the wife fully performed her part of the agreement during the husband's life, the wife was entitled to specific performance of the contract and the statute of frauds was not a bar to relief. The court therefore impressed a trust for the benefit of the wife upon the property which the husband had wrongfully conveyed.

In *Brown v Superior Court of Los Angeles County* (1949) 34 Cal 2d 559, 212 P2d 878, the court, by way of dictum, said that it was well settled that a person could contract to make a particular disposition of his property by will, that in case of a breach the promisee had several available remedies, that the injured party could bring an action at law for damages, that he could obtain equitable relief in the form of "quasi specific performance" of the contract where the remedy at law was inadequate and the promisor had failed to make the promised disposition in his will, and that the promisee of such an agreement need not wait until the death of the promisor but could seek equitable relief against inter vivos conveyances made by him in fraud of their rights.

In *Bird v Jacobus* (1901) 113 Iowa 194, 84 NW 1062, it was held that even though the party to a mutual will agreement was free to dispose of her interest in real estate during her life, she could not give the property away merely to defeat her obligation.

Similarly, in *Wright v Wright* (1926) 215 Ky 394, 285 SW 188, where a husband and wife, acting in pursuance of a contract, each executed a separate will leaving all property to the other, and the husband, acting without the knowledge of the wife, delivered all of his property to his son and daughter, and removed his will from where it had been kept, it was held that at the death of the husband, the wife surviving, a binding contract subsisted, that equity would grant relief to the survivor who had faithfully carried out the agreement, that the court regarded the children as trustees, holding the property of the deceased husband for the use and benefit of the wife, and that if they had converted it or should in the future convert it to their own use, so that it could not be delivered in kind to the wife, then the wife was entitled to full compensation for her deceased husband's property and effects thus converted. In affirming a judgment for the wife, the court said that had the wife known that her husband had destroyed his will, and therefore intended to revoke it and to violate the agreement to make reciprocal wills, there was authority for holding that the will of the husband would become ineffectual and he would have been released from the agreement, as would also the wife. On the other hand, the court continued, there was abundant authority for holding, and indeed it seemed to be the general rule, that where one of the persons to an agreement undertakes, secretly and without the knowledge of the other, to revoke his will and to dispose of his property in a manner contrary to the provisions of his will, his efforts are futile where the other

party to the agreement has faithfully kept it and where there is a sufficient consideration to support the agreement.

And in *Re Salisbury's Estate* (1934) 242 App Div 645, 272 NYS 135, affd 265 NY 536, 193 NE 308, involving a married couple's joint will, the inter vivos conveyances of the wife were upheld on the ground that the agreement did not prevent the wife from making inter vivos gifts, and that she acted in good faith without any deliberate and fraudulent purpose to defeat the will.[FN59]

CUMULATIVE SUPPLEMENT

Cases:

Inter vivos transfer of property by party to contract to make will may be set aside by donee beneficiary of will contract, where transfer is made with fraudulent intent to defeat donee beneficiary's rights under terms of will contract. *Boyle v. Schmitt*, 578 So. 2d 367 (Fla. Dist. Ct. App. 3d Dist. 1991).

[Top of Section]

[END OF SUPPLEMENT]

§ 7. Previous breach of agreement by other party

Where one party has violated a mutual will agreement by making inter vivos dispositions of property, it has been held that such dispositions constituted a repudiation of the agreement, allowing the other party to make dispositions at variance with the agreement. The following cases so held.

Where a wife repudiated a mutual will agreement by making certain inter vivos dispositions of her property during her estranged husband's lifetime, it was held in *Mitchell v Marklund* (1965) 238 Cal App 2d 398, 47 Cal Rptr 756, that this was more than sufficient to release her former husband from his obligations under the agreement, and that the husband's inter vivos dispositions were therefore valid. The husband and wife, as part of a property settlement, had agreed to execute wills leaving all of their property to their two children equally, and the agreement was incorporated into an interlocutory divorce decree. After the husband died, leaving a will which specifically disinherited the children and made his second wife the sole beneficiary, the children (beneficiaries to the agreement) instituted the present action, seeking to impose a constructive trust both upon this property and upon the property transferred to the second wife during his lifetime, and to enforce the agreement. On appeal from a judgment for the defendants which found the agreement unenforceable, the judgment was affirmed, the court saying that the parties were free to repudiate the agreement during their joint lifetimes, notwithstanding their agreement not to revoke their wills, and that their actions constituted a repudiation of the agreement.

Assuming the existence of an agreement between husband and wife to make reciprocal wills by which each was to will to the other a life estate in their respective properties, with remainder equally to their children, the court in *McLean v Jones* (1932) 90 Colo 213, 8 P2d 261, held that the wife's breach of the contract, by extinguishing the husband's life estate in certain property, released him from his obligations thereunder. It was found, however, that the evidence did not show such an agreement.

§ 8. State statute governing contracts between husband and wife

Some jurisdictions impose by statute special requirements on the execution of contracts between husband and wife which involve the wife's real estate. In such jurisdictions, joint will agreements between a husband and

wife which are not executed in conformance with such statutory requirements are ineffective, it was held in the following case, leaving both parties free to transfer property covered by the will.

Thus, in *Olive v Biggs* (1970) 276 NC 445, 173 SE2d 301, where a state statute imposed special requirements upon the execution of contracts between husbands and wives that involved the wife's real estate, and where a husband and wife executed a joint will involving her real estate, the will being executed in conformance with an agreement which was not executed as required by the statute, the court said that a contract by which one bound himself to make a specified testamentary disposition of his real property was a contract affecting that property, that consequently a contract between husband and wife prescribing the testamentary disposition of their properties was not binding upon the wife unless the procedure prescribed by statute governing contracts between husband and wife which affect property was followed, and that during the life of the wife, such a contract, not executed as prescribed by this statute, was not binding upon the husband, since as to him there was a failure of consideration. When, however, the wife dies, leaving the will for which her husband bargained with her, the contract is thereafter binding upon him, the court declared, adding that in this regard it is said that while a promise void for incapacity of the promisor will not support a counterpromise, if the void promise is actually performed, the performance may become sufficient consideration to support the counterpromise.

C. Application to specific transfers

§ 9[a] Gift—Held proper

In the following case it was held proper for a party to a joint will to make, during the lifetime of both parties, inter vivos gifts of property covered by the will.

In *Re Salisbury's Estate* (1934) 242 App Div 645, 272 NYS 135, affd 265 NY 536, 193 NE 308, the court in a per curiam opinion held that the joint will of a husband and wife providing that each during his or her life should remain the owner of his or her property with all ownership rights, and with limitation only on the disposition by any other will or codicil, did not prevent the wife, who predeceased the husband, from making inter vivos gifts, since she acted in good faith under the advice of counsel and without any deliberate and fraudulent purpose to defeat the will. Further, the court said, there were no equities in favor of the surviving husband, since it appeared that he had no property at the time the joint will was made, that the wife was suffering from a fatal disease, that he persuaded or constrained her to convey the residence property so that the parties were tenants by the entirety and to execute the will, that it was morally certain that he would be the survivor, and that he stood solely as the one to benefit by the arrangement. The court went on to say that it would have been a simple matter to provide in the will that ownership of individual property should be limited to ordinary use, that the avails and income were to be used only for current expenses, and that no gift of property thereafter should be valid, but that this was not done. The court therefore construed the will as speaking of the disposition of property owned by the wife at the time of her death, without restraint on her right to make gifts to her own relatives during her lifetime.

§ 9[b] Gift—Held improper

In the following case involving a mutual will agreement whereby each party left all property to the other, it was held improper for one party, acting during the lifetime of both parties, to give all of his property away without informing the other party.

Where a husband and wife, in pursuance of a contract, each executed a separate will leaving all property to the other, and the husband, acting without the knowledge of the wife, delivered all of his property to his son and

daughter, and removed his will from where it had been kept, it was held in *Wright v Wright* (1926) 215 Ky 394, 285 SW 188, that at the death of the husband, the wife surviving, a binding contract subsisted, and that equity would grant relief to the survivor who had faithfully carried out the agreement. In affirming a judgment for the wife, the court said that had the wife known that her husband had destroyed his will and therefore intended to revoke it and to violate the agreement to make reciprocal wills, there was authority for holding that the will of the husband would become ineffectual and he would have been released from the agreement to make the will, as would also the wife. On the other hand, the court continued, there was abundant authority for holding, and indeed it seemed to be the general rule, that where one of the persons to an agreement undertakes, secretly and without the knowledge of the other, to revoke his will and to dispose of his property in a manner contrary to the provisions of his will, his efforts are futile where the other party to the agreement has faithfully kept it and where there is a sufficient consideration to support the agreement. Pointing out that the gift to the son and daughter included notes, choses in action, and money, the court said that although specific performance could not be had, the court below properly awarded the wife damages equivalent to the sum total of the property received by the children from their father in violation of the terms of the contract made by him with the wife for the execution of reciprocal wills. The court went on to say that equity regards that as done which should have been done, and that thus the court regarded the children in the present case as trustees, holding the property of the deceased husband for the use and benefit of the wife, and that if they had converted it or should in the future convert it to their own use, so that it could not be delivered in kind to the wife, then the wife was entitled to full compensation for her deceased husband's property and effects thus converted.

§ 10[a] Transfer to joint survivorship bank accounts or bonds—Held proper

In the following case involving a joint and mutual will whereby the property of each was devised to the other, it was held that one party acting during the lifetime of both parties could properly use his funds to open a joint bank account with a third person to reduce the amount that the other party would receive under the will.

In *Re Glen* (1936) 247 App Div 518, 288 NYS 24, *affd* without op 272 NY 530, 4 NE2d 433, *reh den* 272 NY 640, 5 NE2d 371 and (disapproved on a collateral matter *Re Granwell* 20 NY2d 91, 281 NYS2d 783, 228 NE2d 779), [FN60] where a joint and mutual will executed by a husband and wife in conformance with an agreement devised the "estate belonging to me at the time of my death" for the benefit of the survivor, it was held that the instrument did not give the wife any interest in or control of her deceased husband's property during his lifetime, or restrict in any way his right to use or dispose of it as he might wish while he lived, and that she thus had no right, as widow and executrix of her husband's estate, to an equitable lien in favor of the estate on a joint bank account opened during the lifetime of her husband in the names of himself and his brother, payable to either, or the survivor. The brother filed a petition to which the widow filed a counterclaim, and the trial court found that the transfer of funds into the joint bank account was in violation of the contract and was thus null and void. Reversing, the appellate court pointed out that a statute made the brother's title absolute in the absence of fraud or undue influence, that it was necessary that the fraud or undue influence referred to in the statute be practiced on the person opening the joint account, that there was no claim of any fraud or undue influence on the deceased husband, and that actual fraud was therefore not relied upon. The court then went on to say that the only case where mere intent to defraud is sufficient to render a transaction fraudulent and void is where a conveyance is made with intent to defraud creditors, that there was no such allegation in the present case, and that it was therefore clear that the lower court erred in not striking out the wife's defense of fraud and in not dismissing her counterclaim of fraud. The court added that the joint will agreement had been fully executed by the decedent, that furthermore it did not give the respondent any interest in nor control of the decedent's property during his lifetime, or restrict in any way his right to use or dispose of it as he might wish

while he lived, and that, even assuming that the decedent opened the bank account with the design and intent to reduce the amount that his wife would receive under his will, still such design and intent would not make the opening of the account a fraud on her.

§ 10[b] Transfer to joint survivorship bank accounts or bonds—Held improper

In the following cases involving joint or mutual wills whereby the property was left to the survivor, it was held improper for one party acting during the lifetime of both parties to use funds to purchase bonds or to open bank accounts in the party's own name and that of third parties with the right of survivorship.

Where a husband and wife, pursuant to an oral contract, executed reciprocal wills, and the wife took no action thereafter to revoke the will that she executed under the contract, it was held in *Anderson v Benson* (1953, DC Neb) 117 F Supp 765 (applying Nebraska law), that upon the death of the husband the wife was entitled to all property which the husband conveyed, without consideration, to third persons with the intention of fraudulently defeating the rights of his wife derived from the terms of the contract. After executing the reciprocal wills, the husband had, without informing his wife, secretly executed another will disposing of his property differently than agreed to in the contract. He had also purchased United States Series E savings bonds with money that he and his wife had earned by their joint efforts, each of the bonds being issued in his name and that of a relative as co-owners. Pointing out that it would not order the co-owners of the bonds (the husband's relatives) to request the United States to do other than it agreed to do under the provisions of its contract, the terms of which were expressed in the bonds and the authority under which the bonds were issued, the court said that there was nothing in the laws or regulations which prevented it from declaring a resulting trust in the proceeds of the bonds in order to prevent the perpetration of a fraud, and that the co-owners should cash the bonds in keeping with the laws and regulations of the United States and pay the proceeds to the wife. The wife had instituted the action to establish a contract between herself and her deceased husband to make mutual and reciprocal wills and to enforce a claim to, and remove a cloud upon, the property which the husband had disposed of in violation of the contract.

Where a husband and wife executed a joint and mutual will in which they agreed that all of their property was to be deemed community property, that upon the death of one of them, certain bequests were to be made, and that all of the rest and residue of their property was to go to named trustees, who were to pay the net income to the survivor for life and then to named beneficiaries, and where the husband and wife agreed in the will that the survivor would not dispose of any of the corpus or principal of any of the property, it was held in *Chase v Leiter* (1950) 96 Cal App 2d 439, 215 P2d 756, that the wife had violated the contract contained in the will when she had withdrawn \$94,800 from her and her husband's joint bank account 12 days before the husband's death, and had redeposited the money in joint tenancy accounts of herself and her daughter, and that the money was still community property subject to the terms of the will. The court said that although the will provided that the "survivor" would not dispose of any of the corpus or principal, thus referring to the period of survivorship, it was apparent from the whole will that it was the intention and the agreement of the parties that the same agreement not to dispose of any of their property was to apply to the period prior to the death of the first one to die. The court explained that the will referred to their "being desirous of ultimately disposing of" all of their property, "according to a plan and program for that purpose" to which they had agreed, and that the whole tenor of the will was that it was to take effect at once.

§ 11. Other transfers

[Cumulative Supplement]

In the following cases involving joint or mutual wills, it was held proper under the circumstances for the

parties, during the lifetime of both, to make inter vivos transfers of the property involved in the wills, the transfers being made in an undisclosed manner or in a manner other than that discussed in §§ 9, 10, supra.

Where a husband and wife, as part of a property settlement, agreed to execute wills leaving all of their property to their two children equally, and the agreement was incorporated into an interlocutory divorce decree, and where each party thereafter violated that agreement by making certain inter vivos dispositions of their property, it was held in *Mitchell v Marklund* (1965) 238 Cal App 2d 398, 47 Cal Rptr 756, that the parties were free to repudiate the agreement during their joint lifetimes, notwithstanding their agreement not to revoke their wills, and that their actions constituted a repudiation of the agreement. After the husband died, leaving a will which specifically disinherited the children and made his second wife the sole beneficiary, the children (beneficiaries to the agreement) instituted the present action, seeking to impose a constructive trust both upon this property and upon the property transferred to the second wife during his lifetime, and to enforce the agreement. On appeal from a judgment for the defendants which found the agreement unenforceable, the judgment was affirmed, the court saying that the agreement to make wills could not acquire the status of a judgment by the physical incorporation of the property settlement, in which it was embodied, into the interlocutory decree of divorce, because it was beyond the power of a court sitting as a divorce court to make, such judgment, that the divorce court lacked the power to order the husband to make a will disposing of his separate property, that the wife had repudiated the contract by making certain inter vivos dispositions of her property during the estranged husband's lifetime, and that this was more than sufficient to release her former husband from his obligations under the contract.

Where a mother (the plaintiff) and daughter-in-law, pursuant to an agreement, executed mutual wills whereby the daughter-in-law left her entire estate to her husband (son of the plaintiff) with remainder over in fee to the mother if she survived her son, and the mother left her property to her son and her daughter (not daughter-in-law), it was held in *Bird v Jacobus* (1901) 113 Iowa 194, 84 NW 1062, that there was nothing in the agreement which prevented the daughter-in-law from disposing of her interest in the real estate at any time during her life, that the agreement was not to devise to the mother any specific property, but only such as the daughter-in-law might have at her death, and that the daughter-in-law could not give away the property merely to defeat her obligation, but that otherwise her free use of it was not restricted.

CUMULATIVE SUPPLEMENT

Cases:

Trial court could have declared inter vivos trust funded by wife void, where trust contained substantial portion of wife's assets at time of her death, and divided property contrary to terms of mutual will created by her and husband; such declaration would have resulted in assets of trust passing in probate pursuant to estate plan agreed upon by husband and wife and which was binding on wife. *Murphy v. Glenn*, 964 P.2d 581 (Colo. Ct. App. 1998), reh'g denied, (Apr. 16, 1998) and cert. denied, (Oct. 19, 1998).

[Top of Section]

[END OF SUPPLEMENT]

III. Factors determining survivor's power to make inter vivos transfers

A. Express terms of agreement or will

§ 12. Survivor given fee simple title

[Cumulative Supplement]

Where a joint or mutual will or its agreement gives the survivor a fee simple title in property, leaving whatever remains of the property to named beneficiaries, the survivor has been held to possess full authority to make any good-faith inter vivos disposition that he or she desires.[FN61] The following cases so hold.[FN62]

Likewise, a joint and mutual will executed by a husband and wife, which left all of the estate to the survivor "to be used, occupied, enjoyed, conveyed and expended by, and during the life of such survivor, as such survivor shall desire," and which upon the death of the survivor left "any of such estate which then remains" to their children, was held in *Scales v Scales* (1961, CA5 Tex) 297 F2d 219 (applying Texas law), to give the surviving wife a "defeasible or conditional fee simple title," with the power to dispose of the property "imprudently or improvidently or in bad faith."

Also noteworthy in this regard, although the right of the survivor to dispose of the property was only collaterally involved, is *Newman v United States* (1959, DC Ill) 176 F Supp 364 (applying Illinois law), wherein it was held that the surviving spouse took an absolute estate without qualification in fee simple, under the mutual wills of a husband and wife whereby the entire estate of each was given to the other "to hold the same as an absolute estate forever," and if the other predeceased the testator, then it was given to their named children.

Similarly, a joint will, executed by a husband and wife, which left all property to the survivor "absolutely and in fee simple," with all of the property which was owned by the survivor at the time of death going to named persons, was held in *Nett v Phillips* (1961, DC Iowa) 202 F Supp 270 (applying Iowa law), to leave the property to the surviving wife without limitation on the survivor's right to dispose of the property in any manner that she saw fit during her lifetime, but to prohibit any testamentary disposition by the survivor, and thus it was held that the survivor was entitled to her claimed marital deduction for federal estate tax purposes.

In *Callaway v Faust* (1956) 212 Ga 596, 94 SE2d 379, a joint will under which a husband and wife left all property to the survivor "to be used and owned fully in any way said survivor may desire," and under which, at the death of the survivor, "all property then owned or held by such survivor" went to a named beneficiary, was held to allow the surviving husband to dispose of the property as he wished, since, it was held, he took the property in fee simple. The court said that the provision leaving the beneficiary "all property then owned or held" by the survivor was not intended to limit his fee.

A married couple's joint will that left all property "to the survivor of us, for his or her own use and benefit forever," and "all the rest, residue and remainder" to their two children in equal shares, was held in *Suwalski v Suwalski* (1969) 112 Ill App 2d 98, 251 NE2d 279, to give the property to the surviving husband to use as he saw fit during his lifetime, and after his death, to give the property that remained to the two children.

In *Culver v Hess* (1944) 234 Iowa 877, 14 NW2d 692, the joint will of a husband and wife which left all property to the survivor "absolutely in fee simple," and which upon the death of the survivor left "all that may remain" to their sons equally, was held to give the survivor the right to freely deal with the property during her lifetime as though her title therein was absolute and in fee simple, but the court said that this right did not include the right to make a testamentary disposition of any property possessed by the survivor at her death.

And in *Re Estate of Lenders* (1956) 247 Iowa 1205, 78 NW2d 536, the survivor's authority to give property away was upheld under mutual wills which left the property to the survivor "absolutely," and which provided that upon the death of the survivor, the property which the survivor might then own went to named beneficiaries.

In *Re Logan's Estate* (1962) 253 Iowa 1211, 115 NW2d 701, where Item I of a joint and mutual will left all property to the survivor, and Item II left "the remainder of all the property" to designated beneficiaries, "subject to the bequest in Item I," it was held that the survivor was given a fee simple title to the property of the first to die, and that at the death of the survivor, all property remaining in the survivor's hands went to the named beneficiaries.

Similarly, in *McCuen v Hartsock* (1968, Iowa) 159 NW2d 455, involving a joint and mutual will which left

the personal property to the survivor absolutely, the right of the survivor to transfer a joint bank account which had been held jointly by the husband and wife, to a joint tenancy account with a son, was upheld.

In *Lindley v Lindley* (1960) 67 NM 439, 356 P2d 455, where by means of a joint will a husband and wife left to the survivor all property "in fee simple" and "absolutely free and clear of any conditions or restrictions with full power of disposition," and directed that "should there be any property" belonging to the survivor at his or her death, it was to go to named beneficiaries, it was held that upon the death of the husband the surviving wife acquired "absolute title to the property during her lifetime, including the right to dispose of said residuary estate," and that she therefore had the right to make inter vivos gifts of cash and realty with a total value of from \$400,000 to \$650,000.

And in *Bailey v Bailey* (1948, Tex Civ App) 212 SW2d 189, error ref, a joint will which left all property to the survivor for life and after the death of the survivor, to specific children, and which permitted the wife, if she were the survivor, "to rent the lands and receive the use of the rental income," was held to authorize the wife to give \$1,220 to her son when more than that amount had been received by her as rental income. The surviving wife had made out a \$1,220 check to her son, which he used to pay off a debt. The court said that the will specifically authorized the surviving wife to use the rental income, that under the provisions of the will she became vested with the title and ownership of the rents and revenues, and that rents received during her lifetime did not become a part of the corpus of the estate until her death.

In *Richardson v Lingo* (1955, Tex Civ App) 274 SW2d 883, error ref n r e, where a husband and wife, pursuant to an agreement, executed mutual wills leaving all of the estate of which he or she should die seized, to the other, and his or her heirs and assigns in fee simple absolutely and forever, and if the other should not survive, then to named beneficiaries, it was held that the survivor was free to convey the property.

A joint and mutual will which left to the survivor the testator's "entire personal property" to "manage, control and dispose of" during her lifetime was held in *Johnson v Johnson* (1957, Tex Civ App) 306 SW2d 780, error ref, to authorize the surviving wife to use the personal property to purchase a house and lot to give to her son. The court explained that the will gave the survivor, in language free of ambiguity, the unqualified and unrestricted right to dispose of the personal property and the rents and revenues of the real property during the survivor's lifetime, and limited the rights of the remainderman to whatever estate remained in the survivor at his or her death, and that if it pleased the surviving wife to use the personal property to buy a home and give it to her son, the court could see no restrictions in the will preventing it.

A joint and mutual will which left the property, including minerals, to the survivor to be used as the survivor desired or saw fit, and on the death of the survivor, to named beneficiaries, was held in *Odell v Odell* (1957, Tex Civ App) 306 SW2d 914, error ref n r e, to give the surviving husband the royalties from the oil wells on the property to use as he wished and, it was further held, the survivor, who had remarried, could purchase real estate out of those royalties, taking it in the name of himself and his new wife, this property and the personal property accumulated after the first wife's death being community property of the survivor and his new wife.

In *Wenzel v Menchaca* (1962, Tex Civ App) 354 SW2d 635, error ref n r e, the joint will of a husband and wife which left all property to the survivor, "with further full power of disposition by sale by the surviving spouse, for and during the life of said surviving spouse," was held to be absolute devise passing to the surviving spouse the fee title to such property, permitting the survivor to make an inter vivos disposition of the real estate, conveying good title.

CUMULATIVE SUPPLEMENT

Cases:

In action by son to set aside conveyances of mother and to enjoin mother from disposing of property in manner allegedly conflicting with provisions of joint and mutual will between mother and deceased father, trial court erroneously granted judgment in favor of son, where mother, as surviving spouse, received fee simple absolute title in all real property, and where will contained no provisions clearly and unmistakably manifesting intent to limit that fee simple devise. Son's reliance on contract theory was of no avail in that there was no language in will to effect that will was result of contract. *Caudell v Caudell* (1991) 260 Ga 802, 401 SE2d 2, 102-47 Fulton County DR 12B.

That wife, as survivor, had a joint will that she executed with her husband probated as his individual will and took under that will did not thereafter estop her from making a new will, where husband's stated purpose in joint will was to convey all of the property he owned to wife if she were the survivor; concluding that wife received fee simple absolute title under the will would not in any way prevent the full effect and operation of every part of the will. *In re Estate of McFatter*, 94 S.W.3d 729 (Tex. App. San Antonio 2002).

[Top of Section]

[END OF SUPPLEMENT]

§ 13. Survivor given life estate

In the following cases where the surviving party to a joint or mutual will was expressly given a life estate under the will with the remainder going to designated beneficiaries,[FN63] the courts considered it improper for the survivor to dispose of the property in such a manner as to prevent the beneficiaries from taking at the death of the survivor as provided for in the will.

In *Rucker v Harris* (1968) 91 Ill App 2d 208, 234 NE2d 392, where a husband and wife, who owned a two-family home in joint tenancy, executed a joint will leaving all property to the survivor to use during the survivor's life, with the remainder going to the daughters of the husband by a former marriage, it was held that the joint will was a contract for the devolution of all property to the daughters of the husband, that the wife, who survived the husband, had only a life interest in the property formerly held in joint tenancy, and that her *inter vivos* conveyance of the home to the defendant could convey no greater interest. The court explained that where a husband and wife properly execute a joint will which indicates a contractual agreement between them as to the disposition of their property after both of their deaths, a life estate in the property is created in the survivor, with the remainder interest belonging to the beneficiaries named in the will, and that this is true even if the property is held in joint tenancy, provided that the will evidences an intention to include such property in the ultimate devolution to the remainderman.

In *Tiemann v Kampmeier* (1961) 252 Iowa 587, 107 NW2d 689, where a joint will left all property to the survivor for life with the right to dispose of such property as the survivor desired for his or her care and support, and directed that on the death of the survivor, all of the rest remaining in the survivor's hands was to go to certain named beneficiaries, including the present plaintiffs, it was held that the parties contracted that the survivor should have only a life estate in the single or common fund which was created upon the death of the other testator, and that under this will the farm that was held by both in joint tenancy was, at least after the wife's death, held by the husband in the nature of a trust, subject to a life estate, for the beneficiaries named in the will. The court said that although the joint will allowed the survivor to dispose of the property as he desired for his care and support within his sound discretion, he could dispose of the property only for care and support.

The joint will of a husband and wife that left all property to the survivor for life and then to named beneficiaries was held in *Eikmeier v Eikmeier* (1953) 174 Kan 71, 254 P2d 236, to prohibit the surviving husband from divesting himself of his real estate during his lifetime. The court affirmed a judgment protecting

the beneficiary's interest in land which the surviving husband had deeded to his new wife.

In *Rastetter v Hoenninger* (1915) 214 NY 66, 108 NE 210, where the joint will of a husband and wife provided that the survivor should have the income from their property for life, the property to be divided among their children upon the surviving party's death, the court took the view that the surviving husband, who had accepted the benefits of the will upon the wife's death, had the right to convey his own real estate to one of his daughters during his life (or, as occurred in this instance, take title to land purchased by him, in the name of the daughter), in the absence of a showing that the gift was made in contemplation of death, or for the purpose of defeating his testamentary agreement with his wife, but that he was not authorized to purchase the real estate in question with money formerly belonging to the wife, which he had taken under the joint will. Nothing short of plain and express words to that effect would suffice to limit the use, or to impress a trust upon, the property of each during his or her own life, the court said, adding that the parties disabled themselves from making a different "testamentary" disposition after accepting the benefits of the agreement, and that the survivor could not, of course, after accepting the benefits of the agreement, make a gift in the nature, or in lieu, of a testamentary disposition or to defeat the purpose of the agreement. The court went on to explain that upon the death of the wife, the husband became trustee for the remaindermen of the wife's personal estate, and that if the identical money received from the wife could be traced to the purchase of the real estate in question, equity would impress a trust upon it.

Where by a mutual will agreement certain farmlands were left to the survivor for life, and the remainder to named beneficiaries, it was held in *Ankeny v Lieuallen* (1941) 169 Or 206, 113 P2d 1113, dismd on other grounds 169 Or 222, 127 P2d 735, that the surviving party had no right or authority to mortgage any interest in the farmlands except his life estate therein. The lower court had decreed foreclosure and the defendants appealed. Pointing out that the bank had full knowledge of the mutual will contract when it accepted the mortgage, the court said that a husband and wife, or any two persons, could contract with each other to make mutual wills containing reciprocal provisions, and that when such wills had been executed pursuant to a contract, if it was necessary in order to give effect to such agreement, equity would impress the property of the survivor with a trust in favor of the person entitled to the property under the mutual agreement. As for the plaintiff's contention that the survivor was empowered to mortgage the lands though not permitted to sell them, the court said that it would be idle to impose a limitation upon the power of the holder of a life estate in land to sell the land and at the same time permit him to mortgage them for more than the lands were worth, and thereby do indirectly what he was not permitted to do directly. Reversing the foreclosure decree, the court said that it was primarily a question of the parties' intention, and that from the provisions of the contract and the wills it seemed clear that the parties intended the survivor to have no right to dispose of the property during his or her lifetime, and that all of the farmlands owned by either of them should pass to the remainderman upon the death of the survivor.

In *Moore v Moore* (1917, Tex Civ App) 198 SW 659, error ref, it was held that although she could mortgage her life estate, the surviving party to a joint will agreement which left the estate to the survivor for life and the remainder to named beneficiaries had no power under the joint will to sell or mortgage the beneficiaries' fee title in the remainder.

In *Dickerson v Yarbrough* (1948, Tex Civ App) 212 SW2d 975, where a joint and mutual will executed by a husband and wife left the property to the survivor, directing that the survivor keep the property in as good condition as circumstances would permit during the lifetime of such survivor, and that at the survivor's death the property was to be divided between the nearest of kin, and after the wife's death the husband deeded some of the property (land valued at \$2,000) to the wife's next of kin for \$200, it was held that the deed conveyed no more than the surviving husband's life estate, the remainder fee having already vested in the devisees referred to as next of kin.

Under a joint will executed by a husband and wife, which left to the survivor a life estate in all property without the power to sell any of the real estate, and the remainder to named beneficiaries, the survivor's inter vivos conveyance of some of the real estate was held in *Russell v Garrett* (1965, Tex Civ App) 392 SW2d 375, not to alter the rights of the remaindermen or the status of the property at the death of the surviving spouse. Creditors of the surviving widow attempted, after her death, to subject the land which she had not conveyed during her lifetime to liens for payment of judgments which they had obtained against the widow. Affirming a judgment denying the creditors' claims and giving title and possession of the land to the beneficiaries named in the joint will, the court said that at the death of the husband the remaindermen each took a vested remainder subject to the widow's life estate, and that the fact that the widow disposed of all of the personal property of the estate and in spite of the prohibition against it sold certain other tracts of land inventoried in the estate was a matter between her and the remaindermen, but that it did not alter the rights of the remaindermen under the joint will or the status of the property. The court said that the widow, having probated the will and having accepted the benefits thereunder, was estopped to change any of its provisions, and that any change in the will or the handling of the estate in a manner repugnant thereto could not have affected the rights of the beneficiaries thereunder.

§ 14. Transfer expressly authorized

Where the joint or mutual will, or its agreement, expressly authorizes the survivor to dispose of the property as he or she sees fit, even though it does not expressly give the survivor a fee simple title to the property,[FN64] the courts have respected the parties' desires. The mutual will agreements or the wills in the following cases were construed as expressly authorizing the surviving party, who was not expressly given a fee simple title, to make the inter vivos disposition of the property in question, or to make any inter vivos disposition, at least if it was made in good faith and was in the survivor's interest.[FN65]

Thus, in *Fourth Nat. Bank v First Presbyterian Church* (1932) 134 Kan 643, 7 P2d 81, where a husband and wife, each owning large estates of about equal value, devised by individual wills certain property to children and friends, each giving the other spouse the remainder for life, with the power to sell, exchange, or otherwise dispose of the property involved (except certain assets), but not by will, with the specific provision that the survivor's deed of conveyance under such circumstances should transfer full fee, and such parties at the same time executed a joint and mutual will by which each agreed that he or she would abide by the individual wills and make no other will or codicil different therefrom, which joint and mutual will should become effective upon the death of both, at which time a named trustee was to carry out the provisions of the individual wills, and the husband, upon the death of the wife, accepted her will and benefits conveyed thereunder, and thereupon entered into a contract with a church corporation to erect a memorial to his wife, depositing \$100,000 for that purpose (the total estates being about \$650,000), the court sustained the validity of the contract as against the contention of the devisees and legatees that the provisions of the joint will impressed the property with a trust which required the husband to hold and manage it in accordance with their mutual agreements, and that any disposition of his or her property which would reduce or impair the estate was invalid. The court observed that the trust did not become effective until after the contract was made, i. e., until the death of both husband and wife; and that he was not required to keep the estate up to the value which it had been when the wills were made; that the husband, after his wife's death, had control and dominion of his wife's property as well as his own, with the express power to make contracts in connection with portions thereof, and in the exercise of such powers in good faith any dealings or contracts he made were valid even though unprofitable or improvident; that he had the right to use the assets of the estate in keeping with his station and life and circumstances, and to meet the ordinary social and civic demands of the community.

And in *Beall v Hardie* (1955) 177 Kan 353, 279 P2d 276, where a husband and wife executed a joint will leaving all of their property to the survivor, the property to be "the sole and absolute property" of the survivor, and leaving whatever property remained at the death of the survivor to the two children, it was held that the joint will authorized the surviving wife to execute a warranty deed conveying, for a valuable consideration, all of her interest in the real estate to one of the children, thereby divesting the other child of his remainder interest. The court said that the surviving testator, by the terms of the will, received a life estate with a qualified power of disposition, the only qualification or restriction being that the survivor could not make a testamentary disposition of the property covered by the will, in contravention of the interest of the remaindermen, and that by the terms of the will, although it was expressed as the wish of the parties that the property be not sold, it further provided that it could be sold should the survivor desire to make such disposition.

The surviving wife's conveyance of a home to her daughter, reserving a life estate therein, was in conformance with an agreement of the wife and her husband, and the validity of the conveyance was not affected by a joint and mutual will, according to the court in *Sage v Sage* (1925) 230 Mich 477, 203 NW 90, where the wife and her husband had executed a joint and mutual will leaving their property to the survivor for life and the remainder to designated beneficiaries, and then purchased a home and made an oral agreement with one of their daughters to give her the home if she would care for them. The court explained that if there had been no agreement, acted upon by the parties during their lives, and the surviving wife had made the deed to the daughter after the husband's death, equity would have declared her act to be fraudulent, and would have enforced the provisions of the will, because after the husband's death the will became irrevocable. The court went on to say, however, that the husband and wife were under no obligation to preserve this or any of their estate for the heirs, and that they had made a joint disposition of all the property and could deed or devise it as they saw fit if they were both parties to the transaction. Pointing out that they disposed of the property before the will became irrevocable by the death of the husband, the court said that the fact that the deed was not made until after he died did not matter as long as the contract pursuant to which it was given was legal and binding.

The survivor's disposition of property to one of the beneficiaries of a mutual will, thus leaving nothing for the other beneficiary, was upheld in *Phelps v Pipher* (1948) 320 Mich 663, 31 NW2d 836, where the survivor and his wife, in conformance with an agreement, executed mutual wills leaving their property to the survivor, and the remainder to their son and daughter, and then shortly before the wife's death they agreed that if the wife was unable to participate with the husband in changing their wills to leave all property to the daughter upon the death of the survivor, the husband would take the necessary action to see that the daughter received the property, and then after the wife's death the husband deeded the property to the daughter, leaving the deeds with the scrivener to be delivered to the daughter if not called for during his lifetime, and changed his will to exclude his son. Pointing out that the fact that the mutual wills were not changed before the wife's death did not make the husband's will irrevocable after her death, the court explained that the rather common expression that a joint and mutual will is irrevocable by the survivor after the death of one party to it is not technically and legally correct, that it is the contract to make the will, not the will itself, which is irrevocable, that the contract is irrevocable because a court of equity, under its fraud and trust jurisdiction, would decree its specific performance, and that such decree incidentally, although by indirection, enforced the will, and so the will is often called irrevocable.

Where a husband and wife executed a joint and mutual will whereby all property went to the survivor "upon the condition, however, whatever remains of the same after the death of the survivor, is given, devised and bequeathed" to named beneficiaries, but the survivor was not to be "restricted in any way in his lifetime in the matter of the bona fide disposition or use of any property," in *Re Rubin's Will* (1965) 48 Misc 2d 539, 265 NYS2d 407, it was held that upon the death of the husband the wife received a life estate coupled with a power of invasion for her own benefit, the power to be exercised in her sole discretion provided that she acted in good faith. The court said that the intent of the testator obviously was to limit the power of disposition to his wife's

use, comfort, and benefit, that she would be the sole judge of what was necessary for her benefit and enjoyment, and that the language used clearly indicated that the wife's power of disposition should not be restricted in any way, but that the disposition still had to be made in good faith for her own benefit.

Where a husband and wife executed mutual wills leaving all property to the survivor with the full power to sell and convey and use the proceeds from the sale as the survivor saw fit, the unconsumed portion remaining at the death of the survivor going to the heirs of the husband and the heirs of the wife equally, it was held in *Re Barnes' Estate* (1950, CP) 64 Ohio L Abs 6, 108 NE2d 88, *affd* (App) 64 Ohio L Abs 28, 108 NE2d 101, that the surviving wife was a quasi trustee for the remaindermen, that while she could use and enjoy the estate to its fullest extent for her support, and consume the whole of it if necessary, she could not go beyond what would be regarded as good faith toward the remaindermen, and that where she commingled the funds that she received with her own, the expenditures for her purposes were presumed to be paid, first, out of the income from the estate, and then out of the corpus of the decedent's estate.

A joint will executed by a husband and wife that left all property to the survivor "to be used, occupied, enjoyed, conveyed, and expended by and during the life of such survivor," with such property as remained undisposed of at the death of the survivor going to named beneficiaries, was held in *Tillman v Mahaffey* (1952, Tex Civ App) 252 SW2d 255, *error ref n r e*, to devise a "limitation or defeasible fee simple title" to the survivor. The named beneficiaries who were to take upon the death of the survivor were not given any interest in the estate so long as the survivor lived, the court explained, and they were not vested with any right to interfere with the survivor in the exercise of the title given her, nor were they given any vested right, title, or interest in the proceeds of any sale that she might make. The survivor was not required to preserve, protect, nor account for any of the property to the beneficiaries, the court said, adding that the testators had clothed the survivor with the unqualified right to convey the property during his or her lifetime, and had limited the rights of the remaindermen to whatever estate remained in the survivor at his or her death.

In *Ellis v First Nat. Bank* (1958, Tex Civ App) 311 SW2d 916, *error ref n r e*, it was held that where a husband and wife executed identical wills leaving all property to the survivor for life, "to have, during such time, full and absolute authority to handle, manage, sell, in any manner dispose of said properties, or any part thereof," the survivor had the right to make a gift from the estate of 1,000 shares of stock to one of their daughters. Although it is not clear, it appears that mutual wills were involved in the present case. Reversing a judgment denying that the survivor had a right to make such a gift, the court said that where the survivor takes a conditional fee, or even a life estate, with the full power of disposition, he may dispose of that property as he sees fit during his lifetime.

A joint and mutual will executed by a husband and wife which left all property to the survivor to be used, enjoyed, and conveyed as if it were "left to the survivor in fee simple," and which provided that any conveyance exercised by the survivor should "convey the full, complete and fee simple title," was held in *Foust v Coyne* (1959, Tex Civ App) 331 SW2d 386, *error ref n r e*, to authorize the surviving husband to convey real estate to a new wife in consideration of \$10 and of love and affection for the new wife, reserving for himself a life estate. The court said that it was of the opinion that under the terms of the will the surviving husband had a right to dispose of the property as he did, and that the deed in question was not a testamentary instrument.

In *McKamey v McKamey* (1960, Tex Civ App) 332 SW2d 801, *error ref*, it was held that where by the terms of a joint and mutual will the survivor is given the unlimited right of disposition of the property by *inter vivos* conveyances, such survivor may convey the property as he or she sees fit, even though it may defeat the plan of disposition set forth in the will. A husband and wife had executed a joint and mutual will leaving all property to the survivor "to be used, occupied, enjoyed, encumbered or conveyed and expended," as the survivor desired, and upon the death of the survivor "any such estate then remaining" went to their five children in a specified manner. After the husband's death the wife disposed of the property in a different manner than that

provided for in the joint will. The court declared that the wife was authorized under the will to convey the property as she wished, and that her conveyance of "practically all of her property" to her children in two deeds, reserving to herself a life estate, was authorized under the will.

In *Cammack v George* (1964, Tex Civ App) 377 SW2d 687, error ref n r e, a joint and mutual will giving the survivor all of the estate "to be used, occupied, enjoyed, conveyed, managed, conserved, expended, and controlled by, and during the life of such survivor, as such survivor may desire," subject only to the condition that upon the death or remarriage of the survivor, the portion of the estate belonging to the decedent should vest in the plaintiffs (children of the wife), was held to give the survivor a life estate in the property of the decedent, with the power to dispose of the fee before the survivor's death or remarriage, and the surviving husband's inter vivos conveyances, it was further held, defeated any interest of the plaintiffs in so much of said property as was conveyed.

According to the court in *Dickerson v Keller* (1975, Tex Civ App) 521 SW2d 288, error ref n r e, when called upon to determine the extent of powers of disposition in mutual will cases, it had in almost every instance held the power to be absolute and unlimited when words such as "with full power to dispose of" or "absolutely to dispose of. . . according to her pleasure" or "as such survivor may desire," or the like, were used to create or describe the power, or where language of a conditional fee was used. However, the court added, in life estates the disposition could not be testamentary.

Although the surviving parties to the joint will agreements involved in the following cases were expressly given the power to sell, it was held that this did not authorize them to dispose of the property without valuable consideration.

Thus, in *Nye v Bradford* (1946) 144 Tex 618, 193 SW2d 165, 169 ALR 1, a provision in a joint and mutual will which authorized the surviving party to "sell" the home place if the survivor so desired was held not to authorize the survivor to convey the property to another as a gift. The surviving wife conveyed the property to the daughter in consideration of "the love and affection" which she bore toward the daughter. The court said that according to its terms the deed was a gift and not a sale, that the joint will authorized the survivor, who became a life tenant, to sell the property, that by selling it she could defeat the remainder, which was devised to the two children in equal undivided interests, that she was not authorized by the will to accomplish that by gift of the property, and that the rights of the remaindermen could not be taken away from them except in accordance with the terms of the will.

And in *Heller v Heller* (1921, Tex Civ App) 233 SW 870, where the joint will left the property to the survivor, who was to "have the right to sell or otherwise dispose of any part of our community property and invest the proceeds of such sale or disposition as he or she may think best," the remainder to go to their children, it was held that this did not allow the survivor to convey some of the real estate to one of the children in consideration of \$10 and love and affection, although it did permit the survivor to convey the property to a son in consideration of services rendered and to be rendered by him in caring for and managing the estate. The court explained that while the general power of disposition of the property conferred upon the survivor was unrestricted when considered by itself, the will had to be construed as a whole, and that the specific provision in question should not be construed as authorizing the surviving wife to give or devise the property or any portion of it contrary to the express provisions of the will, which directed that upon the death of both of the testators, all of the property should be equally divided between all of their children. To give that one provision a construction which would authorize the wife to give the property to one of the children would defeat the manifest purpose and intention of the testator as evidenced by the will as a whole, and it should not be so construed, the court said, adding, however, that it did expressly authorize a sale or disposition by the survivor of any part of the property and the investment of the proceeds as the survivor might deem best.

§ 15. Transfer expressly forbidden

Where the parties to a joint or mutual will expressly prohibit the survivor from disposing of the property during his or her lifetime, the survivor is bound thereby and may not make an inter vivos disposition contrary to that agreed upon, it is held in the following cases.

In *Mitchell v Bagot* (1941) 48 Cal App 2d 281, 119 P2d 758, it was held that where a joint will executed by a husband and wife left all property to the survivor "without restrictions as to its use or disposal save that the survivor shall not deed any of it away by deed of gift or unless he or she has received the equivalent of its full market value," with the remainder to go to designated beneficiaries, the survivor was given a life estate with the power to consume the principal for his support, subject only to the limitation that he could not give the property away, and that if he sold it, he was required to receive the full market value. As for the power of the survivor to dispose of the property, the court merely said that there could be no doubt that he had such power under the conditions noted above.

And where two brothers, pursuant to an agreement, made "absolute wills" to each other with the understanding that the survivor would will all of the property belonging to them to their nieces and nephews, and the surviving brother transferred a large share of the estate by deed to a lady friend, and willed most of the remainder of this estate to the lady, it was held in *Re Doerfer's Estate* (1937) 100 Colo 304, 67 P2d 492, that the pact between the two brothers, the coincidental making of their mutual wills, and the fact that the survivor received and accepted the property of the other brother through his will, impressed all of the property of which the brother died seized and possessed, with a constructive trust which then became operative by law by reason of the survivor's fraud in attempting to will to the proponent the bulk of the estate contrary to the partly executed agreement which the jury found existed between the survivor and his brother.

Where a husband and wife executed a joint and mutual will leaving all the property to the survivor, with certain property going to a church on the death of the survivor, the will providing that if the husband predeceased the wife, the wife should "at no time sell the real estate," it was held in *First United Presbyterian Church v Christenson* (1976) 64 Ill 2d 491, 1 Ill Dec 344, 356 NE2d 532, 85 ALR3d 1, that the provision prohibited the wife from either selling or giving the property away. The court said that the testators, by contract, created a life estate in the survivor, and made gifts over to the church, and that the wife had conveyed to the grantees only that interest which she possessed, namely, a life estate.

And in *Ralyea v Venners* (1935) 155 Misc 539, 280 NYS 8, where the joint will of a husband and wife gave all their property to the survivor, to be divided, at the latter's death, among their children and stepchildren, with a contemporaneous agreement stating, inter alia, that "no agreement or instrument shall be executed providing for any different distribution," and the husband, having accepted the benefits under the joint will at his wife's death, remarried and conveyed to his wife a bond and mortgage upon his real estate and transferred to her all of his personal property, the court construed the agreement between the parties to be a covenant binding upon both parties while living, and upon the survivor, to preserve intact their then owned and later accumulated joint and several property for the life use and benefit of the survivor, with remainder over to the children and stepchildren of both, and held that the bond and mortgage might be set aside. It was said, however, that the contemporaneous agreement, so far as it forbade the execution of a new will by the husband, did not affect his right to dispose of the original joint and several property as he saw fit, leaving none of the same for the children of either party at the time of his death.

Where a joint and mutual will executed by a husband and wife left all property to the survivor, giving the survivor "all the powers and authority that an absolute owner would have, except that the survivor shall hold the corpus of said estate together during the lifetime of such survivor," and providing that the survivor should be "entitled only to the income therefrom for such survivor's use during the lifetime of such survivor," the court in

Thomas v Thomas (1969, Tex Civ App) 446 SW2d 590, error ref n r e, set aside three deeds conveying approximately 2,140 acres of land, which the surviving wife had executed to her daughter after the death of the husband, there being no bona fide sale and no adequate consideration, the court finding the deeds repugnant to the joint and mutual will. The court said that the survivor could not make any disposition inconsistent with the will.

§ 16[a] Power to transfer not defined—Considered authority to freely transfer property

[Cumulative Supplement]

It has been held that if a joint or mutual will, or its agreement, does not expressly prohibit the survivor from making inter vivos dispositions of the property (the property being left to the survivor, then to named beneficiaries, without further explanation of the survivor's interest), [FN66] the survivor is free to dispose of the property as the survivor may see fit, at least if done in good faith, even though it may leave nothing for the third-party beneficiaries. It should be noted, however, that the cases in which the courts have subscribed to this proposition did not involve devises or bequests of specific property which the survivor had attempted to dispose of differently.[FN67]

Nevertheless, according to the courts in the following cases, where the parties have executed a joint or mutual will pursuant to an agreement leaving the property to the survivor without defining the survivor's power to transfer, and upon the survivor's death to named beneficiaries, the survivor is free to make a good-faith inter vivos disposition of the property even though it may leave nothing for the beneficiaries.

In *Ohms v Church of The Nazarene* (1942) 64 Idaho 262, 130 P2d 679, where a husband and wife, in accordance with a contract, executed mutual wills leaving their property to the survivor, and upon the death of the survivor, leaving all property which the survivor owned at that time to the husband's children, it was held that since there were no restrictions in the contract or the mutual wills upon the right of the survivor to convey the property during her lifetime, the wife, who survived the husband, could donate to a church certain land which made up most of the estate, retaining for herself a life estate therein. The wife had originally changed her will to leave the property to the church, but upon learning that this would violate the agreement, she revoked the will, reviving the mutual will, and deeded the land to the church. After the wife's death, the third-party beneficiaries instituted the present action to set aside the deed on the ground that it was contrary to the intent and purpose of the contract. The lower court held the deed valid and the beneficiaries appealed, contending that the plain intent and purpose of the contract was that except for necessities, all property received by the survivor was to be kept intact to pass to the children upon the survivor's death, and that alienation during the life of the survivor, though not expressly prohibited, had the same effect as a violative testamentary disposition. The court rejected this argument, saying that there was no such restriction in the contract or the mutual wills, and none could be legitimately implied, that courts should construe contracts according to the plain language used by the parties in making them, and should not substitute what they might think the parties should have agreed to for what their contract showed that they did agree to. Pointing out that there was no reason to believe that the clear language employed did not correctly express the wishes and intentions of the parties, the court said that although there was strong reason to conclude that the implied meaning of the contract was against this alienation during the wife's lifetime, it still remained that such prohibition had to be implied and was not expressly contained in the contract. The court went on to say that it seemed better to adhere to the proposition that the contract would be enforced as it read, and that since the makers thereof did not see fit to incorporate in it restrictions upon alienation during the life of the survivor, the contract would be limited to the restrictions contained therein, namely, against testamentary disposition. The deed was not testamentary in character, because title immediately vested in the grantee, reserving only a life estate, the court added.

One who obligates himself to make a reciprocal will is not precluded from buying and selling property in good faith, it was held in *Boner's Admr. v Chesnut's Exr.* (1958, Ky) 317 SW2d 867, where a husband and wife, in conformance with an agreement, executed reciprocal wills, each leaving the testator's estate to the other for life, with the remainder to go to designated beneficiaries, and after the wife's death the husband gave another an option to purchase a building owned by the husband by making a demand upon the husband's personal representative within one year after the husband's death, the sale price to be \$15, 000. One of the designated beneficiaries contended that the contract to make reciprocal wills was binding on the surviving husband, and sought, inter alia, to have the deed on the building canceled. Conceding that the building went cheap, the court observed that the option contract covering the building was made in good faith.

A joint will which left "unto the survivor of us all property," and after the death of both "all the rest, residue and remainder" to their three children equally, was held in *Morman v Thornhill* (1970, Miss) 240 So 2d 258, to give the survivor an "absolute" and "unqualified right of disposition," and to authorize the surviving wife to convey, for \$19, 000, a house and lot from the estate. The court pointed out that the paragraph leaving the property to the survivor did not restrict the survivor's right to dispose of the property, and that it could find "no specific prohibition of disposal" in the paragraph which left the remainder to their children.

The absence of any express agreement to the contrary seemed to be the basis of the court's decision in *Galloway v Eichells* (1948) 1 NJ Super 584, 62 A2d 499, that one of the surviving parties to a mutual will agreement could sell her residence and thereby prevent the other survivors from taking it under the will. Two married couples agreed to execute mutual wills, each couple leaving all property to the survivor with the remainder going to the other couple, and after the death of the husband of one of the couples, the wife threatened to sell the residence and move out of the state. The survivor instituted the present action, seeking specific performance of the oral agreement, and the defendant (surviving widow of the other couple) moved to strike the complaint. In granting the motion, the court held that the other couple was not entitled to specific performance of the agreement until after the death of the surviving widow. The court said that if the widow should die without leaving a valid will in accordance with her contract, the contract would then be broken, but that in the instant case the agreement did not relate to any specific real estate or personal property, except the widow's residuary estate, but there might be none at the time of her death. According to the court, there was no lien expressly created, nor could the promise be impressed as a lien, and enforced, on any specific property of the promisor's estate, and there was nothing in the promise that fastened it upon any particular property, nor anything that would permit equity to affix property to it.

In *Schauer v Schauer* (1939) 43 NM 209, 89 P2d 521, where the surviving party to a mutual will agreement was left her husband's half interest in certain real estate which was community property, and she in turn left a half interest in that real estate to her brothers and sisters, leaving all the rest and residue to her husband's son by a previous marriage, it was held that she was devised the property without restraint on the power of alienation, that she was therefore the sole owner of the property with power of alienation, and that she could sell the property if she so desired.

CUMULATIVE SUPPLEMENT

Cases:

Joint will of married couple was not binding on wife who disposed of two parcels of land otherwise than as provided in will where only evidence offered was preamble to will which contained no language of finality or irrevocability to compel finding of contract not to revoke. *Moore v Harvey* (1980, Ind App) 406 NE2d 354.

Husband's and wife's agreement to execute mutual wills did not restrict husband from transferring assets following wife's death, regardless of whether the transfers were made for the purposes of avoiding the

testamentary disposition, where the agreement did not expressly limit a surviving spouse from transferring assets. In *re Leix Estate*, 289 Mich. App. 574, 797 N.W.2d 673 (2010).

Joint testamentary agreement that survivor's entire estate will be left to certain beneficiaries will not necessarily prevent survivor from making lifetime gift, since such a gift does not necessarily defeat purpose of agreement. *Petition of Levine*, 674 N.Y.S.2d 33 (App. Div. 1st Dep't 1998), leave to appeal dismissed, 92 N.Y.2d 920, 680 N.Y.S.2d 460, 703 N.E.2d 272 (1998).

[Top of Section]

[END OF SUPPLEMENT]

§ 16[b] Power to transfer not defined—Considered restriction on authority to transfer

[Cumulative Supplement]

Where a joint or mutual will leaves property to the survivor, and upon the death of the survivor, the remainder (without naming specific property)[FN68] to designated beneficiaries without defining the survivor's power over the property, some courts consider this a restriction upon the survivor's authority to dispose of the property by gift. According to the courts in the following cases, the survivor in such instances is prohibited from transferring the property to others without valuable consideration.

Thus, where a husband and wife executed "joint and mutual wills" leaving the property to the survivor, with one-half of the remainder going to the husband's daughter or her heirs, and one-half to designated heirs of the wife, it was held in *Iwerson v Dushek* (1976, Ark) 543 SW2d 942, that the surviving husband's declaration of trust, conveying the assets of his deceased wife to himself as trustee for the exclusive use and benefit of himself and his daughter, was invalid because it exceeded the limited power of disposition allowed him under the wills. The court explained that the wills allowed the husband to use the assets of the estate for his well-being, but did not give him the right or power to convey by will or by trust the remainder of the estate to his daughter on his death, and that on the contrary it contemplated an equitable division of the residue among the various heirs of both testators.

In *First United Presbyterian Church v Christenson* (1976) 64 Ill 2d 491, 1 Ill Dec 344, 356 NE2d 532, 85 ALR3d 1, the court said that it had decided many cases where an estate was given to one person in general terms without such express language as "for life" or "in fee simple," defining the estate in the first taker, and where such general terms were followed by subsequent language giving the property to another "when," "at," or "on" the death of the first taker, and that in applying the simple rule of interpretation that an instrument would be given effect in all its parts, and in viewing the ambiguous character of the first limitation in such a manner that the second limitation could also be given effect, it had held that the first limitation created a life estate, since to hold otherwise would make all the language of the gift over meaningless.

In *Johnson v Soden* (1940) 152 Kan 284, 103 P2d 812, the court invalidated a surviving husband's conveyance of property, apparently without valuable consideration, it being held that the conveyance violated an oral contract between the husband and his wife whereby the couple agreed to leave the property acquired by their joint efforts to the survivor, and that on the death of the survivor the residue of the estate was to go to their sons in equal shares. The surviving husband had deeded the property to one son. In setting aside the deeds and granting specific performance of the oral contract at the instance of the other son, the court said that the wife kept her promise, the husband benefited thereby, and the contract was consequently binding on him.

Also of interest in this regard is *Estate of Weidman* (1957) 181 Kan 718, 314 P2d 327, where a husband and wife executed a joint and mutual will in which they left all of their property at the time of their death to their brothers and sisters, one-half to the heirs of the wife, and one-half to the heirs of the husband, the court holding

that they intended to give each a life estate in the property of the other and at the same time make certain that the corpus of all property owned by both at the time of the death of whichever died first should go one-half to the wife's brothers and sisters, and one-half to the husband's brothers and sisters, and that therefore the surviving wife took a life estate in the estate of her deceased husband without the power of disposition.

Where a husband and wife executed a joint will leaving all property to the survivor, and the residue which had not theretofore been disposed of by the survivor, to certain nephews, and the husband, who survived his wife, remarried and deeded to the new wife property which had been owned by his former wife, it was held in *Price v Aylor* (1935) 258 Ky 1, 79 SW2d 350, that under the joint will the husband took only a life estate, and that therefore the conveyance was ineffective to give the new wife title as against the nephews. The court said that the conclusion was inescapable that the testators intended the survivor to take a life estate with a full and unrestricted right to its use and enjoyment and for the survivor's maintenance and support, and that possibly, if necessary, it might have been used for such purpose even to the extent of exhaustion, but that it was equally clear that the parties intended that whatever might remain at the time of the death of the survivor was to pass under the will to the nephews.

In *Rubenstein v Mueller* (1967) 19 NY2d 228, 278 NYS2d 845, 225 NE2d 540, where a husband and wife executed a joint will leaving their property to the survivor, and on the death of the survivor to certain named beneficiaries, and the husband, after the wife's death, remarried and opened a joint bank account in his own and the new wife's names, it was held that upon the husband's death the new wife was not entitled to the proceeds of the account, and that those proceeds were to be distributed in accordance with the joint will. Pointing out that the husband obtained most of the money in question from joint savings accounts that he had possessed with his former wife, the court said that in any event it did not attempt to segregate the assets of a husband and wife after a marriage of the duration involved in the present case. In affirming the lower court's judgment for the beneficiaries under the joint will, the court explained that on the death of one party to a joint will, the survivor was bound by the mutual agreement that the named beneficiary should receive the property remaining when the survivor died.

In *Di Lorenzo v Ciancio* (1975) 49 App Div 2d 756, 373 NYS2d 167, where a husband and wife executed mutual wills leaving their property to the survivor and on the survivor's death to their three children equally, the court held that the surviving husband's inter vivos conveyance of his house and savings accounts (his sole assets) to his daughter without consideration violated the obligation under the wills to testamentarily dispose of their property equally among their three children, and that these conveyances should be set aside. Pointing out that the trial court found that the transfers were made without consideration, the court said that the husband's ownership of the property in question, as survivor, was impressed with a constructive trust to leave so much of that property as he would not use during the balance of his life, for his reasonably necessary maintenance, to their three children equally. It is noteworthy, however, that the husband had disposed of all of the property, thereby completely defeating the agreement.

Where a husband and wife executed a joint will leaving all property to the survivor and on the death of the survivor to their children, and the surviving husband, who had remarried, sold property which he had owned by the entirety with the original wife, buying different property in his name and that of his new wife, it was held in *Wagner v Wagner* (1977) 58 App Div 2d 7, 395 NYS2d 641, that the surviving husband could not defeat the agreement embodied in the joint will by making such a gift to his second wife. The surviving children sought to impose a constructive trust upon the real property, and the lower court dismissed. Reversing the judgment and granting judgment to the children, the court said that the joint will strongly suggested an enforceable obligation upon the survivor to dispose of his property pursuant to the terms of the will, because the plural pronouns "we" and "us," and not "I," were used, and further because the beneficiaries under the will, other than the testators themselves, were their children, that the surviving husband was free during his lifetime to use the property but

he could not make a gift of the property, as he did in the present case, to defeat the purpose of the agreement, and that a husband and wife who were tenants by the entirety could, by joint will, provide for the ultimate disposition of property held by them as tenants by the entirety.

It was held in *Re Estate of Rothwachs* (1968) 57 Misc 2d 152, 290 NYS2d 781, that the surviving wife took a life estate with a right to use as much of the principal as desired, but with the limitation that the remainder thereof be given to their daughter, where the joint will of a husband and wife left all property to the survivor, and upon the death of the survivor all property which the survivor "possessed, including such property as he or she shall have acquired under the terms" of the joint will, went to the daughter. Upon the death of the husband, the surviving wife claimed that she was entitled to the full exemption under the state's estate tax, because she had an unlimited power to invade the principal, thus making her interest equivalent to an unrestricted fee. The tax collector argued that the widow had, at most, the equivalent of a life estate, the remainder of which passed to the daughter upon her death. The court said that since all property, including that jointly held, passed under the will, the surviving spouse received only the use of the jointly held property during her lifetime without the power to make a valid different testamentary disposition, and that therefore the interest would not be indefeasibly vested so as to qualify it for the exemption in question.

The mutual will agreement between a husband and wife whereby all property went to the survivor and at the death of the survivor one-half was to go to the heirs of the husband, and one-half to the heirs of the wife, was held in *Fitch v Oesch* (1971) 30 Ohio Misc 15, 59 Ohio Ops 2d 16, 281 NE2d 206, to deny the survivor authority to dispose of the property through the contrivance of gifts, joint and survivor accounts, or bonds, and that therefore all property which the surviving wife disposed of during her lifetime as gifts or by means of joint and survivorship agreements had to be considered as part of the estate to go to the remainderman. Conceding that the surviving wife had a perfect right to spend and use up as much or all of the property as she desired, the court said that the wife could for all practical purposes abrogate the agreement with impunity if she could make gifts of the property as she saw fit, or place it in bonds or such so that the effect of the agreement became null and void, and that if this were possible, such agreements would be of no value, being subject to abrogation with impunity by the survivor by use of the law on joint and survivor accounts, or by gift to dispose of the property.

Where two sisters, acting in accordance with an agreement, executed mutual wills, one sister leaving the rest and residue of her property to a second sister without disposing of the property in the event the second sister predeceased her, but the second sister leaving the estate to a named beneficiary if the first sister should predecease her, and the second sister took under the will when the first died, both wills remaining unchanged at that time, it was held in *McGinn v Gilroy* (1946) 178 Or 24, 165 P2d 73, that the surviving sister did not have the right to give away any of the property prior to her death, and that the named beneficiaries were entitled to an automobile, furniture, and home furnishings which were included in the mutual wills and which the surviving sister gave away before she died.

Pointing out that it was well settled that the surviving party to a joint or mutual will agreement held all of the property subject to a trust to carry out the agreement if the agreement provided only that the survivor should, upon his death, dispose of the property to certain beneficiaries, and did not contain a provision defining the survivor's powers over the property during the survivorship, the court held in *Daniels v Aharonian* (1939) 63 RI 282, 7 A2d 767, reh den 63 RI 518, 9 A2d 865, that the third-party beneficiary to a mutual will agreement was entitled to enforce the agreement against the surviving party, and that the conveyance of property, without valid consideration, executed by the survivor was invalid as against the beneficiary, since the agreement had not given the survivor authority to convey the property without valuable consideration. Emphasizing that the agreement contained no provision defining the survivor's powers over the whole property during the survivorship, but only provided that he should by will dispose of his property at his death to certain beneficiaries in a certain way, the court said that the survivor could use not only the income, but also reasonable portions of the principal, for his

support and for ordinary expenditures, and could change the form of it by reinvestment and the like, but could not give away any considerable portions of it or do anything else with it that would be inconsistent with the spirit or the obvious intent and purpose of the agreement. The court declared that the realty in question had to be treated as included in the mother's assets for purposes of determining the son's share under the mutual wills, and that the mother's assets should be treated as though the mutual will agreement had been carried out in good faith.

If that part of a joint will agreement which bound the surviving party contained no provision defining such party's powers over the whole property during the survivorship, but only provided that he should by will dispose of his property at his death to certain beneficiaries in a certain way, then according to the court in *Ashley v Volz* (1966) 218 Tenn 420, 404 SW2d 239, the survivor held all of the property subject to a trust to carry out the agreement, but could use not only the income, but also reasonable portions of the principal, for his support and for ordinary expenditures, and could change the form of it by reinvestment and the like, but could not give away any considerable portions of it, or do anything else with it that would be inconsistent with the spirit or the obvious intent and purpose of the agreement. A husband and wife had executed a joint will leaving all property to the survivor, and upon the survivor's death the "unexpended residue" went to their son, or if deceased, to the son's children. After the wife's death the husband remarried, gave his residence to the new wife, and also arranged to give her \$75,000. The court said that it was the husband's and wife's joint intention that all of the property, regardless of what it was, would go, at the death of the survivor, to their son or grandchildren, and that consequently there was a trust imposed upon the survivor to keep the property for this purpose, so to speak.

CUMULATIVE SUPPLEMENT

Cases:

Where joint will does not give survivor power to transfer property subject to will, survivor lacks such power. In *re Estate of Gibson* (1995, Tex App Texarkana) 893 SW2d 749.

[Top of Section]

[END OF SUPPLEMENT]

§ 17[a] Beneficiary granted only that which survivor "may own at time of death," or the like—Considered authority to freely transfer property

In addition to those joint or mutual wills in which the survivor is expressly authorized to make inter vivos dispositions and the beneficiaries are left only that which remains at the survivor's death, [FN69] and those wills which give the survivor a fee simple title, leaving whatever remains to named beneficiaries,[FN70] those wills, or mutual will agreements, which leave to the designated beneficiaries only that property which the survivor "may own at the time of the survivor's death," or the like, have been construed by some courts as indicating a desire on the part of the testators to give the survivor full authority to dispose of the property during the survivor's lifetime. In deciding that the testators in the following cases had intended the survivor in a joint or mutual will to have the full power of disposition, it appears that the courts placed decisive importance upon the provision limiting the beneficiaries' legacy to that which might remain at the survivor's death, although there are other factors present which undoubtedly contributed to the result.

Especially noteworthy in this regard, although it was primarily concerned with the estate taxes owed by the survivor, is *Dekker v United States* (1965, DC Ill) 245 F Supp 255 (applying Illinois law), holding that a joint will executed by a husband and wife that left all property to the survivor, and upon the death of the survivor, "if there be anything left," to their children, placed no restriction upon the surviving wife's use of the property in

her lifetime, allowing the wife to sell the property without restraint and without regard to her needs. The Internal Revenue Service had claimed that the surviving wife took only a life estate, with the remainder going to the children, and that she therefore owed more estate taxes. The wife paid the tax and filed the interest in suit for a refund, contending that she took an absolute interest in the estate. Reviewing state law on the point, the court said that the Illinois rule was that a joint will of a husband and wife which reflected a contractual arrangement between them for the devolution of property to named beneficiaries after the death of both joint testators created a life estate in their property in the survivor of them, with an enforceable gift over to the remainder beneficiaries upon the termination of the life estate. This rule applied to property owned by the parties in joint tenancy as well as to property owned outright by each of the joint testators if there was evidenced an intent, by agreement, to hold such property until the death of both for the use of the ultimate beneficiaries named in the will, the court continued, but in the present case the husband and wife clearly intended a testamentary disposition of property to the survivor, without restriction upon the survivor's title thereto, with an alternative gift to children at the time when the survivor should die. The court went on to explain that the husband left behind a written monument of his intention, saying that upon the death of the survivor, the husband desired that any property remaining was to descend to his children, and that the words which he used placed no restriction upon the wife's use of the property in her lifetime.

The mutual wills of a husband and wife which left the property to the survivor "absolutely," and upon the death of the survivor left all of the "property I may own at the time of my death" to named beneficiaries, were held in *Re Estate of Lenders* (1956) 247 Iowa 1205, 78 NW2d 536, to give the surviving wife authority to make gifts to her sisters in money and property valued at about \$88,000. The court said that the named beneficiaries were entitled to take only such portion of the wife's estate as her will gave them. Emphasizing that the beneficiaries were to receive "the rest 'of the property I may own at the time of death,' " the court said that no specific property was referred to, and that neither will attempted to dispose of any property except such as the maker might own at the time of death. The wills negated the thought that the testators contracted to dispose of all of the property that they owned or might later acquire or in fact any property other than each might own at death, the court added.

In *Harrell v Hickman* (1948) 147 Tex 396, 215 SW2d 876, a joint will, executed by a husband and wife pursuant to an agreement, that left the property to the survivor for the survivor's "sole use and benefit," and the remainder of the property of which the survivor should die seized to named beneficiaries, was held to have clothed the survivor with the unqualified right to convey the property during his or her lifetime, to have limited the rights of the remainderman to whatever estate remained in the survivor at his or her death, and to have allowed the survivor to give the property away, retaining a life estate. The husband, who survived the wife, remarried and conveyed to the new wife the land involved in the present suit, reciting a consideration of \$10 and love and affection, the husband reserving full possession and enjoyment to himself for life. Affirming the lower court's judgment dismissing the action, the court said that it was clearly the intention of the testators that only the property remaining on hand at the death of the survivor should vest in the named beneficiaries.

§ 17[b] Beneficiary granted only that which survivor "may own at time of death," or the like—Considered authority to transfer only for necessities and the like

Holding that the survivor could dispose of the property only for such things as necessities or reasonable needs, the courts in the following cases rejected the claim that the survivor was given full power of disposition by the provision in a joint or mutual will which left to the beneficiary, at the survivor's death, only that property which the survivor might own at his death, or the like.

In *Estate of Mulholland* (1971) 20 Cal App 3d 392, 97 Cal Rptr 617, where a married couple's joint and

mutual will left all of the property to the survivor without qualification and "the survivor's entire estate" to certain named beneficiaries at the death of the survivor, the court said that where a bequest or devise is made in ordinary language, without words of inheritance or perpetuity, but in terms standing alone to carry the absolute or fee interest, and is followed by a limitation over of the property not disposed of by the first taker, the first taker takes a life estate only, with power of disposal, that the fact that the will did not use the term "life estate" was not fatal to the construction given to the will, and that it appeared settled "by the overwhelming weight of authority" that the mere fact that the first taker was invested with the power to dispose of or consume the whole of the property for certain purposes did not invest him with the absolute ownership thereof and render the gift over void; thus, it was held that the survivor could not give the property away.

And in *Sample v Butler University* (1936) 211 Ind 122, 4 NE2d 545, 108 ALR 857, mod on other grounds and reh den 211 Ind 139, 5 NE2d 888, 108 ALR 866, where, under the mutual wills of a husband and wife, the survivor left all property which the survivor "may own at the time of my death" to a university upon the condition that the income therefrom be given to the wife's daughter and the husband's son for life, it was held that in using the quoted words the parties intended no more than to avoid a restriction upon the disposal of the property in case it might be necessary for the reasonable needs of the survivor or for advantageous reinvestment, but that the parties in their mutual will agreement did not intend to authorize the survivor to dispose of all of the joint property in any manner and for any purpose during his lifetime. The court explained that it was clear that the parties intended that the survivor should have the use and benefit of their joint property for life, that it was not unreasonable to conclude that it was their intention that if it should be necessary, the survivor might have recourse to the corpus of the joint estate for support and maintenance in the event the income should be inadequate, and that any other construction would result in imputing to the parties an intention to destroy the very contract which the wills were made to carry out. The court went on to say that under the terms of the contract, that which was necessarily used and consumed must of course be lost, but that the remainder of the joint estate was to be preserved in its original form, or if the investment were changed, then in whatever form that it might be at the death of the survivor, for the ultimate benefit of their children.

In *Ashley v Volz* (1966) 218 Tenn 420, 404 SW2d 239, involving a joint will which did not define the survivor's authority to dispose of the property but left the "unexpended residue" to beneficiaries, it was held that the survivor held all of the property subject to a trust to carry out the agreement, but could use not only the income, but also reasonable portions of the principal, for his support and for ordinary expenditures, and could change the form of it by reinvestment and the like, but could not give away any considerable portions of it or do anything else with it that would be inconsistent with the spirit or the obvious intent and purpose of the agreement. In rejecting the survivor's claim of authority to give the property away, the court said that it was not unmindful of the cases cited to the contrary, and of that stable and effective argument on the use of the term "unexpended residue," but that when one viewed the circumstances of the present parties when they made the joint will, the court could not see how it could arrive at any other conclusion. The principle which should be followed in the disposition of the case at hand was that if part of the agreement which bound the surviving party contained no provision defining such party's powers over the whole property during the survivorship, but only provided that he should by will dispose of his property at his death to certain beneficiaries in a certain way, then it seemed to be well settled that he held all of the property subject to a trust to carry out the agreement, the court explained.

§ 18. Beneficiary granted specifically designated property

Where a joint or mutual will, after leaving property to the survivor, grants specifically designated property to specific beneficiaries upon the death of the survivor, the survivor is prohibited from making a different inter

vivos disposition of that property, even though the grant to the survivor may seem to intend otherwise, it is held in the following cases.[FN71]

And where a husband and wife executed a joint, mutual, and reciprocal will in which the property was left to the survivor and upon the death of the survivor, certain bequests were made, including \$1,000 to the plaintiff, and the wife, after the husband's death, conveyed the real estate to her two grandchildren "without substantial consideration," it was held in *Jennings v McKeen* (1954) 245 Iowa 1206, 65 NW2d 207, that if the survivor should give the property away without substantial consideration, the grantees took the property subject to the provisions of the joint will, making the third party's legacy a charge on it. The court said that there was no sufficient contract to support the conveyance and the grandchildren were not innocent purchasers for value of their grandmother's real estate, and that they took the real estate subject to the provisions of the joint will, making the plaintiff's legacy a charge on it.

Where a husband and wife executed mutual wills under which the surviving wife's personal property and a specified home went to her son and daughter equally upon her death, and the wife gave the property to a third party, in *Schwartz v Horn* (1972) 31 NY2d 275, 338 NYS2d 613, 290 NE2d 816, it was held that the gift violated the mutual will agreement, because an agreement to devise a specific piece of property precluded an inconsistent inter vivos gift of that property.

Where a joint and mutual will left all property "unconditionally and in fee simple" to the survivor, and the testators (husband and wife), directed that upon the death of the survivor or in the event that their deaths were simultaneous, specified realty was to be devised to designated beneficiaries, qualifying one of the devises with the condition that if at the time of their death they did not still own that particular property, then other designated property was to go to that beneficiary, it was held in *Olive v Biggs* (1970) 276 NC 445, 173 SE2d 301, that the survivor's right to sell or convey the property for which the alternate devise was made was not restricted by the contract in the joint will, but that the survivor could not make an inter vivos conveyance or transfer of any other property specifically dealt with in the joint will which would prevent a court of equity from subjecting the property, so transferred in breach of the contract, to the rights of the beneficiaries thereof prior to the acquisition of such property by a bona fide purchaser for value. The husband and wife each owned some of the property individually, and some was held by them as tenants by the entirety. Upon the wife's death, the husband instituted the present action, seeking a judgment declaring his rights to convey an unencumbered fee simple estate in the property involved in the joint will. The court found that the joint will clearly showed that the husband and wife intended the survivor to have full power to sell the one piece of property, but that there was nothing to indicate an intent that the survivor could make an inter vivos conveyance of other properties specifically mentioned.

In the following cases the courts construed the wills as leaving specifically designated property to the named beneficiaries, thus prohibiting the survivor from alienating that property except as necessary for maintenance and support.

In *Cramer v Echelbarger* (1968) 142 Ind App 374, 234 NE2d 864, where a husband and wife executed mutual and reciprocal wills, the wife leaving all of her property to her husband with "the fullest confidence in the promise of my husband that, at his death, he will leave all of our property of which he has possession to Janet," the wife's daughter by a previous marriage, it was held that the surviving husband's subsequent conveyance of the real estate to a trustee, who reconveyed it to him and his new wife as tenants by the entirety, contravened the mutual agreement, the court impressing a trust upon the property for the benefit of Janet. A contractual obligation which is created by a joint or mutual will made pursuant to an agreement is enforceable, and equity will not suffer one of the contracting parties to defraud and defeat his obligation, but will fasten a trust on the property involved, the court declared.

Where a joint and mutual will executed by a husband and wife left "all property possessed" to the survivor,

"absolutely and without reservations," and at the death of the survivor "all property thus possessed" to their three children equally, it was held in *Re Estate of Jones* (1961) 189 Kan 34, 366 P2d 792, that the surviving wife was given a life estate with the power of disposal for necessities only. The court explained that use of the words "thus possessed" gave the surviving wife the power of disposition so long as the interests of the three children in the remaining property left at the wife's death were not changed; in other words, the court added, the remaining property at the wife's death would pass to the three children to share and share alike.

B. Other factors

§ 19. Transfers for survivor's support and maintenance

[Cumulative Supplement]

It is generally held that regardless of the interest given to the survivor in a joint or mutual will, as long as there is no express provision to the contrary the survivor has the power to dispose of the property for necessities, support, and maintenance. The following cases support this proposition.[FN72]Ark

Iwerson v Dushek (1976, Ark) 543 SW2d 942

Cal

Halldin v Usher (1958) 49 Cal 2d 749, 321 P2d 746

Ind

Lawrence v Ashba (1945) 115 Ind App 485, 59 NE2d 568

Iowa

Tiemann v Kampmeier (1961) 252 Iowa 587, 107 NW2d 689

Kan

Fourth Nat. Bank v First Presbyterian Church (1932) 134 Kan 643, 7 P2d 81

Re Estate of Jones (1961) 189 Kan 34, 366 P2d 792

Re Estate of Tompkins (1965) 195 Kan 467, 407 P2d 545

Ky

Price v Aylor (1935) 258 Ky 1, 79 SW2d 350

Mo

Shackleford v Edwards (1955, Mo) 278 SW2d 775

NY

Rastetter v Hoenninger (1915) 214 NY 66, 108 NE 210

Schwartz v Horn (1972) 31 NY2d 275, 338 NYS2d 613, 290 NE2d 816

O'Boyle v Brenner (1948) 273 App Div 683, 79 NYS2d 84, app dismd 301 NY 685, 95 NE2d 47

Di Lorenzo v Ciancio (1975) 49 App Div 2d 756, 373 NYS2d 167

Re Rubin's Will (1965) 48 Misc 2d 539, 265 NYS2d 407

RI

Daniels v Aharonian (1939) 63 RI 282, 7 A2d 767, reh den 63 RI 518, 9 A2d 865

Tenn

Ashley v Volz (1966) 218 Tenn 420, 404 SW2d 239

Wyo

Flohr v Walker (1974, Wyo) 520 P2d 833

Thus, in *Re Estate of Jones* (1961) 189 Kan 34, 366 P2d 792, where a joint and mutual will executed by a husband and wife left all property to the survivor, "absolutely and without reservations," and at the death of the survivor "all property thus possessed" to their three children equally, it was held that the surviving wife was given a life estate with the power of disposal for necessities. The court explained that use of the words "thus possessed" gave the surviving wife the power of disposition so long as the interests of the three children in the remaining property left at the wife's death were not changed; in other words, the court added, the remaining property at the wife's death would pass to the three children to share and share alike.

In *Price v Aylor* (1935) 258 Ky 1, 79 SW2d 350, where the joint will of a husband and wife left all property to the survivor and at the survivor's death to named beneficiaries, it was held that it was the parties' intention that the survivor should take a life estate with the full and unrestricted right to its use and enjoyment and for his or her maintenance and support, and that if necessary it could be used for such purposes "even to the extent of exhaustion."

According to the court in *Schwartz v Horn* (1972) 31 NY2d 275, 338 NYS2d 613, 290 NE2d 816, in no instance would an inter vivos transfer—whether or not it defeated the purpose of a mutual will agreement—be prohibited when the property or its proceeds were used to meet the daily needs of the surviving testator.

In *Re Barnes' Estate* (1950, CP) 64 Ohio L Abs 6, 108 NE2d 88, *affd* (App) 64 Ohio L Abs 28, 108 NE2d 101, it was held that where a husband and wife executed mutual wills leaving all property to the survivor with the full power to sell and convey and use the proceeds from the sale as the survivor saw fit, the unconsumed portion remaining at the death of the survivor going to the heirs of the husband and the heirs of the wife equally, the surviving wife was a quasi trustee for the remaindermen, that while she could use and enjoy the estate to its fullest extent for her support, and consume the whole of it if necessary, she could not go beyond what would be regarded as good faith toward the remaindermen, and that where she commingled the funds she received with her own, the expenditures for her purposes were presumed to be paid, first, out of the income from the estate, then out of her funds, and then out of the corpus of the decedent's estate.

CUMULATIVE SUPPLEMENT

Cases:

Decedent did not violate terms of mutual will between her and her predeceased husband by, prior to her death, placing on property covered by mutual will mortgage to secure repayment of amount of public assistance payments received from county, where transfer was made so that decedent could meet her daily needs prior to her death. *Re Application of Boyton* (1987, Sur) 516 NYS2d 406.

[Top of Section]

[END OF SUPPLEMENT]

§ 20. Transfers to beneficiaries as advance or settlement of legacy

According to the courts in the following cases, under a joint or mutual will which leaves property to the survivor with the remainder going to named beneficiaries, the survivor may transfer property to a beneficiary as an advance on, or a settlement of, the devise or legacy.

Where a husband and wife executed a joint will leaving all property to the survivor for life, and all real estate to then go to the son and daughter, the son being charged with supporting the parents and paying the taxes

and bills, and upon the death of the husband and wife conveyed the real estate to the son and daughter by ordinary warranty deeds, thus conveying a tenancy in common, it was held in *Smith v Caswell* (1936) 278 Mich 209, 270 NW 270, that since the inter vivos conveyance gave the son and daughter the same interests that they would have received through the joint will, but operated only to hasten the vesting, the conveyance did not violate the contract and was valid. Upon the death of the mother, the daughter having predeceased her, the son contended that the joint will devised a joint tenancy for consideration of his support of the parents, that, being contractual and the contract having been performed by him, it was irrevocable, that consequently the later deed of the mother conveying to himself and his sister a tenancy in common was ineffective, and that on the sister's death he took title to the whole as survivor. Determining that the inter vivos conveyance of the mother was in harmony with the will, the court said that it did not violate any contract of which the will was a part.

Where a husband and wife executed a joint will leaving the estate to the survivor and upon the death of the survivor to the wife's son Paul as trustee on behalf of four named grandchildren, who were to receive \$15,000 each, all the rest and residue going to Paul, and where the surviving husband conveyed several properties to Paul "in trust in accord with the terms and provisions" of the husband's last will and testament, it was held in *Kozyra v Jackman* (1975) 60 Mich App 7, 230 NW2d 284, that if the husband intended to establish this inter vivos trust irrevocably, with the grandchildren as beneficiaries to the stated amount and with Paul as a residuary beneficiary for the excess value of the property, then his conveyance was valid. This, the court said, had to await the proof.

In *Curtis v Aycock* (1944, Tex Civ App) 179 SW2d 843, error ref w m, the surviving party to a joint will was permitted to convey part of the estate to the third-party beneficiary in exchange for the beneficiary's release of his interest in the estate, where the son of the parties to a joint will, who was to receive the remainder upon the death of the surviving party, conveyed his interest in the remainder to his mother—the surviving party—in exchange for her warranty deed to a certain part of the estate. After the death of the mother, the son contested her disposition of the property which he had released to her in the settlement. In upholding the transaction, the court said that it knew of no reason why the son could not alienate his expectancy in the property by a valid contract with respect thereto, if the contract was fairly made in good faith by the contracting parties, and that it found nothing to indicate that the mother acted in bad faith or that the settlement agreement with her son was not made for his exclusive benefit. The court went on to say that in all events, since the son conveyed to his mother the property in controversy with covenants of general warranty in consideration of which he accepted and retained the benefits accruing to him under the terms of the partition and settlement agreement until the death of his mother, the son was thereafter in no position to question the validity of his own agreement or of the deeds executed by himself and his mother in pursuance thereof, and that consequently he was bound thereby.

Even though the surviving party to mutual wills may deed property to the sole beneficiary as a settlement of the legacy, if the transaction, in fact, is a mere partitioning of property jointly held by the survivor and the beneficiary, so that the beneficiary receives nothing that he did not already own, then, according to the court in the following case, upon the death of the survivor the beneficiary is still entitled to take all the property under the mutual will agreement, thus invalidating inter vivos gratuitous transfers of that property by the survivor.

Where a husband and wife, in conformance with a contract, executed mutual wills leaving their respective estates to their son, and after the mother's death the son and his father operated, under a partnership agreement, the farmlands that formerly belonged to the estate of his father and mother, and upon the father's remarriage, partitioned the lands between themselves, each conveying the land which they were giving up "free and clear of all claims, rights and demands upon the part of" the grantor, in *Hamilton v Hamilton* (1955) 154 Tex 511, 280 SW2d 588, it was held that the son was not barred or estopped by the partition agreement with the father and by the warranty deeds passed from one to the other, from asserting the contract made for his benefit by and between his father and mother, that the son had not conveyed away any right, title, or interest other than that expressly designated, and that the son was entitled to the land in question under the mutual will agreement. The court said

that the partitioned deeds had only the effect of dividing the property, and that they otherwise conferred on the father no right or title that he did not theretofore possess or enjoy.

Even though the survivor may transfer property to a beneficiary as an advance on the legacy, the survivor can transfer no more than his interest in the estate, and as the following case demonstrates, even though the survivor is entitled to the remainder, the inter vivos transfer may leave him with less than the fee simple title.

Thus, in *Holmes v Holmes* (1969, Tex Civ App) 447 SW2d 423, where a joint and mutual will left all property to the survivor "only for the life" of the survivor, and upon the death of the survivor to the son in fee simple, and the surviving husband executed a deed purporting to convey to his son a fee simple title, it was held that the son possessed only a life estate based upon the life of his father, since the survivor's power of alienation was limited to a life estate. The son's father and mother had executed the joint and mutual will, and after the mother's death the father had attempted to convey the fee simple title to the son, who was at that time married. Later the son was divorced, and the son's wife claimed an interest in the property as community property. The son contended that the only title that his father had to convey to him was a life estate, and that this life estate was all that passed by his father's deed. The court agreed, saying that the rights of the survivor were fixed by the terms of the will upon the death of his wife, that the will gave no express power to the survivor to convey the fee, that it empowered him only to use, occupy, and enjoy the property, and that this created and vested in him a life estate. Thus, the court decided that the life estate in this one-half interest was community property, and the court was authorized to declare vested in the son's wife, a life estate in an undivided one-fourth in making the statutory property division in the divorce proceedings. The trial court was not authorized to divest the son of any interest in the fee, which was his separate property, the court added.

IV. Restrictions on survivor's power to make inter vivos transfers

§ 21. Transfers in avoidance of contract or will

[Cumulative Supplement]

Regardless of the wording of a joint or mutual will, or the accompanying agreement, if property is left to third-party beneficiaries who are to take upon the death of the survivor, most courts consider any inter vivos transfer made by the survivor with an intent to avoid the agreement, to be improper. Inter vivos transfers by survivors were considered improper by the courts in the following cases, because the courts found that the transfers were made with the intention of avoiding the will or agreement.US

For federal cases involving state law, see state headings infra

Colo

Re Doerfer's Estate (1937) 100 Colo 304, 67 P2d 492

Ill

Tontz v Heath (1960) 20 Ill 2d 286, 170 NE2d 153

Re Estate of Bell (1972) 6 Ill App 3d 802, 286 NE2d 589

Ind

Sample v Butler University (1936) 211 Ind 122, 4 NE2d 545, 108 ALR 857, mod and reh den 211 Ind 139, 5 NE2d 888, 108 ALR 866

Lawrence v Ashba (1945) 115 Ind App 485, 59 NE2d 568

Iowa

United States v 1,453.49 Acres of Land (1965, DC Iowa) 245 F Supp 582 (applying Iowa law), affd (CA8 Iowa) 368 F2d 563.[FN73]

- Kan De Jong v Huyser (1943) 233 Iowa 1315, 11 NW2d 566
Re Estate of Buckner (1960) 186 Kan 176, 348 P2d 818
Re Estate of Tompkins (1965) 195 Kan 467, 407 P2d 545
Klooz v Cox (1972) 209 Kan 347, 496 P2d 1350
Seal v Seal (1973) 212 Kan 55, 510 P2d 167
- Ky Hatfield v Jarrell (1968, Ky) 433 SW2d 346
- Mich Sage v Sage (1925) 230 Mich 477, 203 NW 90
- Miss Monroe v Holleman (1966, Miss) 185 So 2d 443
- Mo Bower v Daniel (1906) 198 Mo 289, 95 SW 347 (ovrid Wanger v Marr 257 Mo 482, 165 SW 1027)
Union Nat. Bank v Jessell (1948) 358 Mo 467, 215 SW2d 474
Glueck v McMehen (1958, Mo App) 318 SW2d 371
- Nev Waters v Harper (1952) 69 Nev 315, 250 P2d 915
- NJ Sick v Weigand (1938) 123 NJ Eq 239, 197 A 413
- NM Schauer v Schauer (1939) 43 NM 209, 89 P2d 521
- NY Rastetter v Hoenninger (1915) 214 NY 66, 108 NE 210
Schwartz v Horn (1972) 31 NY2d 275, 338 NYS2d 613, 290 NE2d 816
Phillip v Phillip (1916) 96 Misc 471, 160 NYS 624
Re Rubin's Will (1965) 48 Misc 2d 539, 265 NYS2d 407
- Or Schramm v Burkhart (1931) 137 Or 208, 2 P2d 14
- Tex Hamilton v Hamilton (1955) 154 Tex 511, 280 SW2d 588
Turner v Merchants & Planters Nat. Bank (1965, Tex Civ App) 392 SW2d 889.[FN74]
- Wis Re Estate of Chayka (1970) 47 Wis 2d 102, 176 NW2d 561
- Wyo

For example, where a husband and wife executed mutual wills whereby upon the death of the survivor all property went to a university upon the condition that the income therefrom would go to the wife's daughter and the husband's son for life, and after the death of the wife the surviving husband conveyed

the property to the university upon the condition that he receive the income therefrom during his life and that thereafter the income be paid to his son and others (not including the wife's daughter), it was held in *Sample v Butler University* (1936) 211 Ind 122, 4 NE2d 545, 108 ALR 857, mod on other grounds and reh den 211 Ind 139, 5 NE2d 888, 108 ALR 866, that the university, having notice of the terms of the will, was to pay the annuities to the proper parties under the will, the court pointing out that the husband's disposition of the property to the university was testamentary in character, and that his purpose was to procure for the new beneficiaries an annuity that, by his solemn agreement with his wife, was to be divided between his son and her daughter without depriving himself of income from the property, and that this was a fraud upon his wife and upon those who intended to benefit from the property

Flohr v Walker (1974, Wyo) 520 P2d 833

Similarly, declaring that the husband attempted to defeat the only reason that the wife had for entering into a joint and mutual will agreement with the husband, and that equity would not permit such attempt, the court in *Re Estate of Buckner* (1960) 186 Kan 176, 348 P2d 818, held that the surviving husband was not authorized to give property from the estate to his three sisters and his niece without "good and sufficient consideration" where the surviving husband took the property under a joint and mutual will, executed by the husband and his wife, which left all property to the survivor "without restrictions or limitations of any kind," gave the survivor the "right and privilege of selling, mortgaging and disposing of any property" in the estate, and directed that upon the death of the survivor, one-half of all property "owned by said survivor at the time of said death" went to the wife's niece, and the other half went to the husband's three sisters. At the time of the husband's death, approximately \$8,000 remained in the estate, the husband having made gifts of over \$60,000 worth of property, both real and personal, to his sisters and his niece. The court said that the intent of the husband and wife was to give their respective relatives a definite share in their estate, and that after the death of the wife, with no change in the contractual will and the husband's acceptance of the benefits thereunder, he could not defeat that intention.

And where the surviving party to a joint and mutual will established joint or survivor savings accounts and purchased joint ownership savings bonds for the benefit of her personal relatives, the transfers were invalidated in *Monroe v Holleman* (1966, Miss) 185 So 2d 443, on the ground that the survivor was attempting to defeat the clear intention of the joint will, even though the will, executed by the husband and wife pursuant to an agreement, left all property to the survivor without limitation upon the survivor's use or disposition of the property, and provided that whatever remained should pass on to their respective families, half to each family. The court said that the testimony showed clearly that the surviving wife attempted to disregard her agreement by placing a great part of the estate in joint accounts and joint bonds in an effort to transfer the residue of the estate to her own family in preference to an equal division of the residue between their respective families, and that moreover, the persons preferred were persons whom the testators had agreed in their contract in the will should only receive a one-half interest in the residue of the estate.

In *Bower v Daniel* (1906) 198 Mo 289, 95 SW 347 (ovrld on other grounds *Wanger v Marr* 257 Mo 482, 165 SW 1027), it was held that although a joint will conferred upon the surviving husband the power of unrestricted disposition of the property embraced in the will, the survivor could only dispose of the property in good faith, and not merely for the purpose of defeating the joint will in its operation upon himself, and that the surviving husband's conveyances, without consideration, of property to some of his children contrary to the terms of the will, reserving to himself a life estate therein, were for the purpose of defeating the joint will and were thus ineffective for that purpose. The court said that, conceding the joint will as embracing only such property as each (husband and wife) had at the time of his or her death, and that the surviving husband might

have thereafter sold and disposed of his property in good faith, or have given it away, it was a fraud in fact and in law for him to convey it to others, voluntarily and without consideration, reserving to himself a life estate, and in this way make a disposition of his property, both by deed and by will, which was different from that for which he contracted with his wife in the joint will.

Where a husband and wife, in conformance with a contract, executed mutual wills leaving their respective estates to their son, it was held in *Hamilton v Hamilton* (1955) 154 Tex 511, 280 SW2d 588, that the contract did not restrict the husband's right to use and enjoy his estate in his normal business affairs or for his wants, needs, and convenience, that he had the power to convey, mortgage, invest, reinvest, and even make reasonable gifts, that the son could not complain if the estate were depleted by poor business investments, and that the only restriction upon the father was that he could not give away his property with the intent to defraud and thus avoid his obligation under the contract.

A surviving wife's transfer by inter vivos gifts of a substantial portion of the property received by her under a joint will which she executed with her husband was held in *Re Estate of Chayka* (1970) 47 Wis 2d 102, 176 NW2d 561, to violate the joint will agreement, since the transfers violated her duty of good faith, which was an implied condition of the contract, by leaving the will in effect but giving away the property which the parties agreed was to be bequeathed at the death of both to a designated party. The court said that the contract to make a will, once partially executed and irrevocable, was not to be defeated or evaded by completely and deliberately denuding one's self of one's assets after entering into a bargain. The wife had remarried and conveyed the real estate to herself and her husband as joint tenants, and had transferred \$32,000 worth of bonds to her husband as a gift, as well as transferring funds into a joint bank account shared with the husband. In response to the husband's argument that the wife complied with her joint will agreement by leaving unrevoked the will giving all of the property that she possessed at the time of her death to the beneficiary, the court said that this was a mere play on words, that what she in fact had done was to strip nearly all of the flesh from the bones, leaving only a skeleton for testamentary disposition to the beneficiary, and that this was a compliance in form, not in substance.

And in *Flohr v Walker* (1974, Wyo) 520 P2d 833, where a husband and wife, in conformance with an agreement, executed a joint and mutual will leaving all their property to the survivor and upon the death of the survivor to a named beneficiary, it was held that the surviving husband could use the income and reasonable portions of the principal for his support and ordinary expenditures, but that he could not dissipate the estate or alienate by inter vivos transfers or by will to defeat the provisions of the joint will leaving the remainder to the named beneficiary. The surviving husband, in his late 80's, had an automobile accident, and the beneficiary prevented him from driving thereafter. This angered the husband and he attempted to regain possession of certain property (which he had put in the possession of the beneficiary) so he could dispose of the property to prevent the beneficiary from getting it through the will. He instituted the present action seeking to obtain possession. Reversing the trial court's judgment for the husband, the court said that the general rule seemed to be that a joint and mutual will executed pursuant to an agreement based on valuable consideration is contractual as well as testamentary and becomes an irrevocable obligation on the part of the surviving testator upon the death of the other party testate under a will which is in accord with the terms of the agreement.

CUMULATIVE SUPPLEMENT

Cases:

Joint and mutual will bequeathing all of testators' property to the survivor, "as the survivor's property absolutely" did not permit surviving testator to upset the dispositive scheme by conveying parcels of real estate five days before her death for \$10 per parcel, where no facts established that surviving testator had any intention

other than to circumvent the dispositional scheme. In re Estate of Erickson, 299 Ill. Dec. 372, 841 N.E.2d 1104 (App. Ct. 4th Dist. 2006).

[Top of Section]

[END OF SUPPLEMENT]

§ 22. Undue influence on part of transferee

Under a joint or mutual will whereby property is to pass to designated beneficiaries upon the death of the survivor, any transfer of property by the survivor which is obtained by fraud or undue influence on the part of the transferee will be set aside, according to the courts in the following cases.

Thus, the conveyances made by the surviving party to a mutual will agreement could be set aside upon a showing that they had been made as a result of undue influence on the part of the recipient, it was held in *McGuire v McGuire* (1874) 74 Ky 142, where the survivor had conveyed to a son certain property which he had agreed in the mutual will agreement to convey to his daughters.

And in *Carmichael v Carmichael* (1888) 72 Mich 76, 40 NW 173, the conveyance of real estate by the surviving party to a mutual will agreement was set aside on the ground that the conveyance was obtained by fraud and undue influence on the part of the grantees. However, the court said that the survivor was not mentally competent to destroy the mutual will even if the law would permit her to do so.

Similarly, where by a mutual will agreement the survivor was given lifetime use of the property with a remainder over, it was held in *Phillip v Phillip* (1916) 96 Misc 471, 160 NYS 624, that the survivor's conveyance of real property subject to the agreement would be set aside if the conveyance was made through fraud or undue influence. The doctrine was applied where a husband and wife, in accordance with an agreement, executed mutual wills (irrevocable after the death of one party) devising their farm to a son, but the husband, after his wife's death, remarried and conveyed the farm to his new wife.

§ 23. Relevance of survivor's original property interest

Property which a person holds by the entirety or in joint tenancy with a spouse, or in severalty, ordinarily belongs to the survivor in fee simple absolute upon the death of the other spouse. However, it was held in the following cases that where a husband and wife execute a joint or mutual will, pursuant to an agreement, whereby property is left to the survivor and upon the survivor's death to named beneficiaries, the survivor's interest in property which is held with the spouse by the entirety or in joint tenancy, as community property, or that which the survivor holds in severalty, may be altered by the agreement so that the survivor takes less than a fee simple absolute upon the death of the spouse, and the survivor's authority to transfer the property is correspondingly restricted or prohibited.

In *Tontz v Heath* (1960) 20 Ill 2d 286, 170 NE2d 153, it was held that land held in joint tenancy could be the subject of a contract embraced in a joint and mutual will if that was the intention of the parties as revealed by the language of the instrument and the circumstances of the parties, and that a joint and mutual will that disposed of "all" of the property that the testators "now own or shall hereafter acquire" to the survivor for "the term of his or her natural life," and then to certain specified children, included property held in joint tenancy by the parties to the contract. Moreover, since the property which was held in joint tenancy constituted most of the testators' wealth, the court said that the apparent purpose of the agreement (to restrict the survivor to a life interest and to insure that all of the third-party beneficiaries would share in the property) would be largely nullified if the agreement did not embrace the property held in joint tenancy.

In *Jusko v Grigas* (1962) 26 Ill 2d 92, 186 NE2d 34, it was held that a joint will could apply to property held in joint tenancy and limit the disposition of such property in the hands of the surviving party to the joint will agreement.

Where a husband and wife, by a joint and mutual will, left to the survivor all property which they "should own or be entitled to," the remainder to go to designated beneficiaries, and the real estate was held by the testators in joint tenancy, it was held in *First United Presbyterian Church v Christenson* (1976) 64 Ill 2d 491, 1 Ill Dec 344, 356 NE2d 532, 85 ALR3d 1, that neither the execution of the joint and mutual will, nor its probate upon the death of the husband, effected a severance of the joint tenancy, and that although the title to real estate held in joint tenancy did not pass under a joint and mutual will, such real estate could be the subject of a contractual agreement contained in a joint and mutual will and a court of equity would, under appropriate circumstances, enforce the agreement and limit the survivor's disposition of the property.

Where a husband and wife executed a joint will leaving all property to the survivor to use during the survivor's life, with the remainder going to the daughters of the husband by a former marriage, it was held in *Rucker v Harris* (1968) 91 Ill App 2d 208, 234 NE2d 392, that the surviving wife received only a life estate in the property formerly held in joint tenancy by her and her husband, and that she could convey no greater interest. The court said that the property held in joint tenancy became subject to the joint will agreement, and that the survivor would not be permitted to dispose of the property by a subsequent will or conveyance.

In *Re Estate of Bell* (1972) 6 Ill App 3d 802, 286 NE2d 589, it was held that a married couple's joint will agreement constituted a valid and enforceable contract between the husband and wife, and that this contract impressed a trust upon all property of both testators, including property owned by them as joint tenants with the right of survivorship, and that the bank accounts which the husband and wife held jointly, and which the surviving husband converted to joint ownership between himself and another, were subject to the restrictions of the joint will agreement.

Even though a husband, upon the death of his wife, takes all of their real estate held by the entireties regardless of any attempt by the wife to make any disposition of it by testamentary devise, and even though the surviving husband takes title to such real estate by operation of law and not as a result of mutual wills made in conformance with an agreement between the husband and his wife, it was held in *Lawrence v Ashba* (1945) 115 Ind App 485, 59 NE2d 568, that a mutual will agreement would include such property if the agreement provided that the survivor was to leave "all" of his or her property to third-party beneficiaries.

And in *Campbell v Dunkelberger* (1915) 172 Iowa 385, 153 NW 56, the court said that there is no reason why reciprocating mutual wills could not devise property held and owned in severalty, and that it had discovered no authority so deciding.

In *Jennings v McKeen* (1954) 245 Iowa 1206, 65 NW2d 207, it was held that the fact that a large part of the property disposed of by a joint will was held by the testators in joint tenancy, and that the survivor became owner by virtue of the joint tenancy, was immaterial so long as the survivor received benefits under the will sufficient to constitute a consideration to support the contract.[FN75]

Property held in joint tenancy can be made subject to a joint will and when done so is governed thereby, according to the court in *Tiemann v Kampmeier* (1961) 252 Iowa 587, 107 NW2d 689.

In *Berry v Berry's Estate* (1949) 168 Kan 253, 212 P2d 283, where a husband and wife executed a joint and mutual will under which the survivor took a life estate in all property of the deceased, and upon the death of the survivor, "all" property was to be divided among designated beneficiaries, and upon the husband's death the surviving widow claimed full title to the land in question (the husband and wife having owned the property as joint tenants), it was held that the terms of the contractual joint and mutual will effected a severance of the joint tenancy provision in the deed, and that upon the death of the husband the surviving widow took a life estate in the property in question with the remainder over. The court distinguished *National Life Ins. Co. v Watson*

(1935) 141 Kan 903, 44 P2d 269,[FN76] on the ground that in the Watson Case the controversy involved title to real estate standing in the name of the husband, who survived, as of the date of the joint and mutual will and as of his wife's death, while in the present case, the court said, the joint and mutual will operated on property held in joint tenancy by the testators at the time the will was executed.

In *Seal v Seal* (1973) 212 Kan 55, 510 P2d 167, it was held that under a married couple's joint and mutual will, which left all property to the survivor and at the death of the survivor to named children, the surviving wife was not authorized to give property away without consideration, and that this applied to all property in her hands, regardless of whether it came to her under the will or was in her own name at the time of the husband's death.

In *Stewart v Shelton* (1947) 356 Mo 258, 201 SW2d 395, it was held that where a husband and wife held property by the entirety, neither spouse had any right, title, or interest which could be conveyed, encumbered, or devised by his or her sole act, and that one spouse acting alone could not defeat the right of the other to take the entire estate as survivor, or do anything to affect the right of survivorship, but that by agreement and joint act the two by will could devise a remainder over after life enjoyment by the surviving spouse.

In *Rubenstein v Mueller* (1967) 19 NY2d 228, 278 NYS2d 845, 225 NE2d 540, it was said that while neither a husband nor a wife could dispose of property owned by them as tenants by the entirety so as to affect the right of survivorship, they could do so by acting in concert, as by a joint will or a contract.[FN77]

In *Azzara v Azzara* (1956) 1 App Div 2d 1012, 151 NYS2d 458, reh and app den 2 App Div 2d 760, 154 NYS2d 429, app dismd 2 NY2d 829, 159 NYS2d 962, 140 NE2d 860, where a husband and wife, by a joint will, left their house to their son and daughter equally, and after the husband's death the surviving wife made an inter vivos conveyance of the property to the daughter when the son died, it was held that while neither husband nor wife could dispose of property owned by them as tenants by the entirety so as to affect the right of survivorship, they could do so by acting in concert, as by a joint will or contract, and that a joint will which imported a contract was enforceable in equity.

In *Re Estate of Rothwachs* (1968) 57 Misc 2d 152, 290 NYS2d 781, it was held that since all of the property of a husband and wife, including that jointly held, passed to the survivor under a joint will executed by the husband and wife, the will governed the survivor's disposition of all the property.

Where a husband and wife, who possessed community property, executed a joint will leaving a life estate to the survivor for life, and the remainder to named beneficiaries, in *Moore v Moore* (1917, Tex Civ App) 198 SW 659, error ref, the court said that under the joint will the surviving wife agreed to take a life estate in all of her husband's portion of the community property to the exclusion of their sons and daughters, and to reduce her community rights in the estate to a life estate, and that she therefore had no authority under the will to sell or mortgage the beneficiaries' fee title in the remainder, although she could mortgage her life estate.

And where a husband and wife, holding community property, executed a joint and mutual will, each leaving "all of our property" to the survivor for life, and the remainder to their next of kin equally, and the surviving husband conveyed his "one-half undivided interest" in the property to the wife's next of kin, it was held in *Dickerson v Yarbrough* (1948, Tex Civ App) 212 SW2d 975, that the deed conveyed no more than the husband's life estate, the remainder fee having already vested in the devisees, who were referred to in the will as next of kin. The court said that the survivor was estopped from making any other or different disposition of the property than that contemplated in the agreement, but that "many cases," including *Wallace v Peoples* (1935, Tex Civ App) 89 SW2d 1030, error dismd w o j,[FN78] had held that the element of trust related only to property received by the survivor under a mutual will, in this instance the wife's undivided one-half interest, the survivor not becoming a trustee of his own property, and that under these authorities the surviving husband in the case at hand was fully enabled to convey his one-half interest in the described acreage, the rights of next of kin of the survivor not vesting until his death.

In *Orsburn v Miller* (1975, Tex Civ App) 521 SW2d 140, it was held that where a joint and mutual will left property to the survivor and upon the death of the survivor left the "entire estate" to the daughter, and the will remained in effect until the death of one party and was offered for probate by the survivor, the result was to place the survivor's one-half fee ownership in the community property beyond her power to otherwise effectively dispose of it by deed or will. The survivor was vested with a life estate only in the entire community estate of both parties, the court said.

In *Flohr v Walker* (1974, Wyo) 520 P2d 833, the court said that even though all of the husband's property at the time the joint and mutual will was executed with the wife, and until the wife's death, was in joint tenancy with the right of survivorship which might have served to transfer the property to him at the wife's death, this did not free him from the obligation of the joint, mutual, and contractual will, the benefits of which flowed originally to the wife, then to the beneficiary.

V. Application to specific transfers by survivor

A. Transfers without valuable consideration; joint will

§ 24[a] Transfer of full interest—to children or grandchildren—Held proper

In the following cases involving property which was taken by the surviving party to a joint will agreement, the survivor taking under the joint will, it was held that the survivor could properly, under the joint will agreement, transfer property to his or her children or grandchildren without receiving a valuable consideration therefor.

The surviving party to a joint and mutual will was authorized to sell or give away any of the property obtained under the will, it was held in *Scales v Scales* (1961, CA5 Tex) 297 F2d 219 (applying Texas law), where the will, executed by a husband and wife, left all of the estate to the survivor "to be used, occupied, enjoyed, conveyed and expended by, and during the life of such survivor, as such survivor shall desire," and upon the death of the survivor left "any of such estate which then remains" to their children. The wife survived and had allegedly conveyed a business to her son for inadequate consideration, had made other gifts to the son, and had sold a lot the sale of which the plaintiff alleged to be unauthorized under the will. The beneficiaries sought to prevent their mother, the survivor, from giving the property away, wasting or dissipating it as she had allegedly been doing. The court said that she received a defeasible or conditional fee simple title, since the will itself gave her the right and power to use, occupy, enjoy, convey, and expend the estate during her life as she, the survivor, should desire, and that this gave her the power to act imprudently or improvidently or in bad faith. The words of the will were plain and unambiguous and gave to the survivor the unlimited, unrestricted, and unquestioned power to dispose of the estate as the survivor should desire, the court continued, and, that being so, it followed that the court could not disregard or change the will of the testator, it was added.

In *Smith v Caswell* (1936) 278 Mich 209, 270 NW 270, where a husband and wife executed a joint will leaving all property to the survivor for life, and all real estate to then go to the son and daughter, the son being charged with supporting the parents and paying the taxes and bills, and upon the death of the husband the wife conveyed the real estate to the son and daughter by an ordinary warranty deed, thus conveying a tenancy in common, it was held that since the inter vivos conveyance gave the son and daughter the same interests that they would have received through the joint will, but operated only to hasten the vesting, the conveyance did not violate the contract and was valid. Upon the death of the mother, the daughter having predeceased her, the son contended that the joint will devised a joint tenancy for consideration of his support of the parents, that, being contractual and the contract having been performed by him, it was irrevocable, that consequently the later deed of the mother conveying to himself and his sister a tenancy in common was ineffective, and that on the sister's

death he took title to the whole as survivor. The court determined that the estate created by the will was a tenancy in common, and that the inter vivos conveyance of the mother was in harmony with the will and therefore did not violate any contract of which the will was a part.

In *Kozyra v Jackman* (1975) 60 Mich App 7, 230 NW2d 284, it was held that where a husband and wife executed a joint will leaving the estate to the survivor and upon the death of the survivor, the wife's son Paul was made trustee on behalf of four named grandchildren who were bequeathed \$15,000 each, Paul also being made residuary legatee, and where the surviving husband conveyed several properties to Paul "in trust in accord with the terms and provisions" of the husband's last will and testament, it was held that if the husband intended to establish this inter vivos trust irrevocably with the grandchildren as beneficiaries to a stated amount and Paul as a residuary beneficiary for the excess value of the property, then his conveyance was valid. This, the court said, had to await the proofs.

Where the joint will of a husband and wife provided that the survivor should have the income from their property for life, the property to be divided equally between their son and daughter upon the surviving party's death, it was held in *Rastetter v Hoenninger* (1915) 214 NY 66, 108 NE 210, that in the absence of a showing that such gift was made in contemplation of death, or for the purpose of defeating his testamentary agreement with his wife, or that the real estate in question was purchased with money belonging to the wife, the surviving husband could purchase land, taking it in the name of his daughter. In reversing a judgment for the son, who claimed a one-half interest in the property in question, and in ordering a new trial, the court said that the theory of the lower court's judgment for the son, with which it disagreed, was that upon the execution of the joint will, each of the testators became a trustee of his or her own property, and that while entitled to the income, he or she was disabled from disposing of the corpus. It went on to explain that the parties merely disabled themselves from making a different testamentary disposition after accepting the benefits of the agreement, that each, during his life, remained the absolute owner of his own property with all the rights of an owner, and that nothing short of plain and express words should suffice in such a case to limit the use, or to impress a trust upon, the property of each during his or her own life. Of course, the court continued, the agreement had to be carried out honestly and in good faith, and the survivor could not, after accepting the benefits of the agreement, make a gift in the nature, or in lieu, of a testamentary disposition, or to defeat the purpose of the agreement. According to the court, if the identical money received from the wife could be traced to the purchase of the real estate in question, equity would impress a trust upon it. In such a case it would not be an answer to say that upon his death the husband left a larger personal estate than he received from his wife, the court added.

The surviving party to a joint will was permitted to convey part of the estate to the third-party beneficiary in exchange for the beneficiary's release of his interest in the estate, in *Curtis v Aycock* (1944, Tex Civ App) 179 SW2d 843, error ref w m, where the son of the parties to a joint will, who was to receive the remainder upon the death of the surviving party, conveyed his interest in the remainder to his mother—the surviving party—in exchange for her warranty deed to a certain part of the estate. After the death of the mother the son contested her disposition of the property which he had released to her in the settlement. In upholding the transaction, the court said that it knew of no reason why the son could not alienate his expectancy in the property by a valid contract with respect thereto if the contract was fairly made in good faith by the contracting parties, and that it found nothing to indicate that the mother acted in bad faith or that the settlement agreement with her son was not made for his exclusive benefit. The court went on to say that in all events, since the son conveyed to his mother the property in controversy with covenants of general warranty in consideration of which he accepted and retained the benefits accruing to him under the terms of the partition and settlement agreement until the death of his mother, the son was thereafter in no position to question the validity of his own agreement or of the deeds executed by himself and his mother in pursuance thereof, and that consequently he was bound thereby.

Where a husband and wife executed a joint will which left all property to the survivor for life, and after the

death of the survivor to specific children, and which permitted the wife, if she were the survivor, "to rent the lands and receive the use of the rental income," it was held in *Bailey v Bailey* (1948, Tex Civ App) 212 SW2d 189, error ref, that the surviving wife was authorized by the will to give \$1,220 to her son when more than that amount had been received by her as rental income. Shortly before she died, the surviving widow made out a \$1,220 check to her son, which he used to pay off a debt. After her death, the executor of her estate claimed, and the lower court agreed, that the son could not receive his share of the estate until after he repaid the \$1, 220. On appeal, this ruling was reversed, the court explaining that the will specifically authorized the surviving wife to use the rental income, that under the provision of the will she became vested with the title and ownership of the rents and revenues and the rents received during her lifetime did not become a part of the corpus of the estate until her death and such rents and revenues could not be impressed with a trust so long as she lived, that since she had the right to use the rents without any limitation, the burden rested upon the executor to show that the \$1,220 item was a loan or advancement and not a gift, and that absent such pleading and proof, he could not prevail.

The surviving wife could use her personal property and that of her deceased husband to purchase a house and lot and give the property to her son, it was held in *Johnson v Johnson* (1957, Tex Civ App) 306 SW2d 780, error ref, where the husband and wife had executed a joint and mutual will which left the survivor their "entire personal property" to "manage, control and dispose of" during the survivor's lifetime, and the use, management, control, rents, and benefits of their real estate during such survivor's lifetime, the realty going to their children as specified in the will upon the death of the survivor. After the death of the wife, the other children instituted the present action, challenging the validity of the wife's deed to her son. Affirming the trial court's judgment that the deed was valid, the court said that the joint will set forth a full and comprehensive plan for the disposition of the property of the testators, even to designating by description the specific pieces of real estate to go to the children at the death of the survivor of the joint makers of the will, that it gave the survivor, in language free of ambiguity, the unqualified and unrestricted right to dispose of the personal property and gave him or her the rents and revenues of the real property during the lifetime of such survivor and likewise limited the rights of the remaindermen to whatever estate remained in the survivor at his or her death, and that if it pleased the surviving wife to use the personal property in buying a home and giving it to her son, the court could see no restrictions in the will preventing it.

Where a husband and wife, by a joint and mutual will, left all property to the survivor "to be used, occupied, enjoyed, encumbered or conveyed and expended," as the survivor desired, and provided that upon the death of the survivor "any such estate then remaining" was to go to their five children in a specified manner, it was held in *McKamey v McKamey* (1960, Tex Civ App) 332 SW2d 801, error ref, that after the death of the husband the wife was authorized under the will to convey the property as she wished, and that her conveyance of "practically all of her property" to her children in two deeds, reserving to herself a life estate, was authorized under the will. Conceding that the wife disposed of her property in a different manner than she would have been authorized to do by a testamentary disposition, the court said that where by the terms of a joint and mutual will the survivor is given the unlimited right of disposition, such survivor may convey the property as she or he sees fit, even though it may defeat the plan of disposition set forth in the will.

§ 24[b] Transfer of full interest—to children or grandchildren—Held improper

In the following cases involving a joint will agreement, the survivor taking under the joint will, it was held improper, under the joint will agreement, for the survivor to transfer property to his or her children or grandchildren without receiving valuable consideration therefor.

A survivor's transfer of real estate by sale, lease, and gift, and her transfer of personal property by gift, were

held in *Tontz v Heath* (1960) 20 Ill 2d 286, 170 NE2d 153, to be null and void because the joint and mutual will under which she took the property became binding upon her after her husband's death, and she was estopped from making the transfers. The wife and husband had executed a joint and mutual will giving all property to the survivor for life, and then to their two daughters, to the husband's four daughters by a previous marriage, and to the children of a fifth daughter who was deceased. After the husband's death the wife sold one tract of land, deeded (without consideration) another tract to her two daughters (the deed was not recorded and the wife remained in possession and paid the taxes), gave the two daughters a bill of sale for all the furnishings in her home (but the furnishings remained in her home until her death), purchased \$3,000 worth of United States savings bonds payable on death to one daughter, and a like amount for the other daughter, leased two other tracts of land for a period extending beyond her lifetime, and gave her two daughters and their children unspecified amounts as gifts for various occasions. Upon her death, the husband's children by his first marriage instituted the present action to set aside the transfers, and the trial court declared all the transfers null and void except the gifts of unspecified amounts. On appeal the court affirmed, explaining that even though the land was held in joint tenancy by the husband and wife, such land could be the subject of a contract embraced in a joint and mutual will if the parties so intended, that the wording of the present will indicated such an intention, and that because the land constituted most of the testators' wealth, the apparent purpose of the agreement (to restrict the survivor to a life's interest and insure that the named beneficiaries shared in the property at the survivor's death) would be largely nullified if the agreement did not embody the land. As for the argument that the agreement did not expressly prohibit inter vivos conveyances by the survivor, the court said that the gifts to the daughters were made with a furtive intent or an intent to circumvent the contract and were thus invalid, and that the sale and lease of the land violated the provisions of the contract.

In *Campbell v Dunkelberger* (1915) 172 Iowa 385, 153 NW 56, a widow, who had executed a joint will with her husband, giving each a life estate in the property of the other, with provisions as to the remainder, was restrained from deeding 120 acres to her son, in violation of the joint will. Having accepted the property of the husband upon his death, the court held that she was estopped from disposing of the property as charged in the petition. It was said that joint or mutual wills may or may not be revoked at the pleasure of either party, according to the circumstances and understanding upon which they are executed, but that after the death of one of the parties, if the survivor took advantage of the provisions of the will, it would seem that she could not dispose of the property other than according to the terms of the will. These principles were well established by the authorities, according to the court.

In *Jennings v McKeen* (1954) 245 Iowa 1206, 65 NW2d 207, it was held that if a joint will between a husband and wife is made pursuant to a contract, and contains a provision for the benefit of a third person, and the will is still unrevoked when one testator dies, such provision becomes a contract in favor of the third person, binding upon the survivor, and that if the survivor should give the property away without substantial consideration, the grantees take the property subject to the provisions of the joint will making the third party's legacy a charge on it. A husband and wife had executed a joint, mutual, and reciprocal will in which the property was left to the survivor, and in which, upon the death of the survivor, certain bequests were made, including \$1,000 to the plaintiff. The wife survived and conveyed the real estate to her two grandchildren "without substantial consideration," and made a new will. After the death of the wife, the later will was probated and the plaintiff filed a claim for \$1,000 based on the joint will. The probate court allowed the claim, but the estate was insufficient to pay it, and the grandchildren were not parties to the proceedings so the court refused to enforce the claim. The plaintiff then instituted the present proceedings against the grandchildren for specific performance of the joint will, and the trial court decreed the bequest to be a charge on the real estate. On appeal the decree was affirmed, the court explaining that the instrument was clearly mutual and reciprocal as well as joint, that the instrument itself, together with the circumstances attending its execution, clearly established that it

was made pursuant to a prior agreement between the husband and wife, that the fact that a large part of the property was held by the testators in joint tenancy and that the survivor became owner by virtue of the joint tenancy was immaterial so long as she received benefits under the will sufficient to constitute a consideration to support the contract, that there was no sufficient contract to support the conveyance and the grandchildren were not innocent purchasers for value of their grandmother's real estate, and that they took the real estate subject to the provisions of the joint will making the plaintiff's legacy a charge on it.

Where a husband and wife executed a joint will in which certain property was ultimately left to the plaintiff, the husband and wife agreeing not to revoke after the death of one of them, and the husband, who survived the wife, executed and delivered to his son a quitclaim deed to the property, it was held in *Gurniak v Liszewski* (1967, Mo) 411 SW2d 84, that the instrument purported to contain the terms of an agreement between the husband and wife concerning the dispositions of their property, and that generally speaking, a contract between husband and wife for the execution of wills containing reciprocal bequests and bequests to a third person, effective in enjoyment on the death of the testator last surviving, is enforceable, provided that the agreement is not harsh or unconscionable, is supported by a sufficient consideration, and is definite and certain. The trial court had dismissed the beneficiary's petition on the ground that it had no jurisdiction of the subject matter. On appeal the court reversed and remanded the cause, saying that since the instrument was not offered for probate after the wife's death and since the husband was still living, the instrument had no standing as a will, and that on the basis of constituting a will it was ineffectual for the purpose of proving title to or the right to possession of real estate, but that probate of the instrument as a will was not essential to the proof of the terms of the instrument as constituting a contract. The court went on to say that the plaintiff brought her action as a third-party beneficiary under an alleged contract for a declaratory judgment, and that by the petition a justiciable controversy was presented by a person entitled to invoke the Declaratory Judgment Act, and the issues alleged were ready for judicial determination.

A provision in a joint and mutual will which authorized the surviving party to "sell" the home place if the survivor so desired was held in *Nye v Bradford* (1946) 144 Tex 618, 193 SW2d 165, 169 ALR 1, not to authorize the survivor to convey the property to another as a gift. A husband and wife had executed a joint and mutual will leaving the property in question to the survivor, with the remainder to their son and daughter equally, but authorizing the survivor to sell it if the survivor so desired. After the husband's death, the wife conveyed the property to the daughter in consideration of "the love and affection" which she bore toward the daughter. The court said that according to its terms, the deed was a gift and not a sale, that the joint will authorized the survivor, who became a life tenant, to sell the property, and by selling it she could defeat the remainder, which was devised to the two children in equal undivided interests, that she was not authorized by the will to accomplish that by gift of the property, that the rights of the remaindermen could not be taken away from them except in accordance with the terms of the will, and that the conveyance was not authorized by the power that the will conferred upon the survivor. The deed to the daughter, if given effect, would deprive the son of the interest in the property that the parties to the joint will agreed would be devised to him and that was devised to him pursuant to their agreement, the court said, adding that as one of the beneficiaries of the agreement, he could maintain a suit to enforce it.

A joint will executed pursuant to an agreement between a husband and wife, which left the property to the survivor, who was to "have the right to sell or otherwise dispose of any part of our community property and invest the proceeds of such sale or disposition as he or she may think best," the remainder to go to their children, did not allow the survivor to convey some of the real estate to one of the children for a consideration of \$10 and love and affection, according to the court in *Heller v Heller* (1921, Tex Civ App) 233 SW 870, but, it was further held, the agreement did permit the surviving wife to convey the property to the son in consideration of services rendered and to be rendered by him in caring for and managing the estate. Having accepted benefits

under the will of the deceased husband, the wife was bound by its disposition of the couple's community estate, and she could not convey or otherwise dispose of any portion of the estate in violation of the joint will, the court said. The court went on to explain that while the general power of disposition of the property conferred upon the survivor by the will was unrestricted when considered by itself, the will had to be construed as a whole, and that the specific provision in question should not be construed as authorizing the surviving wife to give or devise the property or any portion of it contrary to the express provisions of the will which directed that upon the death of both of the testators, all of the property should be equally divided between all of their children. To give that one provision a construction which would authorize the wife to give the property to one of the children would defeat the manifest purpose and intention of the testator as evidenced by the will as a whole, the court said, adding, however, that it did expressly authorize a sale or disposition by the survivor of any part of the property and the investment of the proceeds as he or she might deem best, and that any sale or disposition of the property made in good faith for the purpose of reinvesting the proceeds or using them for the benefit of the estate would be valid regardless of whether such investment or use was judicious.

Where a husband and wife, pursuant to an agreement, executed a joint will leaving all property to the survivor, with the understanding that the survivor would divide or will his or her estate equally among their children, the surviving wife's inter vivos conveyance of the real estate to some of their children but not to all was held in *Martindale v Martindale* (1963, Tex Civ App) 366 SW2d 665, error ref n r e, to violate the agreement, to be invalid, and to justify setting aside the deeds. The court, however, found it unnecessary to pursue this point, since it determined that there was sufficient evidence to support the trial court's finding that the conveyance was the result of undue influence upon the widow, rendering the conveyance null and void, and affirmed the lower court judgment dividing the property equally among all of the children.

Three deeds conveying approximately 2,140 acres of land, which a surviving wife had executed to her daughter after the death of the husband, there being no bona fide sale and no adequate consideration, were set aside in *Thomas v Thomas* (1969, Tex Civ App) 446 SW2d 590, error ref n r e, as being repugnant to a joint and mutual will executed by the husband and wife which left all property to the survivor, giving the survivor "all the powers and authority that an absolute owner would have, except that the survivor shall hold the corpus of said estate together during the lifetime of such survivor," and providing that the survivor should be "entitled only to the income therefrom for such survivor's use during the lifetime of such survivor." The other children who, in addition to the daughter, were beneficiaries under the will, instituted the present action to have the deeds ruled void. In affirming a judgment for the plaintiffs, the court said that prior to the death of either party to a joint and mutual will, it is revocable by either, but that because of the contractual nature of the instrument, if after the death of one subscriber the other probates the will and takes under it, he would be held in equity to the terms of the will, that in such circumstances the survivor was estopped to deny the provisions of the instrument, and that he could not make any disposition inconsistent with it or which would defeat the rights of the remaindermen.

Where a husband and wife, in conformance with an agreement, executed a joint will in which the wife devised to two grandsons certain land which she owned, and the husband devised certain of his land to two daughters, and after the wife's death, but prior to the delayed probate of her will, the husband conveyed to the two grandsons the property which under the will was devised to the daughters, it was held in *Williams v Williams* (1918) 123 Va 643, 96 SE 749, that the daughters, after the death of the survivor, were entitled to a decree ordering the grandsons to convey to them the property in question. The court said that the mere fact that a will is made jointly by two or more testators does not affect the right of one to revoke it at his pleasure, either before or after the death of the other or others, but that the fundamental reason for this rule is that every purely testamentary disposition of property is in the nature of a gift, that a different rule applies where a contract "is disguised under the name and appearance of a will," and that in such an event the contractual nature of the instrument does not necessarily defeat its character as a will, but enables the party for whose benefit the contract

was made, to prevent, by resorting to a court of equity, a revocation which would destroy the compact or the trust created thereby. Furthermore, the court said that the evidence in the present case left little room to doubt that the division of the property was the result of a mutual agreement between the cotestators, which, at the death of the wife, became fully executed on her part and was irrevocable by the surviving husband.

§ 25[a] To new spouse—Held proper

In the following cases involving property which was taken by the surviving party to a joint will agreement, the survivor taking under the joint will, it was held proper, under the joint will agreement, for the survivor to gratuitously transfer property to a new spouse.

A joint will under which a husband and wife left all property to the survivor "to be used and owned fully in any way such survivor may desire, " and at the death of the survivor left "all property then owned or held by such survivor" to a beneficiary, was held in *Callaway v Faust* (1956) 212 Ga 596, 94 SE2d 379, to allow the surviving husband to dispose of the property as he wished, since, it was held, he took the property in fee simple. After the wife's death, the husband remarried and conveyed his interest in certain real estate to his new wife. After the husband died intestate, the beneficiary instituted the case at hand, seeking a judgment declaring her title in the property conveyed by the husband. The court said that the provision leaving the beneficiary "all property then owned or held" by the survivor was not intended to limit his fee in the property to a life estate, that it referred only to the property of the survivor, and stated that at the survivor's death, all property then owned by him, whether acquired before, at the time of, or subsequently to, the death of the testator first dying, should become the property of the beneficiary.

A joint will, executed by a husband and wife pursuant to an agreement, that left the property to the survivor for the survivor's "sole use and benefit," and the remainder of which the survivor should die seized to named beneficiaries, was held in *Harrell v Hickman* (1948) 147 Tex 396, 215 SW2d 876, to have clothed the survivor with the unqualified right to convey the property during his or her lifetime, to have limited the rights of the remaindermen to whatever estate remained in the survivor at his or her death, and to have allowed the survivor to give the property away, retaining a life estate. The husband, who survived the wife, remarried and conveyed to the new wife the land involved in the present suit, reciting consideration of \$10 and love and affection, the husband reserving the full possession and enjoyment to himself for life. The person who, under the joint will, was to receive the land after the death of the survivor instituted the case at hand, seeking to recover title and possession. Affirming the lower court's judgment dismissing the action, the court said that no provision of the will or contract placed any limitation whatever upon the right of the husband during his lifetime to dispose of the estate in any manner that he might see fit, and that it was clearly the intention of the testators that only the property remaining on hand at the death of the survivor should vest in the named beneficiaries. As for the beneficiary's argument that the deed was executed pursuant to a fraudulent scheme contracted by and between the surviving husband and his second wife for the purpose of evading, circumventing, and avoiding the terms and provisions of the joint and mutual will so far as the rights of the beneficiary were concerned, the court distinguished the present case from *Nye v Bradford* (1946) 144 Tex 618, 193 SW2d 165, 169 ALR 1, pointing out that the joint will in the *Nye* Case only allowed the survivor to "sell" the estate and not to give it away, while in the instant case the court said that there was no limitation placed upon the power of the survivor to dispose of the property. The court also rejected the beneficiary's argument that the deed from the surviving husband in the present case was testamentary in character and therefore a violation of the agreement, the court saying that the deed passed a present interest in the property and was not, therefore, testamentary in character.

§ 25[b] To new spouse—Held improper

In the following cases involving property which was taken by the surviving party to a joint will agreement, the survivor taking under the joint will, it was held improper, under the joint will agreement, for the survivor to gratuitously transfer property to a new spouse.

Where a husband and wife executed a joint will leaving all property to the survivor for life with the right to dispose of such property for his or her care and support as the survivor desired, and on the death of the survivor, leaving all the rest remaining in the survivor's hands to certain named beneficiaries, including the present plaintiffs, it was held in *Tiemann v Kampmeier* (1961) 252 Iowa 587, 107 NW2d 689, that each party, in effect, contracted with the other that all their property, regardless of the type of ownership and the party that owned it, should, at least upon the death of one testator, constitute a single or common fund in which the survivor should have only a life estate with the remainder over to the named beneficiaries, and that under this will, the farm that was held by both in joint tenancy was, at least after the wife's death, held by the husband in the nature of a trust, subject to a life estate, for the beneficiaries named in the will. After the wife's death the husband had purchased a house, and after remarrying, conveyed the house to himself and his new wife as joint tenants. Later he built a new home and deeded it to the new wife. Then he sold the farm which he had owned with his first wife and which his first wife had originally owned in her own right. The third-party beneficiaries instituted the present action seeking an order directing transfer of the properties to the husband for trust purposes, and enjoining his further disposal of the property. The court said that for the contract to be binding upon the survivor after the death of one of the testators, it was essential that he accept the benefits from the decedent's estate, and the record clearly showed that the benefits were accepted. It was further explained that although the joint will allowed the survivor to dispose of the property as he desired for his or her care and support within his or her sound discretion, he could dispose of the property only for care and support, and there was no showing that the various transfers of property were made for such purposes.

In *Price v Aylor* (1935) 258 Ky 1, 79 SW2d 350, where a husband deeded to his second wife property owned by his first wife at the time of her death, it was held that under the joint will of the husband and his first wife the husband had only a life estate, and therefore the conveyance to the second wife was ineffective to give her title thereto, as against nephews to whom the joint will conveyed the residue after the death of both husband and wife. The joint will stated that all of the real and personal property owned by the husband and wife was the result of their joint efforts, although title was in the name of the wife. It provided that on the death of one "all of the property owned by us shall become the property of the survivor," and that all the residue of the property "which has not heretofore been disposed of by the survivor" (after payment of special bequests) should go to the nephews. The court said that the conclusion was inescapable that it was the intention of the testator and testatrix that the survivor should take a life estate with full and unrestricted right to its use and enjoyment and for his or her maintenance and support, that possibly, and if necessary, it might have been used for such purpose even to the extent of exhaustion, but that it was equally clear that it was the intention of the parties that whatever might remain at the time of the death of the survivor should pass under the fourth paragraph of the will giving the residue to the nephews.

Where a husband and wife, pursuant to an agreement, executed joint and mutual wills whereby the survivor took a life estate in all property that each of them owned, and on the death of the survivor, the property went to a named beneficiary, it was held in *Hatfield v Jarrell* (1968, Ky) 433 SW2d 346, that the surviving wife's conveyance of property which had been jointly owned (apparently to a new husband) passed no title to the grantee. As for the contention that a good-faith conveyance of one's property was not precluded even where the property was held subject to a joint will, the court said that the principle could not be invoked in the present case, because the conveyance in question could not in any way be called one made in good faith, and that it was rather an open and patent effort to avoid the operation of the will. Thus, the court reversed the judgment of the trial court to the extent that it held that anything passed by the conveyance from the surviving wife.

In *Wagner v Wagner* (1977) 58 App Div 2d 7, 395 NYS2d 641, it was held that the surviving husband improperly purchased property in his name and that of his second wife as tenants by the entirety, where he and his first wife had executed a joint will leaving all property to the survivor, and on the death of the survivor, to their children. The children had instituted the present action seeking to impose a constructive trust upon the property. The lower court dismissed. Reversing the judgment and granting judgment to the children, the court said that the joint will strongly suggested an enforceable obligation upon the survivor to dispose of the property pursuant to the terms of the will, because the plural pronouns "we" and "us" and not "I" were used, and further because the beneficiaries under the will, other than the testators themselves, were their children, that the surviving husband was free during his lifetime to use the property, but he could not make a testamentary disposition contrary to the agreement, or a gift, as he did in the present case, to defeat the purpose of the agreement, and that a husband and wife who were tenants by the entirety could, by a joint will containing an exchange of promises, provide for the ultimate disposition of property held by them as tenants by the entirety.

A joint will agreement which provided that after the death of either party "no agreement or instrument shall be executed providing for any different distribution" of the property clearly evinced an intention upon the part of both parties to the joint will to preserve the property for the life use and benefit of the survivor, with the remainder over to their children, according to the court in *Ralyea v Venners* (1935) 155 Misc 539, 280 NYS 8, where the joint will left all property to the survivor and upon the death of the survivor, left all the survivor's property to their children. The husband had survived the wife, had remarried, had executed a bond and mortgage of their house which was assigned to the new wife, and had transferred all of his personal property to the new wife. After both the husband and the latest wife had died, the son, a beneficiary under the joint will, brought the present action to set aside the bond and mortgage and transfers of personal property by his father as in fraud or at least in contravention of the joint will agreement. The court construed the agreement between the parties to be a covenant binding upon both parties while living, and upon the survivor, to preserve intact their then-owned and later accumulated joint and several property for the life use and benefit of the survivor, with the remainder over to their children, and held that the bond and mortgage and gift of personal property might be set aside. It was said, however, that the contemporaneous agreement, so far as it forbade the execution of a new will by the husband, did not affect his right to dispose of the original joint and several property as he saw fit, leaving none of it for the children of either party at the time of his death.

The surviving party to a joint will was not authorized to give the property away to a new spouse, according to the court in *Ashley v Volz* (1966) 218 Tenn 420, 404 SW2d 239, where a husband and wife had executed a joint will leaving all property to the survivor, and upon the survivor's death leaving the "unexpended residue" to their son, or if deceased, to the son's children, and after the wife's death the husband remarried and executed a deed of gift of his residence to the new wife, and advised his grandchildren that he wanted to give the new wife \$75, 000. The grandchildren, their father being dead, instituted the present action to determine the rights of the survivor to make such inter vivos transfers. The survivor's demurrer was sustained and the suit dismissed, and the grandchildren appealed. The court said that the demurrer essentially raised the proposition that the grandchildren had no present or existing right or interest in the assets of the estate, and that at most they had only a possibility of a future interest in the property received by the survivor under this will and therefore their suit was premature, that under the terms of the will the survivor became vested with a fee simple title to the property and had an unlimited right to dispose of it as he saw fit, and that for these reasons the grandchildren had no right to discovery and an injunction as they prayed for. Disagreeing with this analysis, the court said that it was the husband's and wife's joint intention that all the property, regardless of what it was, would go at the death of the survivor to their son or grandchildren. Thus, the court continued, there was a trust imposed upon the survivor to keep the property for this purpose. The court went on to say that it was not unmindful of the cases cited to the contrary and the stable and effective argument on the use of the term "unexpended residue," but that

when one viewed the circumstances of the present parties when they made the joint will, it could not see how it could arrive at any other conclusion. The principle which should be followed in the disposition of the case at hand, according to the court, was that if part of the agreement which bound the surviving party contained no provision defining such party's powers over the whole property during the survivorship, but only provided that he should by will dispose of his property at his death to certain beneficiaries in a certain way, then it seemed to be well settled that he held all of the property subject to a trust to carry out the agreement, and could use not only the income, but also reasonable portions of the principal for his support and for ordinary expenditures, and could change the form of it by reinvestment and the like, but could not give away any considerable portions of it or do anything else with it that would be inconsistent with the spirit or the obvious intent and purpose of the agreement. Thus, the lower court judgment was reversed.

In *Larrabee v Porter* (1914, Tex Civ App) 166 SW 395, error ref, where a husband and wife, acting under an agreement, executed a joint will leaving all property to the survivor for life, with the remainder to their five daughters share and share alike, it was held that the surviving husband's warranty deed and bill of sale of all property to his second wife, as well as a new will which left her the property, were illegal and void. The husband made an agreement with the new wife whereby she agreed to marry him and take care of him if he would give her his entire interest in the estate. In affirming a judgment for the beneficiaries under the joint will, the court said that if, as seemed clear from the authorities, the husband at any time prior to his death, after having probated the joint will and accepted the benefits thereunder, could not himself have abrogated it, then the second wife did not stand in any better attitude than he did with reference to this property.

Where a joint and mutual will, executed by a husband and wife in conformance with an agreement, left all property to the survivor, and upon the death of the survivor, to a named beneficiary, the surviving wife's transfer by gifts inter vivos of a substantial portion of the property received by her under the joint will was held in *Re Estate of Chayka* (1970) 47 Wis 2d 102, 176 NW2d 561, to be violative of the agreement of the parties and as a matter of law not made in good faith. The wife had remarried and had conveyed the real estate to herself and her husband as joint tenants, and had transferred \$32,000 worth of bonds to her husband as a gift, as well as transferring funds into a joint bank account shared with the husband. In the present action her will was admitted to probate. In affirming a judgment for the joint will beneficiary, the court said that the will became partially executed upon the death of one of the parties to the agreement and the acceptance by the survivor of properties devised or bequeathed under the will and pursuant to the agreement, that at this point the contract became irrevocable, the survivor having received the consideration promised, and that the will, as a will, remained an ambulatory document, speaking only from the date of death of the maker, but that the mutual agreement of the parties, when executed, became irrevocable. In response to the husband's argument that the wife complied with the agreement by leaving unrevoked the will giving all of the property that she possessed at the time of her death to the beneficiary, the court said that this was a mere play on words, and that it was a compliance in form, not in substance, a formal compliance that breached the covenant of good faith which accompanies every contract, by accomplishing exactly what the agreement of the parties sought to prevent.

§ 26[a] To others—Held proper

In the following cases involving property which was taken by the surviving party to a joint will agreement, the survivor taking under the joint will, it was held proper for the survivor to gratuitously transfer property to persons other than those discussed in §§ 24- 25, *supra*.

Where a husband and wife by individual wills devised certain property to children and friends, with the residue going to the surviving spouse, the survivor having the power to sell, exchange, or otherwise dispose of the property involved (except for certain assets not involved in the case at hand), but not by will, with the

specific provision that the survivor's deed of conveyance under such circumstances should transfer the full fee, and where the husband and wife at the same time executed a joint and mutual will by which each agreed that he or she would abide by the individual wills and make no other will or codicil different therefrom, and by which the property was left to certain beneficiaries upon the death of the survivor, it was held in *Fourth Nat. Bank v First Presbyterian Church* (1932) 134 Kan 643, 7 P2d 81, that the joint and mutual will permitted the surviving husband to donate \$100,000 to erect a memorial to his wife. After his wife's death, and shortly before his own death, the husband had entered into a contract with a church corporation for erection of the memorial. The present action was instituted by the bank, which was named as trustee to carry out the contract. The beneficiaries contended that the provisions of the joint will impressed the property with a trust which required the survivor to hold and handle it in accordance with the mutual agreements, and that any disposition of his or her property which would reduce or impair the estate was invalid and beyond his power, and that his act was therefore ineffectual. Noting that the husband had a total estate worth approximately \$650,000, with the power of use and disposition of the whole, the court said that the amount devoted to a memorial for his deceased wife could not be regarded as disproportionate or unreasonable. The court explained that after the death of his wife he had dominion and control of her property as well as his own, and that with the powers given him in the will, he could make binding contracts relating to all the property other than that which was expressly excepted, that in the exercise of his powers there might be a reduction of the estate without affecting the validity of the contracts made, that he was not required to keep the estate up to the value which it had when the wills were made, or when his wife died, and that even though some of his dealings might have turned out to be improvident or unprofitable investments, which tended to reduce the estate, if they were made in good faith they would not have operated to destroy the validity of the contracts that he made with others.

Where by means of a joint will a husband and wife left to the survivor all property "in fee simple" and "absolutely free and clear of any conditions or restrictions with full power of disposition," and directed that "should there be any property" belonging to the survivor at his or her death, it was to go to named beneficiaries, it was held in *Lindley v Lindley* (1960) 67 NM 439, 356 P2d 455, that upon the death of the husband the surviving wife acquired "absolute title to the property during her lifetime, including the right to dispose of said residuary estate," and that she therefore had the right to make inter vivos gifts of cash and realty with a total value of from \$400,000 to \$650,000. The residuary beneficiaries under the joint will sought to set aside these gifts on the ground, inter alia, that the surviving wife took only a life estate, thus depriving her of the right to make the gifts in question. The plaintiffs contended that the absolute bequest and devise was reduced to a life estate by the provision directing that the property belonging to the survivor at death go to the named beneficiaries, that the will established vested interests in the residuary beneficiaries on the survivor's decease which could not be impaired, and that there was no lapse of the shares going to those beneficiaries now deceased, but that the shares should be prorated among the residuary beneficiaries still living when the survivor finally passed on. Pointing out that the trial court found the language of the will free of ambiguity and found that under this language the widow acquired an absolute title in fee simple to the property in question, and that no other persons acquired vested rights therein, the court said that it agreed with this fully, that the language upon which the residuary gifts were predicated applied only to property "belonging to either of us or the survivor thereof, upon the death of the survivor of us," and that it failed to see the many intricacies and involvements claimed by the plaintiffs, and thus disposed of this contention.

§ 26[b] To others—Held improper

In the following cases involving property which was taken by the surviving party to a joint will agreement, the survivor taking under the will, it was held improper under the agreement for the survivor to gratuitously

transfer property to persons other than those discussed in §§ 24- 25, supra.

Where a joint and mutual will left all of the property to the survivor without qualification, and provided that the survivor devised, etc., "the survivor's entire estate" to certain named beneficiaries, it was held in *Estate of Mulholland* (1971) 20 Cal App 3d 392, 97 Cal Rptr 617, that the survivor received a life estate with the power to consume part or all of the principal for the survivor's own use and benefit. A husband and wife had executed the joint and mutual will, and the surviving wife claimed the estate in fee. Rejecting this, the court said that where a bequest or devise is made in ordinary language, without words of inheritance or perpetuity, but in terms standing alone to carry the absolute or fee interest, and is followed by a limitation over of the property not disposed of by the first taker, the first taker takes a life estate only with the power of disposal, that the fact that the will did not use the term "life estate" was not fatal to the construction given to the will, and that it appeared settled "by the overwhelming weight of authority" that the mere fact that the first taker is invested with the power to dispose of or consume the whole of the property for certain purposes does not invest him with the absolute ownership thereof and render the gift over void, where, taking the whole instrument together, it is concluded that the intent was to give only an estate for life, with limited power of disposal or consumption. The court added, however, that while the life estate in question gave the life tenant the reasonable right to use and consume the life estate property, he could not give it away or make it subject to testamentary disposition at his death, and that whatever the survivor did not consume had to go to the remaindermen.

In *First United Presbyterian Church v Christenson* (1976) 64 Ill 2d 491, 1 Ill Dec 344, 356 NE2d 532, 85 ALR3d 1, it was held that a provision in a joint and mutual will that prohibited the surviving wife from selling certain real estate also prohibited her from giving it away. The will left "all the rest, residue and remainder of our estate" to the survivor, and provided that after the death of the survivor, all which the survivor should own was to go to named beneficiaries. The property in question was specifically devised to the plaintiff church, and in a subsequent paragraph the will provided that if the husband predeceased the wife, the wife should "at no time sell the real estate" which was to go to the church, but could sell any of the other real estate. After the husband's death the widow made a gift of the real estate in question to the other beneficiaries mentioned in the will. When it discovered the gift, the church instituted the present action to have the deed set aside and the church decreed to be the owner subject to the widow's life estate. Directing that the lower court enter a judgment for the church, the court said that although title to real estate held in joint tenancy did not pass under a joint and mutual will, such real estate could be the subject of a contractual agreement contained in the joint and mutual will and a court of equity, under appropriate circumstances, would enforce the agreement and limit the surviving joint tenant's disposition of the property, and that in the case at hand the church was entitled to enforce the contract which was the basis of the will. As for the argument that the will did not prevent inter vivos gifts of the property, the court said that the parties' intent and agreement were to be determined from a reading of the entire will and not from a single word, phrase, or section, and that it found no basis in the will for the defendants' construction. Furthermore, the court said that it had decided many cases where an estate was given to one person in general terms without such express language as "for life" or "in fee simple," defining the estate in the first taker, and was followed by subsequent language giving the property to another "when," "at," or "on" the death of the first taker, and that, applying the simple rule of interpretation that an instrument would be given effect in all its parts, and viewing the ambiguous character of the first limitation in such a manner that the second limitation could also be given effect, it had held that the first limitation created a life estate, since to hold otherwise would make all the language of the gift over meaningless. Applying this "simple rule of interpretation" to the case at hand, the court decided that the testators, by contract, created a life estate in the survivor of them, and so far as relevant to the present case, made the gift over to the designated beneficiaries, and then empowered the defendant to sell any of the real estate except that involved in the present case. Thus, the court decided that the grantees took a life estate which terminated upon the death of the widow.

Where a husband and wife, who owned a two-family home in joint tenancy, executed a joint will leaving all property to the survivor to use during the survivor's life, with the remainder going to the daughters of the husband by a former marriage, it was held in *Rucker v Harris* (1968) 91 Ill App 2d 208, 234 NE2d 392, that the joint will was a contract for the devolution of all property to the daughters of the husband, that the wife who survived the husband had only a life interest in the property formerly held in joint tenancy, and that her *inter vivos* conveyance of the home to the defendant could convey no greater interest. The wife had conveyed the home to the defendant, and had executed a will devising the same property to him. Upon her death the later will was admitted to probate over the daughters' objection, the daughters appealed, and the court held that the joint will was a contract for the disposition of the entire estate and that the second will was void. The daughters then filed the present action, praying that the defendant be compelled to execute a quitclaim deed to the property or that the conveyance to him be canceled. The lower court ordered the conveyance removed as a cloud on their title and enjoined the defendant from exercising any act of ownership over the property, and the defendant appealed, contending that the husband, being the first of the joint tenants to die, had no interest which could be devised, and that the property passed to the wife by operation of law. Rejecting this contention and affirming the judgment, the court said that where a husband and wife properly execute a joint will which indicates a contractual agreement between them for the disposition of their property after both of their deaths, a life estate in the property is created in the survivor, with the remainder interest belonging to the beneficiaries named in the will, that this is true even if the property is held in joint tenancy, provided that the will evidences an intention to include such property in the ultimate devolution to the remainderman, and that the property held in joint tenancy becomes subject to the agreement and the survivor will not be permitted to dispose of the property by subsequent will or conveyance.

In *Re Estate of Buckner* (1960) 186 Kan 176, 348 P2d 818, it was held that the surviving husband was not authorized to give property from the estate to his three sisters and his niece without "good and sufficient consideration" where the surviving husband took the property under a joint and mutual will, executed by the husband and his wife, which left all property to the survivor "without restrictions or limitations of any kind," giving the survivor the "right and privilege of selling, mortgaging and disposing of any property" in the estate, and upon the death of the survivor, giving one-half of all property "owned by said survivor at the time of said death" to the wife's niece, and the other half to the husband's three sisters. At the time of the husband's death, approximately \$8,000 remained in the estate, the husband having made gifts of over \$60,000 worth of property, both real and personal, to his sisters and his niece. Setting aside the gifts and ordering the estate settled "according to the terms of the will," the court determined that there was an ambiguity in the will, because, the court said, the survivor's disposal of property was restricted in that he could make no other testamentary disposition of the property, and because the court, in order to authorize a gift whereby the husband "could revoke and make the will inoperative" after the wife's death when he had accepted benefits under the will, could not ignore the words "selling" and "mortgaging" that preceded "disposing" in the will. After reviewing cases on the point, the court said that the words "selling, mortgaging and disposing," when considered with the entire contents of the will in the order in which those contents appeared therein, and not by rearranging them, inferred consideration, that the surviving husband did not have the right to give the wife's half of the estate, which was set apart to her niece under the terms of his contract with the wife, to someone else without good and sufficient consideration, and that the intent of the husband and wife was to give their respective relatives a definite share in their estate. The husband attempted to defeat the only reason that the wife had for entering into such a special kind of will, and equity would not permit such attempt, the court added.

It was held in *Re Estate of Tompkins* (1965) 195 Kan 467, 407 P2d 545, that the language used in a joint and mutual will gave the survivor a life estate in the property with a qualified power of disposition for personal use and benefit during the survivor's lifetime, but that this did not include the right to gratuitously dispose of any

such property. The joint and mutual will, executed by a husband and wife, gave all of the property to the survivor, "with the right of disposal," and at the death of both, to certain named legatees. After the wife's death the husband transferred funds into two accounts in the names of himself and the defendant as joint tenants, transferred shares in a savings account to the defendant solely, and transferred other shares to himself and the defendant as joint tenants. The plaintiffs, legatees of the will, sought to recover these assets for the estate of the deceased husband. In rejecting the defendant's contention that the surviving husband had an unlimited right of disposal as to all of the property, the court reviewed the cases on the point, and concluded that the proposition that two people who planned their estates and took a joint, mutual, and contractual will could have their plan defeated by the survivor giving away property without consideration in deprivation of the remaindermen was not supported by any cases cited by the defendant.

Where a joint and mutual will executed by a husband and wife left all property to the survivor "to use and enjoy for the natural life" of the survivor with "complete power to sell, mortgage, lease, encumber and dispose of any or all" of the property during his or her lifetime as he or she shall see fit, and at the death of the survivor left "all property not disposed of" to named children, it was held in *Seal v Seal* (1973) 212 Kan 55, 510 P2d 167, that the surviving wife's right of disposition did not include the right to give property away without consideration, and that this applied to all property in her hands, regardless of whether it came to her under the will or was in her own name at the time of the husband's death. Noting that the widow (in her 80's) was dissipating the estate at a "rather alarming rate," the court said that her interest in the estate was no more than a life estate "with a limited power of disposition," and affirmed the lower court's order appointing a trustee to preserve the estate, and restricting the widow's sale of any of the remaining land.

Where an estranged husband and wife, in a separation agreement, agreed that certain property which they owned as tenants by the entirety should go to the survivor during the survivor's lifetime, and on the death of the survivor to their son and his heirs, and the husband and wife each thereafter made wills leaving this property to the son, it was held in *Getchell v Tinker* (1939) 291 Mich 267, 289 NW 156, that the surviving wife's conveyance of the property by warranty deed (no consideration disclosed) 2 days prior to her death was ineffective, because upon the husband's death his interest in the property passed to his wife as provided, and thereafter she had no power to make a disposition contrary to the provision of the separation agreement (which the court said was a joint and mutual will), and that the agreement underlying the mutual will became irrevocable, a right of action for the enforcement of the agreement vesting in the son's heirs as beneficiaries (the son had predeceased his mother). As for the wills which the husband and wife each executed after the separation agreement, the court said that they both devised their interest in the property in question to their son, and that the record contained no evidence to indicate that the contract that the heirs sought to enforce was legally rescinded prior to the death of the husband.

The property of a husband and wife held by the entirety can be the subject of a joint and mutual will executed by the husband and wife, whereby the property is left to the survivor for life with the remainder going to named beneficiaries, leaving the survivor with no power to dispose of the property, according to the court in *Stewart v Shelton* (1947) 356 Mo 258, 201 SW2d 395, wherein it was held that upon the death of one of the parties to such a joint and mutual will, the will became irrevocable, and that deeds to the land executed by the wife after the husband's death violated the contract and should be set aside. The agreement supporting the joint and mutual will called for the remainder to go to the brothers and sisters of each, but the surviving wife deeded the land to her brothers and sisters or their children. Later she repented and instituted the present action to set aside the conveyances. In affirming an order setting aside the conveyances, the court said that where a husband and wife hold property by the entirety, the two may by joint and mutual will devise a remainder over after life enjoyment by the surviving spouse. In the instant case, the court continued, neither spouse acting separately and alone did anything to impair the full enjoyment, present or future, of the other, but, acting jointly, as they could

and did, the husband and wife merely agreed by their joint will that after they both were deceased, their estate held by them by the entirety should go to all of the brothers and sisters of the two of them, and they had full power to do this.

The surviving party to a joint and mutual will had no right to give away a valuable tract of land, according to the court in *Glueck v McMehen* (1958, Mo App) 318 SW2d 371, where the joint and mutual will executed by a husband and wife left to the survivor "full ownership" of their entire estate "subject only to the payment of debts of the deceased and ordinary administrative expenses," and provided that at the death of the survivor, the residue of their "entire estate" was to be distributed to named beneficiaries in a prescribed manner. After the husband's death, the wife executed a deed to certain property, receiving therefor a note for \$1,500 secured by a deed of trust on the property. Later, the wife endorsed the note "paid in full," and released the deed of trust. After the death of the wife, the executor of her estate instituted the present action, claiming that the release amounted to a gift made without consideration. Affirming the lower court's judgment for the plaintiff, the court said that it concurred with the trial court's finding that the agreement between the husband and wife as expressed in the will became irrevocable after the death of the husband and that the wife had no right to give away a valuable tract of land, and that to hold otherwise would be to hold that the survivor could nullify the agreement written into the joint will while both were alive.

Where a husband and wife executed a joint and mutual will, pursuant to an agreement, leaving all property to the survivor absolutely and leaving whatever was left at the death of the survivor to their children, and the husband, who survived the wife, deeded his house to the housekeeper, executed a bill of sale of the household furnishings to the housekeeper, and executed a codicil to the joint will leaving the housekeeper the same house and furnishings, "in grateful appreciation for the services rendered" to him, it was held in *Waters v Harper* (1952) 69 Nev 315, 250 P2d 915, that these transfers were made for the purpose of defeating the agreement between the husband and wife, in contemplation of death, and in lieu of testamentary disposition, and that the trial court properly canceled the deed and bill of sale and properly ordered the housekeeper to execute a quitclaim deed and bill of sale of the property to the beneficiaries of the joint will. It was pointed out that the will contained no express prohibition of a alienation, and that the housekeeper gave no consideration for the transfer. As for the housekeeper's argument that the beneficiaries, at the time of bringing the suit, had no existing interest upon which the suit could be brought, and that any right that they claimed under the joint will would have to await action by the probate court, the court said that the beneficiaries were not claiming under the will as heirs of the surviving spouse, but that they were claiming as beneficiaries of the contract in pursuance of which the joint will had been made.

Where a husband and wife, in accordance with an agreement, executed a joint and mutual will which left all property to the survivor for life and the remainder to designated beneficiaries, and the surviving husband opened four Totten trust accounts after the wife's death, it was held in *Re Nelson's Will* (1951) 200 Misc 3, 106 NYS2d 427, that the surviving husband violated the joint and mutual will agreement when he opened the Totten trust accounts, that the beneficiaries named in the accounts were not entitled to the proceeds thereof, and that the moneys in such accounts were the property of the estate, to be distributed in accordance with the joint and mutual will of the surviving husband and his wife. After the husband died, the executrix of his estate sought the court's advice as to the disposition of the proceeds from these accounts. Declaring that the surviving husband became a trustee for the beneficiaries named in the will, the court said that he could not, after accepting the benefits of the agreement, make a gift in the nature, or in lieu, of a testamentary disposition or to defeat the purpose of the agreement.

Where a husband and wife's joint and mutual will left "all" of their property to the survivor, who was to keep the property "as nearly as possible in as good condition as circumstances will permit during the lifetime of such survivor," and provided that at the death of the survivor the property was to be "equally divided between

the nearest of kin," and after the wife's death the husband deeded his undivided one-half interest in an acreage that had been held with the wife as community property (land valued at \$2,000) to the wife's next of kin for \$200, it was held in *Dickerson v Yarbrough* (1948, Tex Civ App) 212 SW2d 975, that the deed conveyed no more than the surviving husband's life estate, the remainder fee having already vested in the devisees referred to as next of kin. The court said that on the death of one of the parties to a mutual will agreement, who left a will in accordance with the agreement, the survivor became estopped from making any other or any different disposition of the property than that contemplated in such agreement, and that his obligations under the agreement became absolutely irrevocable, and enforceable against him, at least where he availed himself of provisions of the decedent's will in his favor, or accepted any benefits thereunder.

§ 27[a] Transfer reserving life estate—Held proper

In the following case involving property which was taken by the surviving party to a joint will agreement, the survivor taking under the joint will, it was held that under the agreement the survivor could properly transfer, without valuable consideration, the property to another, reserving a life estate for himself.

A surviving husband who obtained property through a joint and mutual will which he executed with his wife, the will leaving all property to the survivor to be used, conveyed, etc., by the survivor during his or her lifetime, any conveyance executed by the survivor to convey the full, complete, and fee simple title, and upon the survivor's death, all property remaining to go to certain heirs, was held in *Foust v Coyne* (1959, Tex Civ App) 331 SW2d 386, error ref n r e, to have the right under the will to convey some of the real estate to a new wife in consideration of \$10 and of love and affection for the new wife, reserving a life estate for himself. After the husband died, the beneficiaries claimed the real estate in question, contending that under the joint and mutual will the survivor did not have the authority to give the land to the new wife, and that the deed was a testamentary instrument. Pointing out that if consideration was considered necessary, love and affection were a sufficient consideration to support a deed from a husband to his wife, the court said that the terms of the will authorized the conveyance.

§ 27[b] Transfer reserving life estate—Held improper

In the following cases involving property which was taken by the surviving party to a joint will agreement, the survivor taking under the joint will, it was held improper under the agreement for the survivor to transfer, without valuable consideration, the property to another, reserving a life estate for himself.

Where a husband and wife executed a joint and mutual will in which the one dying first left all property to the survivor "to be his or hers absolutely," and the survivor left "all of his or her property" to a designated beneficiary, and the wife, after becoming the survivor, deeded some of the property to her sister, retaining the privilege of using the property as long as she lived, deeded other property to her nephew, retaining the benefits of the property as long as she lived, and sold the remaining property, it was held in *United States v 1,453.49 Acres of Land* (1965, DC Iowa) 245 F Supp 582, affd (CA8 Iowa) 368 F2d 563 (applying Iowa law), that the transfers left the wife without property and thereby had the effect of defeating the contract and mutual will, that the transfers were made for that purpose, and that the transfers other than the outright sale were not reasonable, not absolute, not bona fide, and were testamentary in effect. The case involved a dispute over proceeds of that part of the land which had been transferred to the nephew, and which had later been condemned by the United States under its eminent domain power. The beneficiary of the joint and mutual will attacked the wife's transfer as void under the joint and mutual will. After reviewing the Iowa law on the subject, the court said that *Re Logan's Estate* (1962) 253 Iowa 1211, 115 NW2d 701, [FN79] was like the present case in terms of the wording of the will, but that the only indication that the court gave in that case as to the rights of such beneficiaries was

the sentence "compare *Tiemann v Kampmeier*,"[FN80] and that it was not clear whether the court intended the same restrictions on alienation to apply in the Logan Case as were found in the Kampmeier Case. The court went on to say that the case of *Jennings v McKeen* (1954) 245 Iowa 1206, 65 NW2d 207, supra § 24[b], was the same as the present case "in most respects," that in the present case, jointly owned property was mutually willed and a deed conveying all was given by the survivor to a nephew without consideration and with the use and benefit of the property reserved for life, that in the Jennings Case the court held that this could not be done, since it amounted to a transfer in violation of the mutual will agreement, that the court so held without finding any fraud or intentional bad faith, and that the holding was based on the facts that the transfer depleted the estate, the lack of consideration, and the relationship of the parties. In conclusion, the court held that while the designated beneficiary had no present right to the proceeds of the condemnation, the proceeds were held by the nephew subject to the rights of the designated beneficiary under the contract and mutual will, and that the surviving wife had the right to use and spend the proceeds in any reasonable and bona fide manner.

In *De Jong v Huysen* (1943) 233 Iowa 1315, 11 NW2d 566, it was held that where one party to a joint will becomes the survivor and accepts benefits as such, he cannot revoke the will nor can he make a disposition of his property by deed, with reservation of a life estate, in lieu of a testamentary disposition, to defeat the purpose of the agreement. A husband and wife, in conformance with an antenuptial agreement, executed a joint will which provided for \$100 per year for the wife if she survived, and that upon the wife's death all of her property was to go to the husband, or if he predeceased the wife, to his children. The wife survived the husband and received the \$100 per year. After her husband's death, the wife conveyed her house and lot to her sister, reserving a life estate therein. The consideration for this conveyance apparently consisted of some \$400 which the sister had given her in the past, and other favors rendered by the sister. The husband's children instituted the present action seeking to impose a trust upon the property conveyed to the sister. The trial court imposed the trust, and ordered the sister to execute a quitclaim deed, and to make an accounting. On appeal the court affirmed, saying that it had held repeatedly that in a joint will there was a contractual relation which became irrevocable after one of the testators had died and the other had accepted benefits thereunder, that in the present case the joint will was obviously made pursuant to a contract, that the deed to the sister, reserving a life estate, was obviously intended to produce the same result that would have been accomplished by a new will, and that it was in reality of a testamentary character and its purpose was to defeat the contract embodied in the joint will.

Where a husband and wife, pursuant to an agreement, executed a joint will whereby the property was left to the survivor for life, and was then to be distributed among their children, and the husband, upon the death of his wife, accepted the provisions of the will in his favor, but thereafter voluntarily and without consideration conveyed certain land to some of his children contrary to the terms of the will, reserving to himself a life estate therein, it was held in *Bower v Daniel* (1906) 198 Mo 289, 95 SW 347 (ovrld on other grounds *Wanger v Marr* 257 Mo 482, 165 SW 1027), that although the joint will conferred upon the survivor the power of unrestricted disposition, the survivor could only dispose of the property in good faith, and not merely for the purpose of defeating the joint will in its operation upon himself, and that the husband executed the conveyances in question for the purpose of defeating the joint will, thus rendering the conveyances ineffective for that purpose. The court said that, conceding the joint will as embracing only such property as each (husband and wife) had at the time of his or her death, and that the surviving husband might have thereafter sold and disposed of his property in good faith, or have given it away, it was a fraud in fact and in law for him to convey it to others, voluntarily and without consideration, reserving to himself a life estate, and in this way make a disposition of his property, both by deed and by will, different from that for which he contracted with his wife in the joint will.

§ 28[a] Transfer to self and another jointly—Held proper

In the following cases involving property which was taken by the surviving party to a joint will agreement, the survivor taking under the joint will, it was held that the survivor could properly transfer the property in question without valuable consideration, so that the assets would be owned jointly by the survivor and another, with the right of survivorship.

Where a husband and wife executed a "joint, mutual and contractual will" leaving the realty to the survivor for life, the remainder to their two children, and the personal property to the survivor absolutely, the survivor leaving it to their two children share and share alike, it was held in *McCuen v Hartsock* (1968, Iowa) 159 NW2d 455, that the savings accounts which the husband and wife held in joint tenancy accounts and which the husband, after the wife's death, transferred to a joint tenancy account with a son, did not go to the husband through the estate of his deceased wife, that he disposed of the accounts by inter vivos transfers, that the property never became a part of his estate, that there was no evidence to support a holding that the transfers were in violation of any contractual obligations, and that the daughter was not entitled, under the will, to half of the money in those accounts when her father died. After the father's death, the daughter instituted the present suit seeking a one-half interest in the savings accounts. Pointing out that the present case was governed by the decision in *Re Estate of Lenders* (1956) 247 Iowa 1205, 78 NW2d 536, *infra* § 31[a], the court said that the will provisions in the two cases were comparable, that in each case the property was given to the survivor "absolutely," that in each case there were provisions for disposition if the spouse did not survive, that in both cases the gifts were made by the survivor, and that in neither case was the disposition testamentary in character. In determining that the daughter was entitled to none of the accounts, the court said that the money was the husband's as surviving joint tenant and not as a beneficiary under the will, and that it was his own property and there was nothing which prevented him during his lifetime from disposing of his own property as he did. On the basis of the theory of the *Lenders* Case that the gifts therein were reasonable, the trial court determined what in its opinion would be reasonable in the instant case. Disapproving this approach, the court said that nowhere in the *Lenders* opinion was there any suggestion that either the trial court or the present court could make an initial or independent determination of what was reasonable, that in the case at hand if the transfers were in violation of the husband's contract, the court could not place its approval on a partial violation, and that if they were not in violation of his contract, the court had no authority to interfere with what he did with his own property. Finding that there was no violation, the court allowed all of the savings accounts to go to the son under the joint tenancy accounts.

Where a husband and wife, whose property was held by them jointly, exercised a joint and mutual will leaving all their property to the survivor "absolutely and forever," but leaving it to their daughters if both died at the same time, and after the death of the husband the wife executed the necessary documents making a granddaughter the joint owner of an automobile and a \$20,000 certificate of deposit, it was held in *Sheldon v Watkins* (1972) 188 Neb 599, 198 NW2d 455, that it was unnecessary to determine whether the will restricted the surviving wife's power to alienate, because the property passed to the wife by virtue of her being the surviving joint tenant therein, making her the absolute owner thereof with the power of disposition of that property, and that it was not possible by a construction of the will to ascertain an intent on the part of the testators to make the restrictive provisions thereof applicable to property passing by survivorship outside the will. In reversing the trial court's judgment holding the property transfer improper, and in directing the dismissal of the petition, the court said that since the will made no further disposition of the property left to the survivor, the property owned in joint tenancy passed to the surviving joint tenant by virtue of the nature of the tenancy, and not under the law of descent and distribution or by virtue of the provisions of the will of the first joint tenant to die, and that for this reason the court was not required to reach and determine the validity of contentions concerning the restrictions on the widow's power to alienate imposed by the joint and mutual will.

Where, under a joint and mutual will executed by a husband and wife, the survivor was left their "entire

personal property" to "manage, control and dispose of" during his or her lifetime, that which was left going to specified beneficiaries, and their real estate also went to the survivor for life, with the remainder to their children, it was held in *Johnson v Johnson* (1957, Tex Civ App) 306 SW2d 780, error ref, that the survivor had the right to create, with her son, a joint bank account with the right of survivorship, and that the balance of the account belonged to the son after the death of his mother. The other children challenged the right of the son to withdraw \$12,735.57 from the account after the mother's death. In affirming the lower court's judgment for the son, the court said that the instrument creating the joint bank account created a present contractual right whereby either of the signatories to the instrument could withdraw any or all of the funds deposited at any time after creation of the account, that the right of the survivor of them to withdraw such funds at the death of either was created in praesenti and upon the death of the mother, and that the son had the legal right to withdraw such funds as remained in the joint account as his property. Any question of a possible testamentary disposition of the personal property in setting up the joint account was ignored by the court.

Where a husband and wife, acting in conformance with an agreement, executed a joint and mutual will leaving the property, including minerals, to the survivor to be used as the survivor desired or saw fit, and on the death of the survivor to named individuals, it was held in *Odell v Odell* (1957, Tex Civ App) 306 SW2d 914, error ref n r e, that after the death of the wife, the royalties from the oil wells on the property were the surviving husband's to use as he wished, that real estate which the surviving husband purchased after remarrying could be taken in the name of the survivor and his new wife, and that this property and the personal property of the husband, accumulated after the first wife's death, were community property of the survivor and his new wife. Pointing out that no provision was made in the joint will placing any limitation whatever upon the right of the surviving husband, during his lifetime, to dispose of the minerals in or under the lands in question, that each of the testators reserved in himself or herself as survivor the absolute right to dispose of the minerals as such survivor might desire, and that the only limitation in this respect was that following the death of the survivor, the minerals were to vest in the children and grandchildren in the proportions set out in the joint will, the court said that the survivor was authorized under the joint will to dispose of the minerals as he saw fit, and that when he received royalties he had the right to dispose of them without an accounting to the remaindermen, that the will did not reserve to or confer on the remaindermen the right to share in the proceeds from a sale of the minerals, and that under the circumstances the money received from the oil runs was income and, as such, was the community property of the survivor and his new wife.

§ 28[b] Transfer to self and another jointly—Held improper

[Cumulative Supplement]

In the following cases it was held that the joint will agreement involved did not authorize the surviving party to the agreement, who took under the will, to transfer property so that the assets were owned jointly by the survivor and another with the right of survivorship.

A husband's declaration of trust conveying the assets of his deceased wife to himself as trustee for the exclusive use and benefit of himself and his daughter by a previous marriage was held in *Iwerson v Dushek* (1976, Ark) 543 SW2d 942, to be invalid because it exceeded the limited power of disposition allowed the survivor under "joint and mutual wills" which the surviving husband and the deceased wife had executed in accordance with an agreement. The husband and wife had executed "joint and mutual wills" leaving the property to the survivor, with one-half of the remainder to go to the husband's daughter or her heirs, and one-half to designated heirs of the wife. Shortly after the wife's death the husband executed the trust and later amended it so as to designate the daughter as the sole beneficiary, to the exclusion of the deceased wife's relatives. The father also gave his daughter a home, \$20,000 to pay the mortgage thereon, and other gifts of furniture and personal

property. As for these gifts, the court said that these assets were not made a part of the deceased wife's estate, and the lower court specifically found that the daughter could retain this property. The wife's relatives instituted the present action to compel specific performance of the contract to make the joint and mutual wills. Affirming a decree in favor of the plaintiffs, the court said that it was logical to assume that in making the agreement the husband thought that he would die first (since he was 30 years older than the wife) and wanted to be sure that his only daughter would receive the benefit of half of the joint estate after the wife's death. The court went on to say that the wills allowed the husband to use the assets of the estate for his well-being, but did not give him the right or power to convey by will or by trust the remainder of the estate to his daughter on his death; rather, it contemplated an equitable division of the residue among the various heirs of both testators.

See also *Tontz v Heath* (1960) 20 Ill 2d 286, 170 NE2d 153, supra § 23, involving the purchase of United States savings bonds by the surviving party to a joint and mutual will, the bonds being payable to her daughters upon the death of the survivor. The court declared the transfers null and void.

In *Re Estate of Bell* (1972) 6 Ill App 3d 802, 286 NE2d 589, where a husband and wife executed a joint and mutual will leaving all property to the survivor, and all property in the survivor's possession at the time of his death to their two sons equally, and the surviving husband converted two bank accounts to joint ownership between himself and his adopted son, it was held that the unrevoked joint and mutual will constituted a valid and enforceable contract between the husband and wife, and that this contract impressed a trust upon all property of both testators, including property owned by them as joint tenants with the right of survivorship, and that the bank accounts in question properly belonged to the estate of the husband, the surviving testator. After the wife's death the joint will was filed but no estate was opened. During the lifetime of both, the couple had possessed two joint bank accounts, and it was these two accounts which the husband converted to joint ownership with his adopted son. The present action was instituted by the other son after the husband's death, the action seeking to recover the funds in these accounts. In affirming the lower court's order for the return of the accounts to the executor of the estate, the court said that the two testators each had one child who was properly the object of their bounty, that the execution of the joint and mutual will was a simple and logical device whereby both of them could make certain that all of their property would pass to the survivor and thereafter be equally divided between the two sons, who constituted their respective families, and that this was an equitable arrangement which should not be disturbed after the death of one of the testators. In this regard, the court said that the situation presented in effect a family settlement which should be especially favored on grounds of public policy upholding the honor and peace of families. Since such arrangements contributed to the peace and harmony of families and to the prevention of litigation, they would be supported in equity without an inquiry into the adequacy of the consideration on which they were founded, the court added. The court also noted that there were substantial equities in support of the position taken by the other son (plaintiff), who, the court said, appeared to have been in many important respects a good son to both testators.

Where a joint and mutual will gave all property to the survivor, "with the right of disposal," and at the death of the survivor, to certain named legatees, it was held in *Re Estate of Tompkins* (1965) 195 Kan 467, 407 P2d 545, that the language gave the survivor a life estate in the property with a qualified power of disposition for personal use and benefit during the survivor's lifetime, but that this did not include the right to dispose of any of the property gratuitously. The survivor had transferred funds into two accounts in the names of himself and another as joint tenants, transferred shares in a savings account to another, and transferred other shares to himself and the other as joint tenants.

In *Klooz v Cox* (1972) 209 Kan 347, 496 P2d 1350, a joint and mutual will which provided that all property should be "the sole property" of the one who survived, "to be used at their own discretion," was held not to permit the survivor to make gifts and deeds without consideration. The will had been executed by a husband and wife, and the wife, after the husband's death, opened joint bank accounts with others. After her death the

administrator of the estate filed suit against the recipients of the gifts, claiming that the bank accounts were the assets of the wife's estate. The court agreed, pointing out that in *Re Estate of Buckner* (1960) 186 Kan 176, 348 P2d 818, supra § 26[b], and in *Re Estate of Tompkins* (1965) 195 Kan 467, 407 P2d 545, supra, both of which involved similar provisions, it had denied the right of the survivor to give the property away.

In *Monroe v Holleman* (1966, Miss) 185 So 2d 443, it was held that a joint and mutual will executed by a husband and wife pursuant to an agreement, and leaving all of the property to the survivor without limitation upon the survivor's use or disposition of the property, and providing that whatever remained should pass on to their respective families, half to each family, did not permit the surviving wife to use a "great part" of the estate to establish joint or survivor savings accounts and to purchase joint ownership savings bonds for the benefit of her relatives. The bonds and accounts were discovered after the wife's death. In ordering that the joint accounts and the joint bond purchases be recovered for the estate, which was then to be divided equally between the two families, the court said that the testimony showed clearly that the surviving wife attempted to disregard her agreement by placing a great part of the estate in joint accounts and joint bonds in an effort to transfer the residue of the estate to her own family in preference to an equal division of the residue between their respective families, and that moreover, the persons preferred were persons whom the testators agreed in their contract in the will should only receive a one-half interest in the residue of the estate. The court went on to say that since the surviving spouse probated the mutual will involved in the present case and took the benefits thereunder, she was estopped to repudiate the agreement contained in the will, and that she could not defeat the clear intention of the will by giving a large part of the estate to her family in preference to that of her husband's family.

The purchase of government bonds payable to a surviving husband as purchaser and to his children upon his death was held in *Union Nat. Bank v Jessell* (1948) 358 Mo 467, 215 SW2d 474, to violate an agreement and a joint and mutual will which the husband and wife executed, whereby all of their property went to the survivor for life, then to a trust the income of which was to go to their children for life, with the principal going to their grandchildren. In affirming the lower court judgment against the children, the court said that the surviving husband was obligated by the compact of the joint and mutual will with his wife to devise and bequeath their property to the trust regardless of his subsequent good intentions and changed circumstances, and that the purchase and gift of the bonds to the children were in direct violation of that compact. As for the children's argument that title to the United States bonds was governed by United States laws and regulations and the present court could not decree otherwise, the court said that it had not decreed otherwise, that it had decreed that the named beneficiaries cash the bonds and deliver the proceeds to the executor in accordance with the joint will, that there was nothing in this phase of the decree contrary to either the laws or the regulations of the United States, and that those laws and regulations did not prevent the declaration of a resulting trust in bonds purchased in fraud of marital rights, or purchased with fraudulently acquired funds or funds expended in fraud of creditors. However, it was not necessary to characterize the conduct of the testator in the present situation, the court added.

Where a husband and wife executed a joint will leaving their property to the survivor, and on the survivor's death to certain named beneficiaries, and the husband, after the wife's death, remarried and opened a joint bank account in his own and the new wife's name, it was held in *Rubenstein v Mueller* (1967) 19 NY2d 228, 278 NYS2d 845, 225 NE2d 540, that upon the husband's death the new wife was not entitled to the proceeds of the account, and that those proceeds were to be distributed in accordance with the joint will. Pointing out that the husband obtained most of the money in question from joint savings accounts that he had possessed with his former wife, the court said that in any event it did not attempt to segregate the assets of a husband and wife after a marriage of the duration involved in the present case, and that for all practical purposes equity could content itself with considering the assets as their collective property, as if their estates had merged. In affirming the lower court's judgment for the beneficiaries under the joint will, the court explained that on the death of one

party to a joint will, the survivor was bound by the mutual agreement, that the named beneficiaries should receive the property remaining when the survivor died, that the survivor's right to full ownership of the collective property was transformed and modified by this joint agreement, effective upon the other's death, into merely an interest during the life of the survivor with power to use the principal, that while neither a husband nor a wife could dispose of property owned by them as tenants by the entirety so as to affect the right of survivorship, they could do so by acting in concert as by a joint will, or by a contract, and that after the former wife's death the property received by the husband was his, but was subject to an interest enforceable specifically as to so much of it as he did not consume during his lifetime.

Where a joint and mutual will, executed by a husband and wife, left all the remainder and residue of the estate to a trustee for specified beneficiaries, and the surviving wife, using funds from the estate, opened three joint bank accounts with her daughter, it was held in *Turner v Merchants & Planters Nat. Bank* (1965, Tex Civ App) 392 SW2d 889, that since the survivor had no right under the will to dispose of the funds in that manner, the daughter was estopped from asserting her survivorship rights in the accounts. The court pointed out that the surviving wife did not put the funds beyond reach and discretionary use during her lifetime, that under the will the survivor did not have the right to dispose of property at discretion, that such title as the wife had to the funds in the accounts vested in her when she deposited the funds, that the title taken by the daughter had its source in the title that was vested in her mother when she deposited the funds, and that as a party beneficiary the daughter was in privity of estate with the mother. The court explained that as to such privity, the daughter stood in the mother's place and could not in a court of equity insist that the survivorship contracts that the mother had made be enforced, because to do so would be inequitable, and that enforcement would breach and nullify in part the contract between the husband and wife evidenced by the will. In affirming the lower court's judgment, the court said that the facts of the case made out a case of estoppel in pais operating in bar of the daughter's survivorship rights in the accounts.

See also *Re Estate of Chayka* (1970) 47 Wis 2d 102, 176 NW2d 561, supra § 25[b], where the surviving party to a joint and mutual will, among other things, gratuitously transferred funds into a joint bank account with another, the court holding the transfer to be a violation of the joint will agreement.

CUMULATIVE SUPPLEMENT

Cases:

Where agreement made in connection with execution of mutual wills expressed husband's wish to leave his entire estate to wife to provide for her support and maintenance and, after her death, to leave such estate and all property owned by husband and wife in joint tenancy to husband's children, wife could not, after husband's death, either deed property to herself and others as joint tenants or devise property to others; agreement had effect of impressing trust on the property. *Estate of McKusick* (1993, Me) 629 A2d 41.

[Top of Section]

[END OF SUPPLEMENT]

B. Transfers Without Consideration; separate mutual wills

§ 29[a] Transfer of full interest—to children or grandchildren—Held proper

In the following cases where the surviving party to a mutual will agreement, having taken under the mutual will of the other party, gratuitously transferred the property to a daughter, it was held that the transfer was

proper under the agreement.

Where a husband and wife, in conformance with an agreement, executed mutual wills leaving their property to the survivor, and the remainder to their son and daughter, and then shortly before the wife's death agreed that if the wife was unable to participate with the husband in changing their wills to leave all property to the daughter upon the death of the survivor, the husband would take the necessary action to see that the daughter received the property, and then after the wife's death the husband deeded the property to the daughter, leaving the deeds with the scrivener to be delivered to the daughter if not called for during his lifetime, the husband also changing his will to exclude his son, it was held in *Phelps v Pipher* (1948) 320 Mich 663, 31 NW2d 836, that the agreement between the husband and wife shortly before her death amounted to a modification of the original contract for mutual wills and operated to release the husband from complying with the terms of the original contract after the death of his wife. In the present action, instituted by the son after the father's death, the son was seeking specific performance of the original mutual will. Pointing out that the fact that the mutual wills were not changed before the wife's death did not make the husband's will irrevocable after her death, the court explained that the rather common expression that a joint and mutual will is irrevocable by the survivor after the death of one party to it is not technically and legally correct, that it is the contract to make the will, not the will itself, which is irrevocable, that the contract is irrevocable because a court of equity, under its fraud and trust jurisdiction, would decree its specific performance, and that such decree incidentally, although by indirection, enforces the will and so the will is often called irrevocable. In reversing the lower court's judgment decreeing specific performance of the original mutual will and dismissing the complaint, the court said that the parties by mutual agreement had the right to waive the performance of the obligation that the husband had assumed under the contract, that in the exercise of such right the wife did not require that he alter his will during her lifetime, nor did she base her right to make such alteration on a revocation of, or a change in, her own will, that his promise furnished the consideration for her releasing him from his obligation, and that the situation presented was not affected by his failure to act prior to her death, or by the probating of her will.

Although it is not clear, it appears that mutual wills were involved in *Ellis v First Nat. Bank* (1958, Tex Civ App) 311 SW2d 916, error ref n r e, in which it was held that where a husband and wife executed identical wills leaving all property to the survivor for life "to have, during such time, full and absolute authority to handle, manage, sell, and in any manner dispose of said properties, or any part thereof," the survivor had the right to make a gift of 1,000 shares of stock from the estate to one of their daughters. Reversing a judgment denying that the survivor had a right to make such a gift, the court said that where the survivor takes a conditional fee, or even a life estate, with the full power of disposition, he may dispose of that property as he sees fit during his lifetime.

§ 29[b] Transfer of full interest—to children or grandchildren—Held improper

In the following cases where the surviving party to a mutual will agreement, having taken under the mutual will of the other party, gratuitously transferred property to a son, daughter, or grandchild, it was held that the transfers were improper under the agreement.

A surviving husband's conveyance of property, apparently without a valuable consideration, was held in *Johnson v Soden* (1940) 152 Kan 284, 103 P2d 812, to violate an oral contract between the husband and his wife whereby the couple agreed to leave the property acquired by their joint efforts to the survivor, and whereby on the death of the survivor the residue of their estate was to go to the sons in equal shares. The surviving husband deeded the property to one son and made a new will. In setting aside the deeds and granting specific performance of the oral contract at the instance of the other son, the court said that the wife kept her promise, the husband benefited thereby, and the contract was consequently binding on him.

Where, in accordance with an agreement, a father and son executed wills whereby the son devised his property equally to his brothers and sisters in consideration of the father's devise of his property to his daughters (in order to make them equal with his sons, to whom the father had made advances), and where the surviving father conveyed certain of his property to one son to whom he had made large advances, it was held in *McGuire v McGuire* (1874) 74 Ky 142, an action to cancel the conveyances instituted after the death of the father, that such conveyances by the father might be set aside upon a showing that they had been made as the result of undue influence on the part of the recipient thereof. Finding that the son, who received the property from the father, paid no consideration for the conveyances, the court said that it was conclusively established that he took title of both tracts of land as a mere volunteer, with full knowledge of the prior equity of the sisters, founded on a valuable consideration, of which he was largely the recipient, and by a family arrangement which he actively aided to bring about. The sisters had instituted the present action, and the court determined that the lower court properly set aside those conveyances.

Where a mother and father executed mutual wills whereby the surviving wife received all personal property absolutely and 50 acres of land for life, the remainder going to designated children, and the wife transferred the land to some of the children but not to others who were to receive the property under the will, it was decreed in *Carmichael v Carmichael* (1888) 72 Mich 76, 40 NW 173, that the transfer be set aside and that the grantees be enjoined from disposing of, or in any manner interfering with, the real estate. The court found that the transfers had been obtained by fraud and undue influence on the part of the grantees, but the court also said that the contract on the part of the father had been fully performed, and that the mother had received and accepted the benefits of this performance, that a court of equity would not permit her to rescind the contract, and that the nonfulfillment of the contract on the part of the mother would be a fraud which equity would not allow.

Where a husband and wife executed mutual wills, each leaving all property to the survivor and providing that if the spouse predeceased the testator, then one-half of the residue was to go to the husband's nieces and one-half to the wife's son by a previous marriage, and the wife, who survived the husband, conveyed a farm to her son for one dollar and love and affection, the wife and the son later conveyed 40 acres of the farm to others, who made the check payable to the wife, and the wife and the son later conveyed another property of the estate to buyers, who made checks payable to the wife and her son, it was held in *Shackleford v Edwards* (1955, Mo) 278 SW2d 775, that the conveyance of the farm to the son constituted a violation, by the wife, of the contract not to revoke the mutual will, and each of the husband's two nieces consequently owned an undivided one-fourth interest in the farm less the 40 acres conveyed, and that the nieces were not entitled to any interest in the 40 acres or other property conveyed, since there was no proof that the proceeds from the sale of those properties were not used by the wife for necessities, and such use would not necessarily be inconsistent with the provisions of the mutual wills.

Where a husband and wife executed mutual wills leaving their property to the survivor and on the survivor's death to their three children equally, in *Di Lorenzo v Ciancio* (1975) 49 App Div 2d 756, 373 NYS2d 167, it was held that the surviving husband's inter vivos conveyance of his house and savings account (his sole assets) to his daughter without consideration violated the obligation under the contractual wills to testamentarily dispose of their property equally among their three children, and that these conveyances should be set aside. The daughter claimed that the transfers were made to her in consideration of the care that she had given her mother and her father, and her promise that she would take care of her father as long as he lived. Pointing out that the trial court found that the transfers were made without consideration and that the daughter had rendered the care out of a sense of duty without expectation or promise of compensation, the court said that there was sufficient evidence in the record to justify those findings. The husband's ownership of the property in question, as survivor, was impressed with a constructive trust to leave so much of that property as he would not use during the balance of his life, for his reasonably necessary maintenance, to their three children equally, the court explained.

In *Daniels v Aharonian* (1939) 63 RI 282, 7 A2d 767, reh den 63 RI 518, 9 A2d 865, where a husband and wife, in accordance with an agreement, executed wills whereby the husband gave his property to the wife and the wife gave all her property to the children in specified amounts, and after the husband's death, the wills not having been revoked, the wife conveyed the home to a daughter without valuable consideration, and the assets of the husband's business to their son, who paid a valuable consideration therefor, and where the wife also executed a new will before she died, it was held that the son, in an action to enforce the agreement, was entitled to enforce the agreement between his mother and father to the extent of his own interest thereunder (the son was to receive 30 percent of the wife's estate under the agreement), that the conveyance of the home from his mother to his sister was invalid as against him, and that he was entitled to receive from the property and assets belonging to his mother at the time of her death, which, the court said, had to be treated as including the home property, what he would have been entitled to receive if the agreement had been carried out by her in good faith. Emphasizing that substantially all the property which the widow had after the husband's death was property that she had received from him under the agreement, the court said that the trust created by the agreement and taking effect upon the death of the party first dying could be enforced, as to his or their interests thereunder, by any of the persons for whose benefit, after the death of the surviving party, the agreement was made, and that if that part of the agreement which bound the surviving party contained no provision defining such party's powers over the whole property during the survivorship, but only provided that he should by will dispose of his property at his death to certain beneficiaries in a certain way, then it was well settled that he held all the property subject to a trust to carry out the agreement, and could use not only the income but also reasonable portions of the principal for his support and for ordinary expenditures, and could change the form of it by reinvestment and the like, but could not give away any considerable portions of it or do anything else with it that would be inconsistent with the spirit or the obvious intent and purpose of the agreement. In reversing the decree and upholding the son's right to enforce the agreement, the court said that the doctrine is that the survivor received such property subject to an enforceable trust for the benefit of the persons to whom he or she had agreed to give the property by will, and that any of these persons, as cestui que trust, could, like any other cestui que trust, enforce such part of the trust as is for his benefit, and could do so whether or not he had furnished any consideration for the trust.

§ 30. To new spouse

In the following cases where the surviving party to a mutual will agreement who took under the mutual will of the other party remarried and conveyed property gratuitously to the new spouse, it was held that this transfer violated the agreement and was improper.

Where two parties agreed to make mutual wills, each promising to dispose of his property to the other, or if the other was dead, to certain named persons, and one of the parties performed, leaving his property to the other at his death, it was held in *Brown v Superior Court of Los Angeles County* (1949) 34 Cal 2d 559, 212 P2d 878, that the intended devisees and legatees were entitled to enforce their rights as beneficiaries under the agreement, that the contracting party who survived became estopped from making any other or different disposition of the property, and that the survivor's obligations under the agreement became absolutely irrevocable and enforceable against him, at least where he availed himself of the provisions of the decedent's will in his favor and accepted substantial benefits thereunder. A husband and wife had contracted to execute mutual wills devising the entire estate of each to the survivor, with the survivor agreeing to leave the entire combined estate to named beneficiaries. The husband died, and the widow took under the mutual will. The widow later remarried and, according to the petitioner, transferred substantially all of the property, including that received from her former husband, to her new husband without consideration and with the intent to evade her obligations under the

contract and to defraud its beneficiaries. The petitioner, one of the beneficiaries under the mutual will agreement, instituted an action to perpetuate testimony. The witnesses refused to answer certain questions and the court refused to direct them to answer on the ground that the beneficiary had failed to show that he had a cause of action. The beneficiary then instituted the present proceedings to compel the court to order the witnesses to testify. In granting the mandate, the court rejected the witness' contention that the beneficiary had not shown an actual or potential cause of action because he had not alleged that the contract between the husband and wife contained an express agreement not to revoke the mutual wills. The court said that it was not necessary that there be an express agreement to this effect in order to enforce a contractual obligation to leave property to designated persons at death, that in every contract there was an implied covenant of good faith and fair dealing that neither party would do anything which injured the right of the other to receive the benefits of the agreement, that where the parties contracted to make a particular disposition of property by will, the agreement necessarily included a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed, and that the rights of the parties depended upon the contract, and the revocation of the will or other breach of the contract did not prevent the intended devisee or legatee from enforcing the contractual obligations.

Where a husband and wife, in conformance with a contract, made mutual wills leaving all property to the survivor and providing that all property of the survivor should, upon his or her death, go one-half to named relatives of the husband and the other half to named relatives of the wife, and where the wife, after the husband's death, remarried and merged her property with that of her new husband, it was held in *Brewer v Simpson* (1960) 53 Cal 2d 567, 2 Cal Rptr 609, 349 P2d 289, that the lower court properly impressed a trust for the plaintiff beneficiaries' benefit on all property owned by the wife or by the wife and the second husband in joint tenancy on the date of the conclusion of the trial, prohibiting the wife and her second husband from dealing with the trust property so as to obstruct the plaintiffs' rights. After the wife merged her property with that of her second husband, the wife's relatives, who were named in the mutual wills, instituted the present action seeking specific performance of the mutual will contract, a declaration of a trust, and an accounting by the wife. On appeal from the judgment, the wife maintained that her promise to leave half the property to the plaintiffs if she survived was only incidental to the main purpose of the contract, which was to make sure that if she survived the husband, she would receive the entire estate, and if she did not survive him, her relatives would receive half the estate, and that since the contract was not "made expressly for the benefit" of the plaintiffs, they, as mere incidental beneficiaries, could not enforce it. The court rejected this position, saying that the wife would have the court believe that she intended that her relatives should be the express beneficiaries of the husband's will if she predeceased him but only incidental beneficiaries of her will if she survived him, and that the contract evidenced by the mutual wills was readily and reasonably susceptible of the trial court's view that it was "made for the express benefit of all the persons named therein as beneficiaries." The failure of the wills to refer expressly to irrevocability did not, according to the court, render the agreement evidenced by these wills inconsistent with the oral agreement as found by the trial court. The fact that the plaintiffs did not give anything for, or change position in reliance on, any promise of the husband or wife did not prevent enforcement of the contract, the court said, since the court's concern in enforcing, by quasi-specific performance, an agreement such as that of the husband and wife was not that the donee beneficiaries should receive something for which they had not paid, but that the promise of the wife for which the husband bargained should be performed. The court also determined that the statute of limitations had not run, since it did not begin to run on such a contract, insofar as the plaintiffs were concerned, until the survivor's death or until the plaintiffs elected to treat the survivor's anticipatory breach as a final breach. The defense of laches was also rejected by the court. The plaintiffs' beneficial interest in such cases of mutual wills is ordinarily computed on the value of the estate as of the date of the death of the first party to the contract, according to the court, but mutual wills could be worded so as to make it necessary to

compute the value of the estate as of the time of the survivor's death, it was added.

Where a husband and wife, in conformance with an agreement, executed mutual and reciprocal wills whereby their property (including real estate held by the entireties) went to the survivor and upon his death to the wife's three sons, it was held in *Lawrence v Ashba* (1945) 115 Ind App 485, 59 NE2d 568, that the parties intended that the survivor should have the use and benefit of the property for life, and should have the right to dispose of any or all of the corpus of the estate for his reasonable needs in the event the income should be inadequate for that purpose, but that he could not dispose of it to defraud and defeat his obligation. Shortly after the wife's death, the husband remarried and conveyed the real estate to his new wife, saying that the conveyance was intended to prevent the sons from acquiring the property. The sons instituted the present action seeking, among other things, specific performance of the contract, an accounting, and the imposition of a trust. The trial court ordered an accounting, vacated the conveyance, and imposed a trust on the property. In affirming the judgment, the court conceded that the parties to the mutual will agreement did not request that a provision be included making the wills irrevocable, but, the court explained, they apparently knew nothing of such things and so left everything to the lawyer. The court said that equity would enforce such an agreement when well and fairly founded, and would not suffer one of the contracting parties to defraud and defeat his obligation, but would fasten a trust upon the property involved. The court also rejected the defendants' contention that the mutual will contract could not operate upon real estate held by the entireties and acquired by the survivor in this manner. The parties contracted with reference to the real estate so held, the court said, adding that the husband did not agree to leave the sons only the property that he would take under the will of his wife, but that his agreement was that if his wife died before he did, he would leave to the sons all of his property.

In *Eikmeier v Eikmeier* (1953) 174 Kan 71, 254 P2d 236, where, acting in conformance with an oral agreement, a husband and wife executed separate wills, each leaving all property to the other for life and then to designated beneficiaries, it was held that upon the wife's death the husband was bound by the terms of the agreement, even though the practical result thereof was that he was enjoined and prohibited from divesting himself of his real estate during his lifetime. After the wife's death, the husband remarried and deeded the land in question to his new wife. The son, who was to receive the land under the husband's mutual will, instituted the present action seeking to protect his interest in the land. The lower court's judgment protecting the son's rights with respect to the real estate was affirmed.

A conveyance made to avoid the terms of a mutual will agreement, or through fraud, or by the exercise of undue influence, will be set aside, according to the court in *Phillip v Phillip* (1916) 96 Misc 471, 160 NYS 624, where a husband and wife, in accordance with an agreement, executed mutual wills leaving a lifetime use of a certain farm to each other and the remainder to the son on the death of the survivor, and the surviving husband remarried and deeded the farm covered by the mutual wills to his new wife. The son, who was supposed to get the farm under the mutual wills, brought the present action to set aside the conveyance for fraud and undue influence. In setting aside the conveyance, the court said that the father had no authority to change his will after his wife's death, for the purpose of defeating the agreement, and that the conveyance was void for that reason. However, the court said that the conveyance was executed not only in violation of the mutual will agreement, but also through the fraud and undue influence of his new wife.

§ 31[a] To others—Held proper

In the following case where the surviving party to a mutual will agreement took under the will of the other party and gratuitously transferred the property to her sisters, it was held that the transfer was proper, since it was authorized under the mutual will agreement.

Where a husband and wife executed mutual wills leaving the property to the survivor "absolutely," and

providing that after the death of the survivor, all of the "property I may own at the time of my death" was to go to named beneficiaries, and the wife, after the husband's death, made gifts to her sisters in money and property valued at about \$88,000, it was held in *Re Estate of Lenders* (1956) 247 Iowa 1205, 78 NW2d 536, that the wife did not breach a mutual will agreement between the husband and wife by making such gifts, since the agreement (if one existed) did not prevent the wife from "making bona fide gifts of her own property to the extent" that she did. Although there was some question whether the wills were made pursuant to an agreement, the court said that even if they were, the only agreement which could be inferred was that the husband and wife were to dispose of their property as provided in the will, and that the named third-party beneficiaries were entitled to take only such portion of the wife's estate as her will gave them. Emphasizing that the beneficiaries were to receive "the rest 'of the property I may own at the time of my death,'" the court said that no specific property was referred to, and that neither will attempted to dispose of any property except such as the maker might own at the time of death. The wills negated the thought that the testators contracted to dispose of all of the property that they then owned or might later acquire or in fact any property other than each might own at death, the court added. The court distinguished *Campbell v Dunkelberger* (1915) 172 Iowa 385, 153 NW 56, supra, § 24[b], on the ground that the survivor in that case was left only a life estate. *Jennings v McKeen* (1954) 245 Iowa 1206, 65 NW2d 207, supra, § 24[b], was distinguished on the ground that the survivor made a new will (nothing was said of the survivor's inter vivos gifts in that case). The court also emphasized that the gifts involved in the case at hand constituted a comparatively small part of the wife's own property in her lifetime. As for the contention that the gifts were fraudulent, the court said that there was no evidence of actual fraud, and the court rejected the idea of constructive fraud, because the gifts amounted to only 14 percent of her total estate at that time. The court also rejected the argument that the transfers were testamentary in character.

§ 31[b] To others—Held improper

In the following cases where the surviving party to a mutual will agreement took under the will of the other party and gratuitously transferred the property to persons other than a child, grandchild, or spouse, it was held that the transfer was improper, since it was not authorized under the mutual will agreement.

In *Re Doerfer's Estate* (1937) 100 Colo 304, 67 P2d 492, where two brothers, pursuant to an agreement, made "absolute wills" to each other with the understanding that the survivor would will all of the property belonging to the two brothers to their nieces and nephews, and the surviving brother transferred a large share of the estate by deed to a lady friend, and willed most of the remainder of this estate to the lady, it was held that the pact between the two brothers, the coincidental making of their mutual wills, and the fact that the survivor received and accepted the property of the other brother through his will, impressed the property of which the brother died seized and possessed with a constructive trust which then became operative by law by reason of the survivor's fraud in attempting to will to the proponent the bulk of the estate contrary to the partly executed agreement which the jury found existed between the survivor and his brother. The court made no further mention of the property deeded to the lady friend.

Where the surviving party to a mutual will agreement, acting in conformance with the agreement, devised and bequeathed to certain third-party beneficiaries all property which the survivor "may own at the time of my death," it was held in *Sample v Butler University* (1936) 211 Ind 122, 4 NE2d 545, 108 ALR 857, mod on other grounds and reh den 211 Ind 139, 5 NE2d 888, 108 ALR 866, that in using the quoted words, the parties intended no more than to avoid a restriction upon the disposal of the property in case it might be necessary for the reasonable needs of the survivor or for advantageous reinvestment, but that the parties in their mutual will agreement did not intend to authorize the survivor to dispose of all of the joint property in any manner and for any purpose during his lifetime. A husband and wife executed mutual wills for the express purpose of disposing

of their joint property so that their children would benefit therefrom after the death of the survivor. Under the mutual wills the survivor devised and bequeathed the property to a university upon the condition that the income therefrom be given to the wife's daughter and the husband's son for life. The surviving husband conveyed the joint property to the university on the condition that he receive the income therefrom during his life and that thereafter the income be paid, for their lives, to his son and others, not including the wife's daughter. Upon his death the daughter instituted the present action seeking to enforce the payment of her annuities upon all of the property conveyed to the university by the husband. The defendants, the beneficiaries under the husband's inter vivos "gifts" to the university, contended that under the agreement there was no intention that the survivor should be bound by the contract referred to in the wills unless he chose to be bound by it by retaining the joint property of the parties until his death without disposing of it. Observing that such a construction did violence to the very agreement which the wills were made to carry out, the court said that it was clear that the parties intended that the survivor should have the use and benefit of their joint property for life, that it was not unreasonable to conclude that it was their intention that if it should be necessary, the survivor might have recourse to the corpus of the joint estate for support and maintenance in the event that the income should be inadequate, and that any other construction would result in imputing to the parties an intention to destroy the very contract which the wills were made to carry out. The court went on to say that under the terms of the contract, that which was necessarily used and consumed must of course be lost, but that the remainder of their joint estate was to be preserved in its original form, or if the investment were changed, then it was to be preserved in whatever form that it might be at the death of the survivor, for the ultimate benefit of their children. Noting that the husband's disposition of the property to the university was testamentary in character, and that his purpose was to procure for the new beneficiaries an annuity that by his solemn agreement with his wife was to be divided between his son and her daughter, without depriving himself of income from the property during his lifetime, the court said that this was a fraud upon his wife and upon those who intended to benefit from the property. Since the university had notice of the terms of the will, the court ordered it to pay the annuities to the proper parties. The court, in a modification of the opinion (5 NE2d 888), refused to apply the order for annuities to property other than that which was jointly owned by the husband and wife.

Where a husband and wife, both suffering from cancer, the wife near death, executed mutual wills in pursuance of an oral agreement, leaving their property to the survivor with the remainder going to a niece, and after the wife's death the husband executed another will leaving the property to a cousin, then, upon learning that the second will was probably invalid, deeded the property to his cousin, it was held in *Sick v Weigand* (1938) 123 NJ Eq 239, 197 A 413, that a trust would be imposed upon the property for the benefit of the niece. Pointing out that most of the assets of the estate came from the wife and not the husband, the court said that where a testator makes his will or omits to alter it on the promise of a beneficiary that he will make certain disposition of the property bequeathed, or some part thereof, equity will declare the beneficiary a trustee for the performance of his promise to prevent the statute of wills being used as an instrument of fraud.

In *Schwartz v Horn* (1972) 31 NY2d 275, 338 NYS2d 613, 290 NE2d 816, where a husband and wife, in accordance with an agreement, executed mutual wills whereby the wife expressly declared that if her husband predeceased her, her personal property and a specified home would be divided between her son and daughter share and share alike, it was held that if after the husband's death, the wife made a gift of the specified home to a third party during her lifetime, she rendered the specific bequest impossible and thereby breached the agreement with her husband, and that the daughter would be entitled to one-half of the property in question as provided by the mutual will. The daughter instituted the present action after the mother's death, alleging that the mother had conveyed the home to the mother's grandchild (the son's child). Reversing the lower court decision that the mutual will agreement did not preclude such inter vivos dispositions, the court said that the surviving wife expressly agreed to leave the specific home to her son and daughter if she outlived her husband, that he did

predecease her, and that, having had the benefit of his bounty, she could not violate her contract with impunity. Conceding that there was "a sentence or two" in the opinion of *Rastetter v Hoenninger* (1915) 214 NY 66, 108 NE 210, which, when taken out of context, seemed to support the defendants' contention that the wife did no more than obligate herself not to change or alter her will, the court said that the rest of the discussion in the *Rastetter* Case made it exceedingly clear that the surviving testator was not free to make an inter vivos gift to defeat the agreement. There is, of course, a vast difference between an agreement to bequeath or devise a specific piece of property (as in the present case) to named individuals, and an agreement between testators that the survivor would leave his entire estate (as in the *Rastetter* Case) to particular beneficiaries, the court said. An agreement to devise a specific piece of property precludes an inconsistent inter vivos gift, the court explained, but, the court added, this did not mean that the agreement in the other case—that the entire estate be left to certain beneficiaries—necessarily prevented the survivor from making a gift during his lifetime, since such a gift would not necessarily defeat the purpose of the agreement. It was pointed out, however, that in no instance would a transfer—whether or not it defeated the purpose of the agreement—be prohibited when the property or its proceeds were used to meet the daily needs of the surviving testator.

Where a husband and wife executed a written agreement to make mutual wills leaving all property to the survivor, and at the death of the survivor, one-half to the heirs of the husband and one-half to the heirs of the wife, in *Fitch v Oesch* (1971) 30 Ohio Misc 15, 59 Ohio Ops 2d 16, 281 NE2d 206, it was held that all property which the surviving wife disposed of during her lifetime as gifts or by means of joint and survivorship agreements had to be considered as part of the estate to go to the remaindermen, because under the agreement the survivor could not dispose of the property through the contrivance of gifts, joint and survivor accounts, or bonds. Conceding that the surviving wife had a perfect right to spend and use up as much or all of the property as she desired, the court said that the wife could for all practical purposes abrogate the agreement with impunity if she could make gifts of the property as she saw fit or place it in bonds or such so that the effect of the agreement became null and void, and that if this were possible, such agreements would be of no value, being subject to abrogation with impunity by the survivor by use of the law on joint and survivor accounts or by gift to dispose of the property.

Where a husband and wife executed mutual wills in conformance with an agreement that their property (each owning property of about equal value) was to go to the survivor to use so long as the survivor might live, and that the interest of each in such property was then to pass to the heirs of each, it was held in *Schramm v Burkhart* (1931) 137 Or 208, 2 P2d 14, that since the contract had been executed by the wife and the husband had received the benefit of its execution, the contract had become irrevocable, and it was the duty of the court to enforce the contract as against the husband, who attempted, shortly before his death, to violate it by assigning to his brother his interest in the bank account in which he and his wife had placed their money, thereby perpetrating a fraud upon the wife's heirs. The bank had failed and the superintendent of banks sought determination of the rightful owners of the account. The surviving husband had made the assignment while he was seriously ill and only a few days before his death. Directing that the lower court enter a decree awarding one-half of the property to the wife's heirs, the court said that where mutual wills are the result of a contract between the parties making them, which could not be rescinded without the consent of both, and one of them has died and his part of the contract has been carried into execution, equity will not permit the other to violate the agreement, but will enforce the contract by declaring the executor, devisee, or other person coming into possession of the property which was the subject of the contract, to be trustee for those who would have benefited had the contract been performed.

Where the surviving party to a mutual will agreement gave away an automobile, furniture, and other home furnishings which were included in the mutual wills, it was held in *McGinn v Gilroy* (1946) 178 Or 24, 165 P2d 73, that the surviving sister did not have the right to give away any of the property prior to her death, and that

the named beneficiaries were entitled to the items. Two sisters, acting in accordance with an agreement, had executed mutual wills, one sister leaving the rest and residue of her property to a second sister without disposing of the property in the event the second sister predeceased her, but the second sister leaving the estate to a named beneficiary if the first sister should predecease her. The second sister took under the will when the first died, both wills remaining unchanged at that time, and subsequently disposed of the property in question by gift.

§ 32[a] Other transfers—Held proper

In the following case where the surviving party to a mutual will agreement took under the will of the other party and gratuitously transferred property to a church, reserving a life estate therein, it was held that the transfer was proper, since it was not prohibited by the will or the agreement.

Where, in conformance with a contract, a husband and wife made mutual wills leaving their property to the survivor, the survivor leaving all property which the survivor owned at death to the husband's children, it was held in *Ohms v Church of The Nazarene* (1942) 64 Idaho 262, 130 P2d 679, that since there were no restrictions in the contract or the mutual wills upon the right of the survivor to convey the property during her lifetime, the wife, who survived the husband, could donate to a church, certain land which made up most of the estate, retaining for herself a life estate therein. The wife had originally changed her will to leave the property to the church, but upon learning that this would violate the agreement, she revoked the will, reviving the mutual will, and deeded the land to the church. After the wife's death, the third-party beneficiaries instituted the present action to set aside the deed on the ground that it was contrary to the intent and purpose of the contract. The lower court held the deed valid and the beneficiaries appealed, contending that the plain intent and purpose of the contract was that except for necessities, all property received by the survivor was to be kept intact to pass to the children upon the survivor's death, and that alienation during the life of the survivor, though not expressly prohibited, had the same effect as a violative testamentary disposition. The court rejected this argument, saying that there was no such restriction in the contract or the mutual wills, and none could be legitimately implied, that courts should construe contracts according to the plain language used by the parties in making them, and should not substitute what they might think that the parties should have agreed to for what their contract showed that they did agree to. Observing that there was no reason to believe that the clear language employed in the contract and mutual wills involved in the present case did not correctly show the wishes and intentions of the parties, the court declared that while it was true that there was strong reason to conclude that the implied meaning of the contract was against this alienation during the wife's lifetime, the fact still remained that such prohibition had to be implied and was not expressly contained in the contract. After reviewing the relationships between the husband and wife, and between the husband and the children, the court said that insofar as the equities might be considered, there was more justification for leaning to the thought that it was the intention of the parties that during the life of the surviving spouse the property might be handled without restriction other than as to testamentary disposition, and that even though the deed accomplished the same result as though there had been a violative testamentary disposition, it seemed better to adhere to the proposition that the contract should be enforced as it read. However, the deed was not testamentary in character, because title immediately vested in the grantee, reserving only a life estate, the court added.

§ 32[b] Other transfers—Held improper

In the following cases where the surviving party to a mutual will agreement took under the will of the other party and gratuitously transferred property in an undisclosed manner or a manner other than that discussed in §§ 29- 31, *supra*, it was held that the transfer was improper, since it violated the mutual will agreement.

Where a husband and wife executed mutual and reciprocal wills, the wife leaving all of her property to her

husband with "the fullest confidence in the promise of my husband that, at his death, he will leave all of our property of which he has possession to Janet," the wife's daughter by a previous marriage, it was held in *Cramer v Echelbarger* (1968) 142 Ind App 374, 234 NE2d 864, that the surviving husband's subsequent conveyance of the real estate to a trustee, who reconveyed it to him and his new wife as tenants by the entirety, contravened the mutual will agreement, and a trust was impressed upon the property for the benefit of Janet. A contractual obligation which is created by a joint or mutual will made pursuant to an agreement is enforceable, and equity will not suffer one of the contracting parties to defraud and defeat his obligation, but will fasten a trust on the property involved, the court declared.

See also *Fitch v Oesch* (1971) 30 Ohio Misc 15, 59 Ohio Ops 2d 16, 281 NE2d 206, supra § 31[b], where the survivor to a mutual will agreement, after taking under the mutual will of the other party, placed some of the assets in joint or survivor accounts and bonds as well as other gifts, the court holding the transfers invalid since they violated the agreement.

Where it was alleged in a complaint that four brothers and sisters, in conformance with an agreement, executed mutual wills providing that his or her property should be used and enjoyed by the surviving brothers and sisters until the death of the last survivor, at which time the property should then be divided among the children of Elijah, one of the brothers, and that Elijah was the first to die and the others took under his will and then threatened to revoke their wills and make other disposition of the property (the nature of which was not revealed in the opinion), it was held in *Harris v Morgan* (1928) 157 Tenn 140, 7 SW2d 53, that the averments of the bill were sufficient, if supported by proof, to authorize a decree restraining the surviving brothers and sisters from revoking their respective wills, or from making any disposition of their respective property, by gift, or conveyance in the nature of a gift, which would defeat the agreement with the complainant's father (Elijah). Thus, the court said that the lower court was in error in sustaining a demurrer to the beneficiary's complaint, and reversed the decree remanding the cause for further proceedings.

C. Transfer for valuable consideration

§ 33[a] Sale or lease—Held proper

In the following cases involving property which passed under a joint or mutual will, it was held that the surviving party was authorized under the will or its agreement to sell or lease property.

See also *Scales v Scales* (1961, CA5 Tex) 297 F2d 219, supra § 24[a], in which the court upheld the sale of a lot as well as other transfers by the surviving party to a joint and mutual will.

Where a husband and wife executed an instrument which, in the husband's handwriting, provided that the husband and wife agreed that "in case of the death the one that survives shall have whole control of our property," that when both "are gone" the property at a specified address "shall in equal parts go to our children," but that certain other specified property was to go to their son alone, the instruments being notarized, it was held in *Halldin v Usher* (1958) 49 Cal 2d 749, 321 P2d 746, that the document was intended as a testamentary instrument and not as a third-party beneficiary contract, that the son acquired no rights thereunder, and that the wife, who had remarried after the husband's death, was entitled to sell the property which was to go to the son alone. The son had instituted the action, seeking a declaration that the document was a contract imposing a trust on the property in favor of himself and the others named in the instrument, and the trial court, relying upon parol evidence that the husband and wife had intended to make a will, determined that the instrument was intended as a testamentary disposition and that the children acquired no rights thereunder. On appeal this judgment was affirmed, with the observation that the evidence clearly indicated, as found by the lower court, that it was not the intention of the parties to leave the survivor destitute and without means of support, as might have been the case had the construction urged by the plaintiff been adopted.

Mutual wills executed by a husband and wife pursuant to an agreement whereby all property went to the survivor and then to designated beneficiaries was held in *Behrendt v Abraham* (1966) 64 Cal 2d 182, 49 Cal Rptr 292, 410 P2d 828, to allow the survivor to enter into a bona fide sale of property owned by the survivor and her second husband. The wife survived the husband and remarried. Thereafter, the couple acquired certain real estate by a joint tenancy deed, and later sold it. After the wife's death, the buyer defaulted, and the designated beneficiaries sought to obtain the property under the mutual wills. In allowing the beneficiaries to regain the property, the court made it clear that had the purchaser performed his contract, he would have been entitled to a conveyance of the property from the beneficiaries, the beneficiaries presumably being entitled to the proceeds of the sale.

In *Suwalski v Suwalski* (1969) 112 Ill App 2d 98, 251 NE2d 279, a married couple's joint will that left all property "to the survivor of us, for his or her own use and benefit forever," and "all the rest, residue and remainder" to their two children in equal shares, was held to give the property to the surviving husband to use as he saw fit during his lifetime, and after his death the property which remained was to go to the two children. The surviving husband, failing in health, wanted to sell his home, and the son attempted to prevent the sale, contending that under the joint will his father took only a life estate. In rejecting this, the court said that under the will the survivor was not prohibited from selling or converting the property from personalty to realty or from realty to personalty, and that it was given to him for his own use and benefit forever.

The joint will of a husband and wife which left all property to the survivor "absolutely in fee simple," and directed that upon the death of the survivor "all that may remain" went to their sons equally, was held in *Culver v Hess* (1944) 234 Iowa 877, 14 NW2d 692, to give the survivor the right to freely deal with the property during her lifetime as though her title therein was absolute and in fee simple, but that this right did not include the right to make a testamentary disposition of any property possessed by the survivor at her death. The guardian of the surviving wife petitioned to establish the title to the real and personal property in the surviving wife in fee simple, and to obtain authority to sell or encumber the property. Pointing out that it was a rule in construing wills generally that the devise of real estate granting a fee simple estate would not be affected or impaired by a subsequent clause placing limitations on such devise and reducing it to an estate less than fee simple, and that, having once transferred the entire fee simple estate, the entire interest therein was disposed of, rendering void subsequent limitations repugnant thereto, the court said that this was the rule where no other interests than those of the makers were provided for, or in the case of an ordinary will which was not reciprocal. But in the present case, the court added, it was necessary to consider the effect of a joint will, and in such a will a subsequent provision devising a remainder, if any, to third persons eliminated the question of repugnancy. In other words, the court added, the right to the remainder was based on the contract and was irrevocable by the survivor.

An instrument jointly executed by two brothers which bequeathed \$5,000 to a named individual did not, according to the court in *Re Estate of Ramthun* (1958) 249 Iowa 790, 89 NW2d 337, limit the surviving brother's power of alienation or testamentary disposition of property jointly owned by the two brothers prior to the death of one of them. The two brothers owned most of their property jointly, and the deceased brother had previously executed a will leaving everything to his brother. The court determined that under the former will the surviving brother received all of the property left by the decedent, and that by consenting to reward from these funds the individual named in the joint instrument, the court could not infer that the surviving brother agreed to any other disposition of his property or to renounce his absolute ownership and control of the remainder. Thus, the court concluded that there was insufficient evidence to justify an inference which could be the basis in the present case of an agreement binding upon the surviving joint owner not to dispose of his property except as the law provided for intestate property, and that the trial court was correct in finding that there was neither word, suggestion, nor inference in the joint document, nor in the surrounding circumstances, limiting in any way the surviving brother's power of alienation, sale, gift, or testamentary disposition of any of the property involved in

the case at hand or any other property that he might own or acquire.

Where a husband and wife executed a joint will leaving all of their property to the survivor, the property to be "the sole and absolute property" of the survivor, and what property was left at the death of the survivor to the two children, it was held in *Beall v Hardie* (1955) 177 Kan 353, 279 P2d 276, that the joint will authorized the surviving wife to execute a warranty deed conveying all of her interest in the real estate to one of the children for valuable consideration, and thereby divesting the other child of his remainder interest. The court said that the surviving testator by the terms of the will received a life estate with a qualified power of disposition, the only qualification or restriction being that the survivor could not make a testamentary disposition of the property covered by the will in contravention of the interest of the remaindermen, and that by the terms of the will, although it was expressed as the wish of the parties that the property be not sold, it further provided that it could be sold should the survivor desire to make such disposition.

Where a husband and wife, in conformance with an agreement, executed reciprocal wills, each leaving the testator's estate to the other for life, with the remainder to designated beneficiaries, and after the wife's death the husband gave another an option to purchase a building owned by the husband by making a demand upon the husband's personal representative within one year after the husband's death, the sale price to be \$15,000, it was held in *Boner's Admr. v Chesnut's Exr.* (1958, Ky) 317 SW2d 867, that one who obligates himself to make a reciprocal will is not precluded from buying and selling property in good faith. One of the designated beneficiaries originally brought the present action, contending that the contract to make reciprocal wills was binding on the surviving husband, and seeking, inter alia, to have the deed on the building canceled. Conceding that the building went cheap, the court observed that the option contract covering the building was made in good faith.

Under a joint will, executed by a husband and wife, which left all property to the survivor, and after the death of both husband and wife, the rest, residue, and remainder to their three children equally, it was held in *Morman v Thornhill* (1970, Miss) 240 So 2d 258, that the will did not restrict the survivor's right to dispose of the property, and that the surviving wife could convey, for \$19,000, a house and lot from the estate. One of the children, who was a beneficiary under the joint will, instituted the present action, seeking to cancel the deed by which his mother had conveyed the property. Affirming the lower court's order sustaining a demurrer to the complaint, the court distinguished *Monroe v Holleman* (1966, Miss) 185 So 2d 443, supra, § 28[b], on the ground that in the *Monroe* Case the survivor made gifts to circumvent the provisions of the joint will by means of establishing joint bank accounts providing for survivorship, while in the present case the survivor had merely exchanged one asset for another, and that in the *Monroe* Case the money was diverted outside the will, whereas in the case at bar the proceeds from the sale of the land would still descend through the will under its provision as "rest, residue and remainder" upon the death of the surviving spouse. The court went on to say that it was immaterial, in resolving the issue in the case at bar, whether a fee simple title was devised by the will or only a life estate with the remainder to the three children, because under either concept of the will the fact remained that the widow, under the language in the will, had the absolute right of disposition.

See also *Shackleford v Edwards* (1955, Mo) 278 SW2d 775, supra, § 29[b], in which the court upheld the sale of property by the surviving party to a mutual will agreement.

Where two married couples agreed to execute mutual wills, each couple leaving all property to the survivor with the remainder going to the other couple, and after the death of the husband of one of the couples the wife threatened to sell the residence and move out of the state, it was held in *Galloway v Eichells* (1948) 1 NJ Super 584, 62 A2d 499, that the other couple was not entitled to specific performance of the agreement until after the death of the surviving widow, that the widow could perform the contract at any time during her lifetime, that no breach could be assured as long as she lived, and that equity had no power during her lifetime to compel her to execute such a last will and testament. The action was instituted by the surviving couple, seeking specific

performance of the oral agreement, and the defendant (surviving widow of the other couple) moved to strike the complaint. In granting the motion, the court said that if the widow should die without leaving a valid will in accordance with her contract, the contract would then be broken, and that usually in a proper case when relief was afforded in the lifetime of the promisor, particular property was involved and a trust was imposed or fastened or a lien created or enforced upon that property, but that in the instant case the agreement did not relate to any specific real estate or personal property, except the widow's residuary estate, but there might be none at the time of her death. According to the court there was no lien expressly created, nor could the promise be impressed as a lien, and enforced, on any specific property of the promisor's estate, and there was nothing in the promise that fastened it upon any particular property, nor anything that would permit equity to affix property to it.

Where a husband and wife, pursuant to an oral contract, executed mutual wills under which the husband, after devising his one-half interest in certain real estate (community property) to his wife, devised all the rest, residue, and remainder of his estate to his son by a previous marriage, and the wife left a one-half interest in the property to her brothers and sisters, all the rest and residue going to the stepson, it was held in *Schauer v Schauer* (1939) 43 NM 209, 89 P2d 521, that since, under the mutual wills, the property was devised to the wife without restraint on the power of alienation, she was the sole owner of the property with the power to sell. The stepson sought an injunction preventing the surviving spouse from disposing of the stepson's interest in the real estate, and the stepmother demurred to the complaint. In affirming the lower court's order sustaining the demurrer and dismissing the complaint, the court said that it could not assume that the intended sale of the property in question had been conceived, and would be carried out, with the fraudulent intent of depriving the stepson of the benefit of the contract in question, or that it would do so, so as to bring the case within the rule that a court of equity would protect beneficiaries under such contracts by the exercise of such of its powers as were necessary to meet the situation presented, though there was no restraint on alienation.

Where a husband promised to leave, at his death, all property received through his wife's will to the wife's children by a previous marriage if the wife would not change her will so as to leave her property to her children instead of the husband, it was held in *O'Boyle v Brenner* (1948) 273 App Div 683, 79 NYS2d 84, app dismd 301 NY 685, 95 NE2d 47, that the property that the husband received through the wife's will should properly have been placed in a constructive trust after the surviving husband repudiated his promise and signified his unwillingness to perform it, but that the husband could sell the real estate if he so desired and the proceeds would be added to the principal of the trust, and if his "economic needs" required it, the husband could also sell the jewelry and invest the proceeds.

Where a husband and wife, pursuant to an agreement, executed mutual wills leaving all of the estate of which he or she should die seized, to the other, and his or her heirs and assigns in fee simple absolutely and forever, and if the other should not survive, then to named beneficiaries, it was held in *Richardson v Lingo* (1955, Tex Civ App) 274 SW2d 883, error ref n r e, that the survivor was free to convey the property (presumably for valuable consideration), and that the named beneficiaries had no cause of action for breach of the contract to make a will before the death of the survivor. The court said that there was no merit to the beneficiary's contention that the surviving husband's action in conveying portions of the community estate was inconsistent with the contractual obligations which he had undertaken, and thus estopped him from claiming under the will of the deceased wife, that the wife left the husband her estate in fee simple, and that there was authority for the proposition that in a grant of a fee simple, a following proviso that the grantee should not convey without the consent of the grantor is void as a restriction on alienation, and therefore repugnant to the grant. However, the court went on, in the present case the beneficiaries did not allege a contract not to alienate; they alleged only an agreement to make a will identical to that of the deceased wife, which, the court noted, purported only to devise that estate of which she should die seized and possessed. Pointing out that it understood

the beneficiaries, during their oral argument, to concede that the surviving husband had the right of inter vivos alienation, the court said that in any event the conclusion was inescapable that he had such right, and that his actions were completely consistent with the will under which he took title, and the contract which it was alleged that he made.

The joint will of a husband and wife which left all property to the survivor "with further full power of disposition by sale by the surviving spouse, for and during the life of said surviving spouse" was held in *Wenzel v Menchaca* (1962, Tex Civ App) 354 SW2d 635, error ref n r e, to be an absolute devise passing to the surviving spouse the fee simple title to such property, permitting the survivor to make an inter vivos disposition of the real estate, conveying good title. The land in question belonged to the wife. After the wife's death, the husband, who took under the joint will, conveyed the property to the defendants. After the death of the husband, the plaintiffs, heirs at law of the wife, contended that under the joint will the husband took only a life estate, that he consequently could not convey more than his life estate, and that the wife died intestate as to the remainder, and the remainder passed to them as her heirs at law. Rejecting this contention, the court said that the language of the joint will leaving the property to the survivor was clearly and in express terms an absolute devise passing the fee simple title to the survivor unless the estate was limited by the provision which followed (quoted above). After an examination of that provision, the court said that it appeared that there was an intent to enlarge, if possible, the fee already devised by conferring "further full power of disposition by sale" upon the surviving spouse.

A joint and mutual will executed by a husband and wife, whereby the survivor was to have all of the estate "to be used, occupied, enjoyed, conveyed, managed, conserved, expended, and controlled by, and during the life of such survivor, as such survivor may desire," subject only to the condition that upon the death or remarriage of the survivor, the portion of the estate belonging to the decedent should vest in the plaintiffs (children of the wife), was held in *Cammack v George* (1964, Tex Civ App) 377 SW2d 687, error ref n r e, to give the survivor a life estate in the property of the decedent with the power to dispose of the fee before the survivor's death or remarriage, and that the surviving husband's inter vivos conveyances defeated any interest of the plaintiffs in so much of said property as was conveyed. The third-party beneficiaries under the will claimed that the husband, upon the wife's death, took her one-half interest in the community estate, in trust for the plaintiffs, subject to his use and enjoyment thereof during his lifetime, or until such time as he should remarry, and that he would not have unrestricted power to convey and dissipate all of the estate, thereby depriving the plaintiffs of their intended inheritance. In rejecting this contention, the court said that no words were used in the will which would evidence any intent to devise a fee simple title to the survivor, other than the two words "conveyed" and "expended," that all of the authority given to the survivor was limited by the provision "during the life of such survivor," and that it was clear that the parties intended the survivor to take that property of which the first decedent was seized and possessed only until the remarriage or death of the survivor, after which it should vest in fee simple to the named beneficiary-plaintiffs. But, the court continued, this life estate was coupled with the power to dispose of the fee before the survivor's death or remarriage, and therefore the words "conveyed" and "expended" as used in the will were subject to no other interpretation, it was said. The power to "convey" effectively relegated the named beneficiaries, plaintiffs, to the position of contingent remaindermen having no justiciable interest in or to the property passing under the wife's will until the remarriage or death of the surviving husband, the court explained.

The court upheld a surviving wife's inter vivos conveyance of 50 acres of land even though a joint and mutual will executed by the husband and wife left the property as part of a 200-acre tract to the survivor for life with the remainder in fee to a son, in *Fuqua v Fuqua* (1975, Tex Civ App) 528 SW2d 896, error ref n r e, wherein it was said that at the death of the husband the joint and mutual will was not offered for probate, nor were its terms followed by the deceased's heirs at law. It appears that the surviving wife and the brothers of the

beneficiary of the land in question conveyed to the beneficiary in fee a specific 150 acres out of the 200-acre tract, and that the remaining 50 acres were then conveyed in fee to the surviving wife. It was this 50 acres which the wife conveyed, the conveyance of which was contested in the present case.

§ 33[b] Sale or lease—Held improper

In the following cases involving property which passed under a joint or mutual will, it was held improper under the will or its agreement for the surviving party to sell or lease the property.

In *Tontz v Heath* (1960) 20 Ill 2d 286, 170 NE2d 153, supra § 23, a survivor's transfer of real estate by sale and lease, as well as by gift, was held to be null and void because the transfers were not authorized by the joint and mutual will under which she took the property.

In *Schondelmayer v Schondelmayer* (1948) 320 Mich 565, 31 NW2d 721, it was held that a joint and mutual will executed by a husband and wife became irrevocable on the death of the husband, and that the surviving wife could properly be restrained from disposing of the property in violation of the terms of the will. Under the will the husband and wife left their property to the survivor and then to their three sons. After the husband's death, the widow quarreled with one son and threatened to sell the farm which he was to receive under the will. The widow also gave notice, upon the husband's death, of her election to take under the statute rather than under the will (the matter was still pending in court). The son instituted the present action to restrain the widow from disposing of the property in violation of the will. Quoting from another case, the court said that the nonfulfillment of this contract upon the part of the surviving widow would be a fraud which equity would not allow, and that therefore it would decree the performance of the agreement by the widow, or take such steps as should be necessary to prevent her from violating her part of the contract in fraud on the rights of the beneficiaries under the will.

Where, pursuant to an agreement between a husband and wife and their son, the husband and wife agreed to execute mutual wills leaving their real property to the survivor for life with the remainder to the son, who in turn promised to work and care for the property during the lives of the parents and the survivor, and the husband, who predeceased the wife, then executed his will, leaving the property to his wife "to have and to hold to enjoy the use thereof, to sell, lease, mortgage, pledge or otherwise hypothecate during her natural life," the remainder, "if any," to go to the son, it was held in *Wells v Wells* (1969) 252 Or 400, 449 P2d 434, that it would constitute a breach of the agreement for the wife to convey a part of the property to persons other than the son, to enter into a contract to sell part of the property to others, and to distribute as a gift the proceeds of sale to persons other than the son. The son brought the present action seeking to enforce the alleged contract to make a will. Reversing the lower court's decree, which sustained a demurrer to the complaint and dismissed the suit, the court said that the agreement was breached by the transfer of the property to third persons, and that the complaint stated a cause of action. Even though the widow had the power to dispose of the property for her support, the complaint alleged a breach of contract in that the widow disposed of the proceeds from the sale of part of the property by way of a gift, the court added.

§ 34[a] Mortgage—Held proper

[Cumulative Supplement]

In the following case involving a joint and mutual will, it was held proper for the surviving party to the joint and mutual will agreement to mortgage property which belonged to him.

Where a husband and wife executed a "joint, mutual, and reciprocal will, " leaving to the survivor "a life estate in and to all the real property of which we or either of us may die seized or possessed," with the remainder going to designated children, share and share alike, it was held in *National Life Ins. Co. v Watson* (1935) 141

Kan 903, 44 P2d 269, that the surviving husband, who elected to take under the will and thereby acquired personal property and a life estate in realty, title to which was in the wife's name, was not precluded from mortgaging his own realty, and that a judgment in foreclosure which declared that the mortgage executed by the survivor and his second wife was a first lien on the property was correct, as against the contention of the children, the remaindermen, that each of them owned an undivided interest, subject to the husband's life estate. The court said that by the joint will, the husband impliedly agreed that whatever property that he might die seized of should pass under that will to the children named in the will, that he did not bind himself not to alienate or dispose of any of his property during his life as his own wants, needs, or convenience might require, that in joining in the execution of the mutual and reciprocal will he did not thereby intend to disable himself to exercise dominion over his own property, and that when in the fullness of time he was gathered to his fathers, the real estate of which he died seized would pass to the children named in the will. Moreover, the court added, if this was not sufficient, the case could be disposed of under the general rule that one who acquired any sort of interest in real property could rely on the record when he had no personal notice or knowledge of some outstanding interest in it, since a careful examination of the record title of the land in question at the time the mortgage was executed would have shown clear title in the surviving husband and nothing whatever about the joint will which had been probated and which, the court said, merely disposed of the wife's property.

CUMULATIVE SUPPLEMENT

Cases:

See Re Application of Boyton (1987, Sur) 516 NYS2d 406, § 19.

[Top of Section]

[END OF SUPPLEMENT]

§ 34[b] Mortgage—Held improper

In the following cases involving a joint or mutual will agreement, it was held that the surviving party had no authority under the agreement to mortgage property which had been included in the agreement.

In *Ankeny v Lieuallen* (1941) 169 Or 206, 113 P2d 1113, dismd on other grounds 169 Or 222, 127 P2d 735, it was held that the surviving party to a mutual will agreement had no right or authority to mortgage any interest, except his life estate, in farmland which had been included in the agreement, where under the agreement the mutual wills left the farmlands to the survivor for life, and the remainder to named beneficiaries. The lower court decreed foreclosure and the defendants appealed. Pointing out that the bank had full knowledge of the mutual will contract when it accepted the mortgage, the court said that two persons could contract with each other to make mutual wills containing reciprocal provisions, and that when such wills had been executed in pursuance of a contract, either party could, during the lifetime of both, withdraw from the compact and revoke the will as to him by giving such notice to the other as would enable the other to alter or revoke his will also if he so desired, but that in the absence of such notice and revocation, the will became irrevocable after the death of one of them if the survivor took advantage of the provisions made by the other, and if it was necessary in order to give effect to such agreement, equity would impress upon the property of the survivor a trust in favor of the person who was entitled to the property under such mutual agreement. As for the plaintiff's contention that the survivor was empowered to mortgage the lands though not permitted to sell them, the court said that it would be idle to impose a limitation upon the power of the holder of a life estate in land to sell the land and at the same time permit him to mortgage it for more than the land was worth and thereby do indirectly what he was not

permitted to do directly. Reversing the foreclosure decree, the court said that it was primarily a question of the parties' intention, that the mortgaging of property amounted to a disposition of the property, and that from the provisions of the contract and the wills it seemed clear that the parties intended the survivor to have no right to dispose of the property during his or her lifetime, and that all of the farmlands owned by either of them should pass to the remaindermen upon the death of the survivor.

The surviving party to a joint will agreement which left the estate to the survivor for life, and the remainder to named beneficiaries, had no authority under the joint will to sell or mortgage the beneficiaries' fee title in the remainder, although she could mortgage her life estate, according to the court in *Moore v Moore* (1917, Tex Civ App) 198 SW 659, error ref. A husband and wife had executed the joint will, and after the husband's death the wife had mortgaged some of the property. Under the joint will, the court said, the wife agreed to take a life estate in all of her husband's portion of the community property to the exclusion of their sons and daughters, and to reduce her community rights in the estate to a life estate. Pointing out that the wife had the will probated and had accepted the benefit of the revenue and use of the entire estate, the court said that when she mortgaged the property, she owned only a life estate and the children owned the fee.

§ 35[a] In exchange for care of survivor or estate—Held proper

In the following cases involving joint and mutual wills, it was held that the surviving party was not prohibited from conveying property in exchange for a promise to care for the survivor or the estate, and that such conveyances were therefore proper.

Where by joint will a husband and wife left their property to the survivor with the "full right to such survivor to sell all, or any part thereof to raise funds with which to pay debts, or to enjoy life as he or she shall deem proper and right," it was held in *Leighty v Walker* (1963) 136 Ind App 152, 193 NE2d 138, that "sell" denoted disposition for a valuable consideration which could be for a consideration other than money, and that if it was found to be a valuable consideration, the surviving wife could convey her home to others in exchange for their promise to take care of her for the rest of her life. The court said that in modern-day use the word "sell" usually denoted the disposing of property for a valuable consideration, that the court did not feel at liberty to abstract such word from the surrounding language and place upon it the strict interpretation of having it mean that the property could be disposed of for money only, and that whether or not the surviving wife in fact received a valuable consideration, it did not determine. A new trial was ordered.

Where a husband and wife executed a joint and mutual will leaving their property to the survivor for life with the remainder to designated beneficiaries, and then purchased a home and made an oral agreement with one of their daughters to give her the home if she would care for them, it was held in *Sage v Sage* (1925) 230 Mich 477, 203 NW 90, that the surviving wife's conveyance of the home to the daughter, reserving a life estate therein, was in conformance with the agreement of the husband and wife, and that the validity of the conveyance was not affected by the joint and mutual will. The court determined that the wife was mentally competent when she made the deed, and that no undue influence was exercised. The court said that if there had been no agreement acted upon by the parties during their lives and the surviving wife had made the deed to the daughter after the husband's death, equity would have declared her act to be fraudulent, and would have enforced the provisions of the will, because after the husband's death, the will became irrevocable. The court went on to say that the husband and wife were under no obligation to preserve this or any of their estate for the heirs, that they had made a joint disposition of all their property, and could deed or devise it as they saw fit, provided that they were both parties to the transaction, that they did so before the will became irrevocable by the death of the husband, and that the fact that the deed was not made until after he died did not matter as long as the contract pursuant to which it was given was legal and binding.

In *Heller v Heller* (1921, Tex Civ App) 233 SW 870, supra § 24[b], involving a joint will which was executed pursuant to an agreement between a husband and wife, and which left the property to the survivor, who was to have "the right to sell or otherwise dispose of any part of our community property and invest the proceeds of such sale or disposition as he or she may think best," the remainder going to their children, it was held that the agreement permitted the surviving wife to convey the property to a son in consideration of services rendered and to be rendered by him in caring for and managing the estate.

Where a husband and wife executed a joint and mutual will leaving all their property to the survivor "to be used, occupied, enjoyed or disposed of during the life of such survivor, as such survivor shall desire," the remainder to named beneficiaries, and after the death of the husband the wife conveyed their house and land to the defendants, reserving a life estate therein, the consideration being \$10 and the grantees' agreement to care for the widow for the rest of her life, it was held in *Dickerson v Keller* (1975, Tex Civ App) 521 SW2d 288, error *ref n r e*, that the surviving widow had an unqualified power to dispose of the property during her lifetime, that the conveyance was not fraudulent, that no valuable consideration was necessary, that it was not testamentary in character, and that the conveyance need not have been made in "good faith." The action was a suit in trespass to try title, instituted by one of the named beneficiaries. The plaintiff contended, *inter alia*, that prior to the execution of the deed the widow had only a life estate in the property, and that after she executed the deed she still had a life estate, and that she therefore actually received nothing and disposed of nothing by the transaction. In response to this, the court said that it could not agree, that by the execution of the deed the widow disposed of the fee and in return received the agreement of the grantees to care for her, that insofar as the deed indicated, she used the fee to bargain for something that she wanted and thought that she needed, and that this was what the power of disposition given to her by her husband permitted her to do if she so desired.

§ 35[b] In exchange for care of survivor or estate—Held improper

In the following case involving a mutual will agreement, it was held that the agreement did not permit the surviving party to convey property covered by the agreement in exchange for a promise to care for the survivor, and that the conveyance was therefore improper.

In *Allen v Ross* (1929) 199 Wis 162, 225 NW 831, 64 ALR 180, where a mother and daughter, by agreement, made mutual wills leaving all property to the survivor, upon whose death it was to go to the plaintiff, and the surviving mother, after having accepted the benefits under her daughter's will, transferred all of her property (including that which she received under the daughter's will) to other persons in return for their promise to support her during life and to pay her debts and obligations, these *inter vivos* transfers were set aside, the court saying that when two persons enter into an agreement to make, and do actually make, mutual and reciprocal wills by which each bequeaths her estate to the other, if she survives, and the survivor takes under such a will and accepts the benefits of such a mutual will, equity will take such action as may be necessary to give effect to the mutual agreement that the property of the survivor shall go to the person designated by such agreement, and that if it is necessary in order to give effect to such agreement, equity will impress the property of the survivor with a trust in favor of the person who is entitled to the property under such mutual agreement.

RESEARCH REFERENCES

A.L.R. Library

A.L.R. Quick Index, Antenuptial Contracts

A.L.R. Quick Index, Husband and Wife

A.L.R. Quick Index, Surviving Spouse

A.L.R. Quick Index, Third-Party Beneficiary

A.L.R. Quick Index, Wills

A.L.R. Federal Quick Index, Surviving Spouse

A.L.R. Federal Quick Index, Survivors

A.L.R. Federal Quick Index, Wills

Surviving spouse's right to marital share as affected by valid contract to convey by will, 85 A.L.R.4th 418

Establishment and effect, after death of one of the makers of joint, mutual, or reciprocal will, of agreement not to revoke will, 17 A.L.R.4th 167

Wills: effect of gift to be disposed of "as already agreed" upon, 85 A.L.R.3d 1181

Right of life tenant with power to anticipate or consume principal to dispose of it by inter vivos gift, 83 A.L.R.3d 135

Evidence to establish oral antenuptial agreement waiving interspousal rights, 81 A.L.R.3d 453

Divorce or annulment as affecting will previously executed by husband or wife, 71 A.L.R.3d 1297

Measure of damages for breach of contract to will property, 65 A.L.R.3d 632

Acceptance of benefits under will as election precluding enforcement of contract right as to property bequeathed, 60 A.L.R.3d 1147

Statute of limitations applicable in action to enforce, or recover damages for breach of, contract to make a will, 94 A.L.R.2d 810

Decedent's spouse as a proper party to contest will, 78 A.L.R.2d 1060

Spouse's right to take under other spouse's will as affected by antenuptial or postnuptial agreement or property settlement, 53 A.L.R.2d 475

Validity of oral promise or agreement not to revoke will, 29 A.L.R.2d 1229

Power of either spouse, without consent of other, to make gift of community property or funds to third party, 17 A.L.R.2d 1118

Legal Encyclopedias

Am. Jur. 2d, Wills §§ 753-821

Trial Strategy

Contract to Make Will, 22 Am. Jur. Proof of Facts 1

Forms

20 Am. Jur. Legal Forms 2d, Wills §§ 266:22, 36, 40, 41, 43, 45, 46, 77- 80, 94, 95, 151, 155, 174, 177, 216, 263, 303

25 Am. Jur. Pleading and Practice Forms, Wills, Forms 5-7

Law Reviews and Other Periodicals

Contracts to make joint or mutual wills. 55 Marquette L Rev 103

Section 1[a] Footnotes:

[FN1] It supersedes the annotation at 108 A.L.R. 867. The annotation at 169 A.L.R. 9 need no longer be consulted for matters within the scope of this annotation.

[FN2] Including the mortgaging of property.

[FN3] See, for example, Rule v Rule (1955, Pa) 46 Luzerne Leg Reg R 94.

Section 2[a] Footnotes:

[FN4] Am. Jur. 2d, Wills § 786.

[FN5] Am. Jur. 2d, Wills § 764.

[FN6] §§ 9- 11, *infra*.

[FN7] § 3, *infra*.

[FN8] § 4, *infra*.

[FN9] § 5, *infra*.

[FN10] §§ 6- 8, *infra*.

[FN11] §§ 3- 5, *infra*.

[FN12] § 6, *infra*.

[FN13] § 7, *infra*.

[FN14] See Am. Jur. 2d, Husband and Wife § 264, and Am. Jur. 2d, Wills § 777.

[FN15] § 8, *infra*.

[FN16] See Am. Jur. 2d, Wills § 790.

[FN17] § 12, *infra*.

[FN18] § 18, *infra*.

[FN19] § 13, *infra*.

[FN20] § 14, *infra*.

[FN21] § 15, *infra*.

[FN22] § 16[a], *infra*.

[FN23] § 16[b], *infra*.

[FN24] For such cases, see § 18, *infra*.

[FN25] § 12, *infra*.

[FN26] § 14, *infra*.

[FN27] § 17[a], *infra*.

[FN28] § 17[b], *infra*.

[FN29] § 18, *infra*.

[FN30] § 19, *infra*.

[FN31] § 20, *infra*.

[FN32] § 20, *infra*.

[FN33] § 20, *infra*.

[FN34] § 21, *infra*.

[FN35] § 22, *infra*.

[FN36] See, for example, *Sick v Weigand* (1938) 123 NJ Eq 239, 197 A 413, and *Re Salisbury's Estate* (1934) 242 App Div 645, 272 NYS 135, *affd* 265 NY 536, 193 NE 308.

[FN37] In the case of community property, of course, the survivor may be entitled only to half of the property by right of survivorship. Am. Jur. 2d, Community Property § 109.

[FN38] § 23, *infra*.

[FN39] §§ 24- 35, *infra*.

[FN40] *Ankeny v Lieuallen* (1941) 169 Or 206, 113 P2d 1113, *dismd* on other grounds 169 Or 222, 127

P2d 735.

Section 2[b] Footnotes:

[FN41] Am. Jur. 2d, Wills § 796.

[FN42] Am. Jur. 2d, Wills § 796.

[FN43] Am. Jur. 2d, Wills § 797.

[FN44] Am. Jur. 2d, Wills § 799.

It is not necessary that the third-party beneficiaries to a mutual will contract show that they are victims of actual fraud on the part of the surviving party to the contract in order to enforce the contract, according to the court in *Brewer v Simpson* (1960) 53 Cal 2d 567, 2 Cal Rptr 609, 349 P2d 289, where a husband and wife, in conformance with a contract, made mutual wills leaving all property to the survivor and providing that one-half of all the property of the survivor should go to named relatives of the husband and the other half to named relatives of the wife, and the wife, being the survivor, attempted to repudiate her obligations to her relatives (plaintiffs in the present case) under the contract. After the death of her husband, the wife remarried and then merged her property with that of the new husband. Her relatives instituted the present action, seeking specific performance of the contract to make mutual wills, a declaration of a trust over the wife's property, and an accounting by the wife. The lower court impressed a trust on the property and provided a formula for computing the share of the trust property which the plaintiffs would receive on the wife's death. In her arguments the wife emphasized that the plaintiffs did not give anything for, or change position in reliance on, any promise of the husband or wife. In response to this, the court said that its concern in enforcing, by quasi-specific performance, an agreement such as that involved in the present case was not that the donee beneficiaries should receive something for which they had not paid, but that the promise of the wife for which the husband bargained should be performed. The wife also maintained that her promise to leave half of the property to the plaintiffs if she survived was only incidental to the main purpose of the contract, which was to make sure that if she survived the husband, she would receive the entire estate, and that if she did not survive him, her relatives would receive half of the estate. She contended that since the contract was not "made expressly for the benefit" of the plaintiffs, they, as mere incidental beneficiaries, could not enforce it. In response the court said that acceptance of her argument would lead to peculiar conclusions, that the wife would have the court believe that she intended her relatives to be the express beneficiaries of the husband's will if she predeceased the husband, but only incidental beneficiaries of her will if she survived the husband, and that from this it would follow that the husband's will, listing the gifts to kindred of both spouses in the same straightforward manner as the wife's, nevertheless was the vehicle of the same subtle differentiation of intent. The court added that on the other hand the contract evidenced by the mutual wills was readily and reasonably susceptible of the trial court's view that it was "made for the express benefit of all the persons named therein as beneficiaries."

[FN45] Am. Jur. 2d, Wills § 794.

See, for example, *Re Estate of Baughman* (1960) 20 Ill 2d 593, 170 NE2d 557.

[FN46] See, for example, *Jennings v McKeen* (1954) 245 Iowa 1206, 65 NW2d 207, where a beneficiary was bequeathed \$1,000 in a joint and mutual will but the survivor attempted to revoke the joint will by executing a later will, and in the probate of that later will the beneficiary asserted his \$1,000 claim based upon the joint will agreement. The probate court allowed the claim.

[FN47] In *Tontz v Heath* (1960) 20 Ill 2d 286, 170 NE2d 153, it was held that the surviving party to a joint and mutual will breached the agreement when she conveyed some of the property, and that the 7-year statute of limitations began to run at that time, thus having expired before the beneficiaries, who waited until the death of the survivor, instituted the action contesting the conveyance.

[FN48] For example, in *Brewer v Simpson* (1960) 53 Cal 2d 567, 2 Cal Rptr 609, 349 P2d 289, where a husband and wife, in conformance with a contract, made mutual wills leaving all property to the survivor, the remainder to named relatives of the husband and wife, and after the death of the husband the wife remarried and merged her property with that of the second husband, it was held that the statute of limitations on an action by the relatives to enforce the contract would not begin to run until the date when performance of the contract became due, and that was upon the death of the wife. The court explained that where a defendant definitely and unconditionally repudiated a contract before the time fixed for his performance, there was no necessity for making the statutory period of limitation begin to run against the plaintiff until the day fixed by the contract for the rendition of performance, at least unless the plaintiff definitely elected to regard the anticipatory repudiation as a final breach, and that there was nothing in the record which would compel a determination that any plaintiff had made any such election. The wife's assumption that the beneficiaries' mere knowledge of an anticipatory repudiation of the contract caused the statute of limitations to run was untenable, the court added.

[FN49] See, for example, *Newman v United States* (1959, DC Ill) 176 F Supp 364, and *Nettz v Phillips* (1961, DC Iowa) 202 F Supp 270.

[FN50] See, for example, *Re Estate of Lenders* (1956) 247 Iowa 1205, 78 NW2d 536.

[FN51] Am. Jur. 2d, Wills § 810.

[FN52] Thus, for example, a joint will executed by a husband and wife, which left all property to the survivor until his or her death, then to the husband's two children by a previous marriage, was held in *Rule v Rule* (1955, Pa) 46 Luzerne Leg Reg R 94, to permit the surviving wife to do as she desired with the property, since there was no contract between the husband and wife concerning the will. After the husband's death the widow instituted the present action to quiet title. The court said that since the maker of a will may ordinarily alter, modify, or revoke it at any time during life, a "mutual will" entered into between husband and wife could be altered or revoked by the surviving spouse, and that if there had been a binding contract between the parties in pursuance to which the will in question was written, the survivor would be bound, but that since there was no contract, the "so-called will" was not binding.

See also *Garland v Meyer* (1942, Tex Civ App) 169 SW2d 531.

[FN53] See, for example, *Brewer v Simpson* (1960) 53 Cal 2d 567, 2 Cal Rptr 609, 349 P2d 289, holding that the beneficiaries of a mutual will agreement could enforce the contract made in their behalf even though the wills failed to refer expressly to irrevocability.

But the Uniform Probate Code, § 2-701, provides that the execution of a joint or mutual will does not create a presumption of a contract not to revoke the will, and that a contract to make a will or not to revoke a will can be established only by provisions of a will stating material provisions of the contract, an express reference to a contract in the will, and extrinsic evidence proving the terms of the contract, or a writing signed by the decedent evidencing the contract.

[FN54] For example, in *Garland v Meyer* (1942, Tex Civ App) 169 SW2d 531, it was held that a wife who had obtained property through a joint will which she executed with her husband—the will leaving all property to the survivor, the remainder to their daughter—could spitefully sell the property and give the proceeds to her son in order to prevent the property from going to the daughter under the joint will, and that the daughter would not thereby be entitled to the imposition of a trust in her favor on the proceeds from the sale, because, the court said, it could not in sound principle be held that the mere execution of an instrument in the form of a joint will could be given, by construction, the effect of a contract or agreement to make mutual wills which would authorize a court of equity to fasten a trust upon the estate of the defaulting party. The estate was the property of the surviving wife, to do with as she pleased, and if she chose to dispose of it in her lifetime merely to spite her daughter, that ugly spirit did not impair the legality of her act, the court added. The court also said that even though the wife caused the will of her deceased husband to be admitted to probate and even though she accepted the benefits thereof, she had the right to remain in possession of the property as her homestead and as part owner, without creating any estoppel to deal with the property as her own and without restraint.

[FN55] For example, it was held in *Ginn v Edmundson* (1917) 173 NC 85, 91 SE 696, that a surviving wife could sell real estate which had been left to her children in a joint will executed by her and her husband, where there was no contract based upon consideration supporting the will. The court said that in the absence of a contract based upon consideration, the will could be revoked at pleasure, that the widow had the power to repudiate the paperwriting as her will, that the contract of sale which she had executed was binding upon her and the defendant, that her deed would convey to the defendant a good title to the land in controversy, and that the defendant must accept it and pay the purchase price. The widow had instituted the action to recover the purchase price of the property which she had contracted to sell to the defendant.

[FN56] Am. Jur. 2d, Wills § 769.

[FN57] Am. Jur. 2d, Wills §§ 769, 772.

Section 3 Footnotes:

[FN58] See Am. Jur. 2d, Wills § 788.

Section 6 Footnotes:

[FN59] But see *Re Glen* (1936) 247 App Div 518, 288 NYS 24, *affd* without opinion 272 NY 530, 4 NE2d 433, *reh den* 272 NY 640, 5 NE2d 371 and (disapproved on other grounds *Re Granwell* 20 NY2d 91, 281 NYS2d 783, 228 NE2d 779), where a husband and wife had executed a joint and mutual will and the husband later opened a joint bank account in the names of himself and his brother, and where the court held that the only case where a mere intent to defraud was sufficient to render the opening of a joint account fraudulent and void was where it was made with the intent to defraud creditors, and that,

even assuming that the husband opened the bank account with the design and intent to reduce the amount that his wife would receive under his will, still such design and intent would not make the opening of the account a fraud on her.

Section 10[a] Footnotes:

[FN60] The court in *Re Granwell* (1967) *supra*, said that regardless of whether a person designates those to succeed to his interest in property upon his death, if he reserves the power to dispose of the property during his lifetime, he may be regarded as its absolute owner until he dies, and that therefore it could not be said, as it was said in *Re Glen*, that an irrevocable title to this portion of the property was "vested" in someone else at the time the account was opened.

Section 12 Footnotes:

[FN61] But where the beneficiaries were given specific property, it has been held that even though the joint will gave the survivor the property in fee simple, the survivor took only a life estate in that property. *Re Estate of Jones* (1961) 189 Kan 34, 366 P2d 792, and *Olive v Biggs* (1970) 276 NC 445, 173 SE2d 301, *infra* § 18.

[FN62] However, this authority may not go so far as to allow the survivor to transfer property for the purpose of avoiding the agreement. § 23, *infra*.

Section 13 Footnotes:

[FN63] See also § 18, *infra*, for cases in which the court construed the will as leaving the survivor a life estate, because it left, upon the death of the survivor, the same specific property to named beneficiaries.

Section 14 Footnotes:

[FN64] For cases in which the survivor is given a fee simple title, see § 12, *supra*.

[FN65] The survivor may not be permitted to transfer property with the intent to avoid the agreement, according to the cases discussed in § 22, *infra*. And the survivor may not be permitted to transfer property if the will leaves that specific property to specific beneficiaries at the death of the survivor. See § 18, *infra*.

Section 16[a] Footnotes:

[FN66] For those joint or mutual wills which leave the survivor a life estate, or the like, and the remainder to named beneficiaries, see § 13, *supra*.

[FN67] Where the will devises or bequeaths specific property to designated beneficiaries upon the death of the survivor, some courts consider this an intent to restrict the survivor's authority to transfer the property. For such cases, see § 18, *infra*.

Section 16[b] Footnotes:

[FN68] Where specifically designated property is left to named beneficiaries upon the death of the survivor, it is ordinarily held that the survivor takes a life estate regardless of the terms of the survivor's

grant. See § 18, *infra*.

Section 17[a] Footnotes:

[FN69] § 14, *supra*.

[FN70] § 12, *supra*.

Section 18 Footnotes:

[FN71] See also § 13, *supra*, for cases in which the survivor is expressly granted a mere life estate, the remainder (in some instances specifically designated property) going to named beneficiaries.

Section 19 Footnotes:

[FN72] But see *Allen v Ross* (1929) 199 Wis 162, 225 NW 831, 64 ALR 180, where a mother and daughter, by agreement, made mutual wills leaving all property to the survivor, and to the plaintiff upon the death of the survivor, and the surviving mother, after having accepted the benefits under her daughter's will, transferred all property (including that which she received under the daughter's will) to other persons in return for their agreement to support her during life and to pay her debts and obligations, these *inter vivos* transfers were set aside, the court saying that when two persons enter into an agreement to make, and do actually make, mutual and reciprocal wills by which each bequeaths her estate to the other, if she survives, and the survivor takes under such a will, and accepts the benefits of such a mutual will, equity would take such action as might be necessary to give effect to the mutual agreement that the property of the survivor should go to the person designated by the agreement, and that if it was necessary in order to give effect to the agreement, equity would impress the property of the survivor with a trust in favor of the person who was entitled to the property under such mutual agreement.

Section 21 Footnotes:

[FN73] But see *Re Estate of Lenders* (1956) 247 Iowa 1205, 78 NW2d 536, where the court rejected the idea of "constructive fraud" in the survivor's *inter vivos* gifts, since, the court said, the gifts amounted to only about 14 percent of her total estate at that time. A husband and wife had executed mutual wills leaving the property to the survivor "absolutely," and providing that after the death of the survivor, all of the "property I may own at the time of my death" was to go to named beneficiaries, and the wife, after the husband's death, made gifts to her sisters in money and property valued at about \$88,000. The court upheld the gifts, rejecting the contentions that they were fraudulent, or testamentary in character. It appears, however, that the court considered the wills as leaving the survivor a fee simple title to all of the property.

[FN74] But see *McKamey v McKamey* (1960, Tex Civ App) 332 SW2d 801, error ref, where a husband and wife, by a joint and mutual will, left all property to the survivor "to be used, occupied, enjoyed, encumbered or conveyed and expended," as the survivor desired, and upon the death of the survivor left "any such estate then remaining" to their five children in a specified manner, it was held that the survivor could convey the property as he or she saw fit, even though it defeated the plan of disposition set forth in the will, and that the surviving wife's conveyance of "practically all of her property" to her

children in two deeds, reserving to herself a life estate, was authorized under the will. In so holding, the court conceded that the wife disposed of her property in a different manner than she would have been authorized to do by a testamentary disposition.

See also *Scales v Scales* (1961, CA5 Tex) 297 F2d 219 (applying Texas law), holding that the surviving party to a joint and mutual will was authorized to sell or give away, even in bad faith, any of the property obtained under the will, where the will left all of the estate to the survivor "to be used, occupied, enjoyed, conveyed and expended by, and during the life of such survivor, as such survivor shall desire, " and upon the death of the survivor left "any of such estate which then remains" to their children. The court said that the survivor received a defeasible or conditional fee simple title, since the will itself gave her the right and power to use, occupy, enjoy, convey, and expend by and during her life as the survivor should desire, and that this gave her the power to act imprudently or improvidently or in bad faith.

Section 23 Footnotes:

[FN75] In *McCuen v Hartsock* (1968, Iowa) 159 NW2d 455, however, where a married couple's joint and mutual will left "all personalty" to the survivor with the remainder to named beneficiaries, it was held that the money from savings accounts which the husband and wife held in joint tenancy accounts was the surviving husband's as joint tenant and not as beneficiary under the will, that it was his own property, and that he could dispose of it contrary to the provisions of the will.

[FN76] In *National Life Ins. Co. v Watson* (1935) 141 Kan 903, 44 P2d 269, where a joint and mutual will of a husband and wife gave the survivor "a life estate in and to all of the real property of which we or either of us may die seized or possessed," and upon the death of the survivor "the said real estate" went to named beneficiaries, it was held that the surviving husband, who elected to take under the will and thereby acquired personal property and a life estate in realty, the title to which was in the wife's name, was not precluded from mortgaging his own realty, and that a judgment in foreclosure which declared that the mortgage executed by the survivor and his second wife was a first lien on the property was correct as against the contention of the children, the remaindermen, that under the joint will each of them owned an undivided interest, subject to the husband's life estate. The court said that by the joint will the survivor impliedly agreed that whatever property that he might die seized of should pass under that will to the children named as beneficiaries, that he did not bind himself not to alienate or dispose of any of his property during his life as his own wants, needs, or convenience might require, and that he did not thereby intend to disable himself to exercise dominion over his own property.

[FN77] But where a husband and wife, in accordance with an agreement, executed a joint will leaving the "income of our real or personal property" to the survivor for life, and then equally to their son and daughter, it was held in *Rastetter v Hoenninger* (1915) 214 NY 66, 108 NE 210, that upon the death of the wife, the husband became trustee of her personal estate for the remaindermen, that each party during his or her life remained the absolute owner of his or her property with all the rights of an owner, and that therefore, unless the surviving husband, who had given real estate to the daughter, had made the gift in contemplation of death or for the purpose of defeating the testamentary agreement with his wife, or the real estate in question was purchased with money belonging to the wife, the surviving husband was authorized to make the gift. In reversing a judgment for the son, who claimed a one-half interest in the realty in question, and ordering a new trial, the court said that it disagreed with the theory upon

which the lower court based its judgment, namely, that upon the execution of the joint will each of the testators became a trustee of his or her own property, and that while each testator was entitled to the income, he or she was disabled from disposing of the corpus. The court went on to explain that the parties merely disabled themselves from making a different testamentary disposition after accepting the benefits of the agreement, and that nothing short of plain and express words to that effect would suffice in such a case to limit the use, or to impress a trust upon, the property of each during his or her own life. Declaring that the husband was the trustee of the wife's personal estate for the remaindermen, the court said that if the identical money received from her could be traced to the purchase of the real estate in question, equity would impress a trust upon it. In such a case it would not be an answer to say that upon his death the husband left a larger personal estate than he received from his wife, the court added.

[FN78] In *Wallace v Peoples* (1935, Tex Civ App) 89 SW2d 1030, error dismd w o j, involving a joint will executed by a husband and wife, which left all of the property to the survivor "to have, possess and enjoy during his or her lifetime," and then one-half of the remainder to his heirs and one-half to her heirs, the death of the husband was held to affect only the husband's half of the community property, giving the surviving wife an absolute or complete life estate in her husband's half, and leaving her free to otherwise dispose of her own half.

Section 27[b] Footnotes:

[FN79] In *Re Logan's Estate* (1962) 253 Iowa 1211, 115 NW2d 701, the joint and mutual will left all the property to the survivor in Item I, and in Item II left "the remainder of all of the property" to designated beneficiaries, "subject to the bequest in Item I." It was held that the survivor was given a fee simple title to the property of the first to die, and that upon the death of the survivor, his or her property was then given to the persons named in Item II. The real estate involved in the will had been held in joint tenancy with the right of survivorship. Pointing out that if the only purpose in making the will was to provide for a fee simple title in the survivor, there was no reason for the will, the court said that in Item I the husband and wife in no way limited the estate to the survivor, and that the language used made it necessary to hold that they intended a fee simple. The court went on to say, however, that the husband and wife wanted some property to go to the persons named in Item II, and that by construing the word "remainder" as referring to all of the property remaining in the survivor's hands at the time of his death, it was possible to construe the entire will, giving full effect to all provisions.

[FN80] (1961) 252 Iowa 587, 107 NW2d 689, supra § 25[b].

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COURT OF APPEALS OF THE STATE
OF WASHINGTON DIVISION II

In re PATRICIA L. FORSBERG
SPOUSAL TRUST u/w of WALTER
A. FORSBERG,

Deceased.

No. 46251-6

CERTIFICATE OF
SERVICE

PAULINE FORSBERG and LESLIE
FORSBERG,

Appellants,

v.

PATRICIA L. FORSBERG, *et al.*

Respondents.

I certify that on the 18th day of August, 2014, I caused a true and correct copy of the Opening Brief of Appellants to be served on the following in the manner indicated below:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS
OF THE STATE OF WASHINGTON THAT THE FOREGOING IS
TRUE AND CORRECT.

Signed at Seattle, Washington on August 18, 2014.



Christine James
Legal Assistant