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INTRODUCTION

A MYSTIFYING PLETHORA OF RECENT CASES indicates that husbands and and wives seem to be placing much more euphoric confidence in the judicial enforcement of their contractual wills[1] than they do in unbargained-for assurances by the spouse that the provisions of such will never be changed.[2] Many cases indicate that married couples feel that while mutual trust and confidence may be a revered tradition resulting from matrimonial bliss, they prefer to superimpose upon testamentary dispositions of their estates the common law concept of contract as an agreement which the courts will enforce.[3] The repeated pattern of the various cases is that the respective spouses agree that their property shall be disposed of in accordance with their contractually executed wills;[4] the first spouse to die does so with perhaps the ingenuous belief that contract obligation will somehow compel devotion to the spousal agreement which trust and loyalty apparently would not. It is made manifest by the case law that when the surviving spouse changes the provisions of the will upon which there was superimposed the contractual arrangement, the beneficiaries under the contractual will be granted enforcement remedies by the courts, under the theory that the changing of the contractual will was a material breach of the contract. The typical remedy afforded by the courts is the equitable remedy of the constructive trust.[5]

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1 *E.g.*, Crail v. Blakely, 8 Cal. 3d 744, 505 P.2d 1027, 106 Cal. Rptr. 187 (1973); Schwartz v. Horn, 31 N.Y.2d 275, 290 N.E.2d 816, 338 N.Y.S.2d 613 (1972); *In re* Estate of Phillips, 54 Wis. 2d 296, 195 N.W.2d 485 (1972); Estate of Chayka, 47 Wis. 2d 102, 176 N.W.2d 561 (1970). Reference is, of course, made to a "will" as a statutorily prescribed method of testamentary disposition of one's property. *See, e.g.*, OHIO REV. CODE ANN. § 2107.03 (Page 1968).

2 *See* Twombly v. Twombly, 489 P.2d 475 (Okla. 1971); *In re* Briese's Estate, 240 Wis. 426, 3 N.W.2d 691 (1942), wherein it was held that a husband's love and affection for his dying wife was insufficient consideration for husband's promise to wife to support wife's mother as long as she lived.

3 *See, e.g.*, Johnson v. Central Ins. Co., 210 Tenn. 24, 356 S.W.2d 277 (1962).

4 *In re* Estate of Chronister, 203 Kan. 366, 454 P.2d 438 (1969).

5 Redke v. Silvertrust, 6 Cal. 3d 94, 490 P.2d 805, 98 Cal. Rptr. 293 (1971).

Quite typical of the judicial reaction to contractual wills is a recent decision of the Supreme Court of Nebraska[6] which may be summarized as follows:

(1) an agreement between husband and wife to execute mutual wills evidenced by a recital of the wills that they were executed pursuant to agreement is valid and judicially enforceable; and

(2) the mutual promises of the parties to such an agreement are an adequate consideration.

It seems abundantly clear that the courts are committed to the position that the right to change one's will may be limited by a contractual arrangement with one's spouse and, accordingly, that such contractual will, in its agreement aspects, becomes irrevocable at the time one party to the contract dies.[7] The concept has been stated as follows by the Wisconsin Supreme Court:

> Where two parties contract to make a joint, mutual and reciprocal will, each pledges to the other that he will execute a mutually agreeable will, and will have that will in full force and effect at the time of death. The parties may express such contract in a separate document, state in the joint will that it is a contract, or the fact of contract may be conclusively presumed from the fact of the joint wills being executed. Such contract becomes partially executed upon the death of one of the parties to the agreement and acceptance by the survivor of properties devised or bequeathed under the will and pursuant to the agreement to make such joint will. At this point the contract becomes irrevocable, the survivor having received the consideration promised.[8]

Against the background of the numerous court decisions that have enforced the contractual wills, one can only engage in random speculation as to what nuances of human frailty lead husband and wife to stultify their vital right to change their wills by contract obligation. It is not the basic

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[6] Geiger v. Geiger, 185 Neb. 700, 178 N.W.2d 575 (1970).

[7] Crail v. Blakely, 8 Cal. 3d 744, 505 P.2d 1027, 106 Cal. Rptr. 187 (1973); Liberty Nat'l Bank & Trust Co. v. Diamond, 229 Ga. 677, 194 S.E.2d 91 (1972); Estate of Randall v. McKibben, 191 N.W.2d 693 (Iowa 1971); Seal v. Seal, 212 Kan. 55, 510 P.2d 167 (1973); *In re* Estate of Bright, 482 S.W.2d 555 (Tenn. 1972); *In re* Estate of Philips, 54 Wis. 2d 296, 195 N.W.2d 485 (1972); *In re* Estate of Schultz, 53 Wis. 2d 643, 193 N.W.2d 655 (1972).

[8] Estate of Chayka, 47 Wis. 2d 102, 106, 176 N.W.2d 561, 563-64 (1970). In United States v. Ford, 377 F.2d 93 (8th Cir. 1967), the United States Court of Appeals sought to clarify some lingual confusion by lucidly defining the words "joint," "mutual," and "reciprocal" as those various terms have been used with respect to alleged contractual wills. As applicable to these various terms the opinion stated:

> A will is joint when it "is nothing more than a single documentary instrument constituting the wills of two or more persons, jointly executed." Wills are reciprocal when "two or more testators make testamentary dispositions in favor of each other"; this may be done by one will "in which case the will is both joint and reciprocal." A will is mutual "only if it is executed pursuant to an agreement," that is, "only when there is evidence sufficient to show a binding agreement as to disposal of the property of the makers in a certain way."

377 F.2d at 96.

purpose of this writer to explore the sociological overtones of such contractual arrangements, but merely to point out that while in one sense the contract enforcement may prove to be a great monetary windfall for the will beneficiaries,[9] in another sense the contract enforcement may have disastrous tax implications. Federal courts have repeatedly held that the contractual obligation imposed upon the surviving spouse converts what would otherwise have been a bequest or devise in fee simple to the surviving spouse into a mere life estate,[10] a terminable interest which does not qualify for the marital deduction in the estate of the first spouse to die.[11] One need not be too astute to recognize that because the federal estate tax has a graduated tax structure ranging from 3 to 77 percent,[12] it is vitally important to preserve the marital deduction in the estate of the first spouse to die so as to avoid unnecessary tax liability.

Four areas require in-depth exploration in order, not only to establish that the courts are enforcing contractual wills, but also to demonstrate that the contractual burden superimposed upon the testamentary disposition has attendant federal tax consequences. Those discussion areas are:

(1) contract relations between husband and wife with respect to their testamentary dispositions;
(2) the nature and quantum of the evidentiary problem relative to establishing contractual wills;
(3) judicial enforcement of contractual wills through the imposition of a constructive trust for the benefit of those who would have been the beneficiaries in accordance with the terms of the contractual wills; and
(4) the terminable interest resulting upon the establishment of the contractual wills and the attendant tax consequences associated with losing the marital deduction in the estate of the first spouse to die.

CONTRACTUAL WILLS: A CONTRACT THERE MUST BE

It would, of course, be in the alternative either a superarrogation or an insensitive treatment of one's readers akin to the hauteur of a pontificator to dwell upon the fundamental requisites of a contract.[13] But in numerous cases the courts have refused to enforce alleged contractual wills because the evidence did not establish a contract.[14] The courts have

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[9] INT. REV. CODE OF 1954 § 102.

[10] Estate of Krampf v. Comm'r, 464 F.2d 1398 (3d Cir. 1972); Estate of Opal v. Comm'r, 450 F.2d 1085 (2d Cir. 1971); Batterton v. United States, 406 F.2d 247 (5th Cir. 1969).

[11] INT. REV. CODE OF 1954 § 2056.

[12] INT. REV. CODE OF 1954 § 2001.

[13] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 1, 19, 72 (1973).

[14] *E.g.*, Twombly v. Twombly, 489 P.2d 299 (Okla. 1973); Magids v. American Title Ins. Co., 473 S.W.2d 460 (Tex. 1971).

indicated perceptive awareness that a contract is "an agreement, upon sufficient consideration, to do or not to do a particular thing."[15] Consonant with contract law, the promises of the husband and wife not to change their testamentary dispositions have been held to constitute adequate consideration for the agreement for the mutual wills.[16] In other words, a promise for a promise there must be to establish the bilateral contract.[17] However, in *Oursler v. Armstrong*,[18] the New York Court of Appeals held that the mere confidentiality of the relationship between husband and wife did not establish the "promise for a promise" requisite of a bilateral contract and hence rejected the contention that the wills of the husband and wife were contractual. The facts of the case are a familiar pattern: Charles Fulton Oursler had two children by his first wife and two children by his second wife. Oursler and his second wife, Grace, executed wills at the same time before the same attesting witnesses. The husband's will provided that his residuary estate would go to his second wife; but if he survived her, it would go to the four children of both of his marriages, or to their children. The will of the second wife, Grace, provided that her residuary estate should go to her husband, but if she survived him, the property coming to her from Oursler would go to the same four children of both marriages, or to their children. Oursler died in 1952. Grace survived him. On January 21, 1955, in the year of her death, the second wife made a new will which will left everything to her two children of her first marriage and left nothing to the children of Oursler's first marriage.

In *Oursler* the children of the first marriage sought to impress the familiar remedy of constructive trust on the property received by the second wife under Oursler's will. In rejecting the contentions that a constructive trust should be imposed upon the property the second wife received from Oursler, the New York Court of Appeals concluded that the evidence did not establish any promise by the second wife to renounce or in any way to stultify her power of testamentary disposition. The court specifically rejected the rationale of the lower courts which sought to impose a constructive trust by equating the moral obligation of the second wife to the concept of quasi-contract implied in law. The court did not find that the basic requisites of a bilateral contract had been established. In reaching this conclusion, the court dismissed the contention that the mere execution of reciprocal wills by husband and wife established that such wills were contractual. The court stressed that the mere confidentiality of the spousal relationship does not establish the requisite contract.

Various courts have made the fundamental observation that whether

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[15] Johnson v. Central Nat'l Ins. Co., 210 Tenn. 24, 34, 356 S.W.2d 277, 281 (1962).
[16] Geiger v. Geiger, 185 Neb. 700, 178 N.W.2d 575 (1970).
[17] Twombly v. Twombly, 489 P.2d 475 (Okla. 1971).
[18] 10 N.Y.2d 385, 179 N.E.2d 489, 223 N.Y.S. 477 (1961).

a will is contractual or not involves a question of fact which must be established by competent evidence.[19] It is worthy of specific note that in a decision by the Supreme Court of Oklahoma[20] in which, despite the somewhat incredible situation that the respective wills of the husband and wife were set forth in one document with accompanying language such as "we the undersigned" and various references in the one testamentary document to "our will," the court held that the proof did not show that the surviving husband had been legally obligated by oral contract not to revoke the joint will of the husband and wife. It was further held that the husband was then free to revoke such will by executing a different will following the death of his wife. The action was maintained by a grandson against the grandfather's second wife and others to recover realty allegedly devised to the grandson in his grandparent's joint will which was alleged to be contractual. The land was distributed to his grandfather after his grandmother's death, but much to the pique of the grandson, his grandfather executed a different will which did not include the grandson as a beneficiary. The court held that, absent the showing of contract between grandfather and grandmother, there was no basis for the imposition of a constructive trust. Here, rather significantly, the court concluded that the execution of joint wills by the husband and wife as a single testamentary document is not sufficient, of itself, to establish the contractual relationship.

Other courts,[21] however, have given substantial weight to the use of a single document as the joint will of a husband and wife as manifesting contractual "mutual assent" that the will not subsequently be changed. These courts have said that the joint nature of the will does not of itself establish it to be the result of a pre-existing agreement, but have added that this type of will using the pronouns "we" and "our" may be sufficient as circumstantial evidence to indicate that the joint will was executed pursuant to a contractual arrangement. In this respect, the Supreme Court of Kansas,[22] in finding the joint will of a husband and wife to be contractual, concluded:

> In arriving at this conclusion we fingered these factors: the use of the plural words "we" and "ours" throughout the will; the directions contained for the disposition of the testators' property after the death of the survivor; and the carefully drawn provisions for the disposition of any share of a lapsed residuary bequest.[23]

In this decision, the court also discussed the familiar ramifications of

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[19] Estate of Randall v. McKibben, 191 N.W.2d 693 (Iowa 1971); *In re* Estate of Chronister, 203 Kan. 366, 454 P.2d 438 (1969).

[20] Twombly v. Twombly, 489 P.2d 475 (Okla. 1971).

[21] *In re* Estate of Chronister, 203 Kan. 366, 454 P.2d 438 (1969); Estate of Chayka, 47 Wis. 2d 102, 176 N.W.2d 561 (1970).

[22] *In re* Estate of Chronister, 203 Kan. 366, 454 P.2d 438 (1969).

[23] *Id.* at 371, 454 P.2d at 442.

the parole evidence rule and concluded that since the joint will indicated on its face that it was contractual in nature, extrinsic evidence was not admissible to prove otherwise.[24]

The Supreme Court of Texas[25] has taken the familiar view that wills, as distinguished from contracts, are revocable because a will is ambulatory in the sense that it may be changed and that it speaks only at the time of the death of the maker. However, the court specifically recognized that upon proper proof of a binding contract to make testamentary disposition of certain property, the contractual arrangement becomes irrevocable after the death of one of the contracting parties. Thereafter such contract may be enforced even though the survivor's will, made pursuant thereto, has been changed or revoked. Thus the court adverted to the familiar rule that the contract and not the will becomes irrevocable.[26]

It is further manifested by the decided cases that when a husband and wife do not use a single document as their joint testamentary disposition, but instead execute separate wills which are reciprocal in their terms, mere proof of the execution of the separate wills does not establish that the wills were executed pursuant to a contract between the spouses.[27] A federal court[28] has also concluded that the mere execution of reciprocal wills, in itself, is insufficient under the applicable state law (Iowa) to establish the requisite contract mutual assent.

SOME JUDICIAL MUSINGS ON THE EVIDENTIARY PROBLEMS IN ESTABLISHING CONTRACTUAL WILLS

Only a brief and summary reference will be made to the evidentiary problems presented in seeking to establish that the wills of a husband and wife are executed pursuant to contract. These matters of proof are tempered with the continuing caveat that even though one is successful in his evidentiary presentation he may ultimately have substantial regrets relative to the establishment of the contract. Such contracts effectively convert the surviving spouse's interest into the equivalent of a life estate which is a terminable interest not qualifying for the marital deduction under the federal estate tax.[29]

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[24] It goes without saying that where a contract is not intended, it is important that the language in the joint wills does not reflect otherwise.

[25] Magids v. American Title Ins. Co., 473 S.W.2d 460 (Tex. 1971).

[26] *Id.* at 464. As an evidentiary matter, the court found that a contract between the husband and wife had not been established. *See* Crail v. Blakely, 8 Cal. 3d 744, 505 P.2d 1027, 106 Cal. Rptr. 187 (1973); Estate of Schultz, 53 Wis. 2d 643, 193 N.W.2d 655 (1972).

[27] Oursler v. Armstrong, 10 N.Y.2d 385, 179 N.E.2d 489, 223 N.Y.S. 477 (1961); Fanning v. Fanning, 302 A.2d 299 (R.I. 1973).

[28] United States v. Ford, 377 F.2d 93 (8th Cir. 1967).

[29] Estate of Opal v. Comm'r, 450 F.2d 1085 (2d Cir. 1971); Batterton v. United States, 406 F.2d 247 (5th Cir. 1969).

The person contending that the surviving spouse breached an agreement relative to the execution of wills between husband and wife has the burden of proving such contractual arrangements by clear and convincing evidence.[30] But, mere proof that husband and wife executed separate wills which were reciprocal in their terms is not enough to establish the contract.[31] Moreover, if the evidence of the contract to make a will rests wholly in oral testimony the proof must be clear, satisfactory and convincing.[32] The requirement that the oral agreement to make a will be established by clear and convincing evidence is for the edification and guidance of the trial court and is not a standard for appellate review.[33] It has been held that a greater quantum of proof than the mere execution of a joint will is essential to the creation of a mutual and contractual will, and that the proof may be by extrinsic evidence or may appear on the face of the will, or both.[34]

A person seeking to establish that a will was executed pursuant to an oral contract may face the formidable obstacles of the typical state "dead man" statute. Those obstacles, however, may not be insurmountable. In a recent Georgia case,[35] the second wife in a rather typical December-June marriage overcame the dead man statute and established the contractual will by producing three other witnesses who did testify to the existence and terms of the contractual arrangement between the husband and wife. The decision also indicated that under these and similar circumstances, contractual wills must be established by proof which is certain, definite and clear and that such proof must establish the existence of the contract beyond a reasonable doubt. The reference to "beyond a reasonable doubt" as a quantum of proof in this decision seems to be a rather singular borrowing of the proof concepts in criminal proceedings.

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30 Fanning v. Fanning, 302 A.2d 299, 300 (R.I. 1973).

31 *Id.* at 300. United States v. Ford, 377 F.2d 93, 96 (8th Cir. 1967). As pointed out previously, there are divergent judicial viewpoints with respect to the evidentiary impact of the so-called joint will wherein a husband and wife set forth their testamentary desires in one document characterized typically by use of the pronouns "we" and "ours." Those viewpoints fall into two basic categories. One group of courts holds that the execution of a single document as the respective joint wills of the husband and wife is not sufficient to show that the wills were executed pursuant to a contract. *E.g.*, Twombly v. Twombly, 489 P.2d 475 (Okla. 1971). However, a substantial number of courts have taken the view that while the mere execution of joint wills in a single document is not sufficient, in and of itself, to establish that execution was pursuant to a contractual arrangement, the presence of such pronouns as "we" and "ours" are reflective of contractual intent. *In re* Estate of Chronister, 203 Kan. 366, 454 P.2d 438 (1969); *In re* Estate of Bright, 482 S.W.2d 555 (Tenn. 1972); Estate of Chayka, 47 Wis. 2d 102, 176 N.W.2d 561 (1970); *see* notes 20-24 *supra*, and accompanying text.

32 *In re* Estate of Beaver, 206 N.W.2d 692, 698 (Iowa 1973).

33 Crail v. Blakely, 8 Cal. 3d 744, 505 P.2d 1027, 106 Cal. Rptr. 187 (1973).

34 Estate of Randall v. McKibben, 191 N.W.2d 693, 699 (Iowa 1971).

35 Liberty Bank & Trust Co. v. Diamond, 229 Ga. 677, 194 S.E.2d 91 (1972).

Absent a statute of frauds problem, courts[36] have given approval to oral contracts to make or not to change wills. But typical statutes of frauds[37] do provide that contracts to make a will are not enforceable unless they are in writing and signed by the maker, or by some other person at the maker's express direction. Moreover, a recent decision of the California Supreme Court[38] has interpreted a similar statute of frauds to likewise require that contractual agreements not to change wills be in writing. Notwithstanding its ostensible applicability, the statute of frauds may not provide the last word. The same California court also held that a change of position (in this case the wife's suicide) in reliance upon an oral contract not to change a will estopps one from using the statute of frauds as a defense.[39]

JUDICIAL ENFORCEMENT OF CONTRACTUAL WILLS: A STUDY OF BROKEN PROMISES

To avoid inordinate verbosity, reference will be made to only a selected number of court decisions reflective of judicial enforcement of contractual wills when it has been established by proper evidence that husband and wife wills were executed pursuant to a valid agreement.

Estate of Chayka,[40] a 1970 case in the Supreme Court of Wisconsin, has received much judicial attention. A husband and wife executed what the court described as a joint, mutual and reciprocal will which consisted of just one document using the pronouns "we" and "our" giving the property to the survivor and providing that on the death of the survivor the property should go to a named third person. The husband died and the surviving wife gave most of the property which she received pursuant to her husband's will to her second husband by inter vivos gift and thus there was little property left for disposition under the wife's will to the third person designated in the joint and contractual wills of the wife and her first husband. The court concluded that the wife had, by her action, complied only with the form of the contractual will but not its substance. Hence, her action of giving such property, taken under the will of her first husband, to her second husband by inter vivos gift, breached the covenant of good faith that accompanies any contract.[41]

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[36] *See* Redke v. Silvertrust, 6 Cal. 3d 94, 490 P.2d 805, 98 Cal. Rptr. 293 (1971); Cook v. Cook, 80 Wash. 2d 642, 497 P.2d 584 (1972).

[37] *E.g.,* OHIO REV. CODE ANN. § 2107.04 (Page 1968). *See* Sherman v. Johnson, 159 Ohio St. 209, 112 N.E.2d 326 (1953), applying the Ohio statute.

[38] Crail v. Blakely, 8 Cal. 3d 744, 505 P.2d 1027, 106 Cal. Rptr. 187 (1973).

[39] *Id.* at 752, 505 P.2d at 1033, 106 Cal. Rptr. at 193. *See* McIntosh v. Murphy, 52 Haw. 29, 469 P.2d 177 (1970); RESTATEMENT (SECOND) OF CONTRACTS § 217A (1973).

[40] 47 Wis. 2d 102, 176 N.W.2d 561 (1970).

[41] *Id.* at 108, 176 N.W.2d at 564. The implied covenant of good faith has also been utilized by the California Supreme Court in two decisions enforcing contractual wills. *See* Crail v. Blakely, 8 Cal. 3d 744, 505 P.2d 1027, 106 Cal. Rptr. 187 (1973); Redke v. Silvertrust, 6 Cal. 3d 94, 490 P.2d 805, 98 Cal. Rptr. 293 (1971).

The court, in ordering the second husband to reconvey the property given to him by the second wife back to the estate of the second wife, imposed the familiar remedy of a constructive trust. In concluding that the wife had violated the implied covenant of good faith that is in every contract, the court expressed the following views: The parties who contract to make a joint, mutual and reciprocal will may express such contract in a separate document; state in the joint will that it is contractual; or the court may presume the contract from the fact that a joint will was executed. In this factual pattern the court used the term "joint will" to connote that husband and wife executed a single document as their testamentary agreement. The court made the familiar statement that a will is ambulatory, speaking only from the death of the maker. But the court further concluded that if the wills of a husband and wife were made pursuant to a contractual arrangement, then upon the death of one of the spouses such contract becomes irrevocable because the survivor has received the consideration promised.

In a subsequent decision, *In re Estate of Schultz*,[42] the Supreme Court of Wisconsin cited its *Chayka* decision of the previous year for the proposition that two persons may enter into an agreement to make joint, mutual and reciprocal wills to dispose of their respective estates according to some mutually agreeable plan. The court clearly pointed out that those seeking the protection of contractual wills must observe procedural and remedial niceties. Those seeking to enforce the contractual wills had legally protested the admission of the new will of the surviving wife to probate. The court held that this was an improper remedy, that the changed will of the deceased wife could properly be admitted to probate, and that the remedy for those parties relying on the prior joint and contractual will was the commencement of an action in equity to enforce the contract rather than challenging the later will which expressly revoked the joint will of the husband and wife.

At this point a 1968 decision of the Supreme Court of Iowa should be noted. In *McCuen v. Hartsock*,[43] the evidence clearly established that the husband and wife had entered into a joint and contractual will. The facts further established that the husband received the proceeds of savings accounts as the surviving joint tenant on the death of his wife, which property, of course, is not passed by testamentary disposition.[44] The

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[42] 53 Wis. 2d 643, 193 N.W.2d 655 (1972).

[43] 159 N.W.2d 455 (Iowa 1968).

[44] Estate of Peters v. Comm'r, 386 F.2d 404 (4th Cir. 1967); United States v. Ford, 377 F.2d 93 (8th Cir. 1967); Steinhauser v. Repko, 30 Ohio St. 2d 262, 285 N.E.2d 55 (1972). But not all alleged joint tenancy with right of survivorship devices are valid, for the courts look through mere form to the "realities of ownership." *See* O'Hair v. O'Hair, 109 Ariz. 236, 508 P.2d 66 (1973) (joint tenancy with right of survivorship not established between husband and wife). *See also In re* Estate of Duiquid, 24 Ohio St. 2d 137, 265 N.E.2d 287 (1970).

husband, in turn, established joint bank accounts with right of survivorship in his son by utilizing the proceeds of the previous savings accounts which the husband took by right of survivorship as a joint tenant with his wife. Upon the death of the father, suit was brought to determine ownership of the proceeds of the bank accounts in question.

In the suit it was contended that the son was not entitled to such proceeds as a joint tenant with right of survivorship because the establishment of such account by the husband constituted a breach of the joint and contractual wills of the husband and wife. The court rejected this contention and held that the establishment by the father of the joint bank accounts with right of survivorship in his son did not violate the contractual wills which he and his predeceased wife had executed. The court concluded that the proceeds of the savings accounts did not come to the husband through the estate of his deceased wife, and further that since the husband disposed of such bank account proceeds by inter vivos transfers to his son, such proceeds had never become a part of the husband's estate.

Recently, the Court of Appeals of New York was presented with the question of whether the surviving spouse involved in contractual wills executed by a husband and wife (which consisted of an agreement to devise a specific parcel of real property to named beneficiaries) is privileged to make an inter vivos gift of that same property to a third person. In *Schwartz v. Horn*,[45] the court answered this question in the negative and concluded that the surviving widow could not disregard her contract obligation, and hence could not, after her husband's death, make an inter vivos gift of the property to another. The evidentiary problem was not formidable in this case since each of the separately executed wills of the husband and wife specifically recited that a contract had been entered into by the husband and wife, whereby it was agreed that the respective wills they had executed would not be changed or altered by the parties except upon the written consent first obtained by the other party to the agreement.

Against this factual background the court concluded:

> Mrs. Horn expressly agreed to leave her mile square road home to her son and daughter if she outlived her husband. He did predecease her and, having had the benefit of his bounty, she may not violate her contract with impunity.[46]

The court further reflected the rationale of its decision by the following statement:

> Completely insupportable is the defendant's claim that Mrs. Horn did no more than obligate herself not to change or alter her will

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[45] 31 N.Y.2d 275, 290 N.E.2d 816, 338 N.Y.S.2d 613 (1972).

[46] *Id.* at 278-79, 290 N.E.2d at 817, 338 N.Y.S.2d at 615.

> and that she was free during her lifetime, to do as she desired with the mile square road property.[47]

Hence, without expressly stating so, the court applied the constructive condition of the "implied covenant of good faith"[48] that is in every contract and concluded that inter vivos gifts by the surviving spouse contrary to the contractual will agreement is an actionable breach of the contract.

The *Schwartz* litigation was precipitated by an action by the beneficiary of the contractual wills to recover the real property which was devised under the mutual will, but which the surviving spouse had given to a third person. The court further concluded that a mutual and contractual will under these facts would not prohibit the surviving testator from transferring the property, even if such transfer defeated the purpose of the contractual will arrangement, when the property or its proceeds are used to meet the daily needs of such surviving spouse.[49] Because of a lack of proof on this point, the case was remanded with the observation by the court that if the plaintiff could prove the allegations of her complaint that on remand she would be entitled to a remedy in the nature of a constructive trust.

In a 1972 decision, *In re Estate of Philips*,[50] the Supreme Court of Wisconsin reaffirmed the rationale of its *Chayka* decision. Again the Wisconsin court applied the concept that a joint will (in its contractual aspects) becomes irrevocable at the time one party dies. In this unique factual pattern, a doctor and his wife executed a single document as their respective wills using the familiar pronouns "we" and "our" and the usual indications of mutual assent. With commendable candor the doctor and his wife further recited in the single will document that it was agreed by the survivor, to whom all of the property had been devised and bequested, that after the death of both testators the property would be divided equally among the testators' respective heirs. The novel and unique question in this case, which literally transcended the obvious contract obligation, was presented because the wife who received $33,919 from her husband's estate then by clairvoyant or adroit investment policies increased the value of the estate to $451,042 at the time of her death. There was, understandably, no unanimity of opinion among the heirs of the husband and the heirs of the wife as to whether the heirs of the husband would participate equally in the entire estate of $451,042. The contractual wills defined "equal division" as one-half of the entire joint property of the testators at the time of the first testator's death. It was held by the court that the heirs of the husband, under the contractual will

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[47] *Id.* at 279, 290 N.E.2d at 818, 338 N.Y.S.2d at 616.

[48] *See* notes 40-41 *supra* and accompanying text.

[49] 31 N.Y.2d at 280-81, 290 N.E.2d at 819, 338 N.Y.S.2d at 617.

[50] 54 Wis. 2d 296, 195 N.W.2d 485 (1972).

arrangement, would participate equally with the heirs of the wife in the entire value of the estate of $451,042. In this respect the court concluded:

> At the time of her death, Mrs. Philips possessed no assets independently acquired by way of other inheritance, gift or otherwise; her entire estate of over $451,000 was the result of the investment, sale and reinvestment of assets received from her husband's estate in 1946.[51]

The Supreme Court of Nebraska has joined the numerous courts that have enforced contractual wills. In *Geiger v. Geiger*,[52] the court concluded that the mutual promises of the husband and wife constituted adequate consideration for the agreement not to change their respective wills, and that the husband could not, after the death of his wife, execute a new will with substantial changes. In so holding, the court was, of course, following the established principle that while a will is ambulatory and may be changed, even if made pursuant to a contract, such change will be a breach of the contractual arrangement and will be appropriately enforced. In this case the court ordered that the estate of the deceased husband be distributed in accordance with the provision of his prior will made pursuant to contract with his predeceased spouse. The court noted that "the agreement . . . was not revocable."[53]

A 1971 decision of the Supreme Court of Iowa clearly reflects that court's commitment to the enforcement of contractual wills despite its prior decision in *McCuen v. Hartsock*[54] which held that contractual wills do not affect property received by the surviving spouse as joint tenant with right of survivorship in a bank account. In *Estate of Randell v. McKibben*[55] the court held that where husband and wife had executed joint wills and codicils and where there was obviously a bilateral contract superimposed upon their respective wills, such contractual wills governed the disposition of all of the surviving widow's estate. The court further held that a subsequent will executed by the surviving wife in contravention of her contractual arrangement with her husband was not effectual. In a declaratory judgment action, ownership of the real property was determined in favor of those beneficiaries under the prior contractual will.

In *Crail v. Blakely*,[56] a case which had been previously referred to, the Supreme Court of California was faced with a tragic factual situation in which a wife became so apprehensive that her husband would subsequently change their respective wills, which were executed pursuant to an oral contract, that she committed suicide. The evidence established

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51 *Id.* at 299, 195 N.W.2d at 487.

52 185 Neb. 700, 178 N.W.2d 575 (1970).

53 *Id.* at 702, 178 N.W.2d at 576.

54 159 N.W.2d 455 (Iowa 1968).

55 191 N.W.2d 693 (Iowa 1971).

56 8 Cal. 3d 744, 505 P.2d 1027, 106 Cal. Rptr. 187 (1973).

that the respective wills of the husband and wife provided that the first to die was to leave his or her estate to the survivor and the survivor agreed to leave, by testamentary disposition, the combined estate to their children. After the death of the wife, the husband executed another will which did not conform to the contractual testamentary disposition pattern provided for in the oral contract. Various witnesses testified in the trial court as to the contractual arrangement between the husband and wife with respect to their wills. The plaintiffs in this case were the children who brought the suit to enforce the oral agreement between their parents whereby the surviving parent would devise and bequeath all of their combined property to such children. It was further alleged and proven that the father, who survived the mother, left the bulk of his estate to various charities and only one-fourteenth thereof to his children.

The ultimate holding of the court was the imposition of a constructive trust in favor of the children as against those claiming under the second will of the father. Several novel arguments were presented to the court in this case. The defendants asserted that the children's claim for relief should have been denied on the basis of the wife's "unclean hands" in killing herself. It was contended that to enforce the oral contract in favor of the plaintiffs would be contrary to the public policy against suicide. The California Supreme Court retorted that these arguments "border upon frivolity." The court concluded:

> We are not dealing here with a contract contemplating the suicide of one of the parties, but a contract to make and maintain wills leaving property to plaintiffs. Such a contract as we have recently noted, is neither void nor unenforceable as against public policy. . . .[57]

It was held that the defendants were estopped to assert as a defense California's statute of frauds which requires that an agreement to make a will be in writing. The basis of this conclusion was that the evidence showed that the wife had feared that the husband would breach the agreement, or that he might prevail upon her to rescind the agreement. This, coupled with the fact of the wife's suicide, established the requisite change of position in reliance upon the oral agreement necessary to invoke the doctrine of estoppel. Thus, it clearly appears that the California Supreme Court, because it deemed it necessary to invoke the estoppel doctrine, must have concluded that California's somewhat typical statute of frauds is applicable, not only to contracts to make a will, but also to agreements not to change the testamentary dispositions.

Because of its startling contemporary aspects, only one additional case will be referred to. That judicial enforcement of contractual wills has continuing viability is indicated in a May 12, 1973, decision of the Supreme Court of Kansas.[58] In that decision the husband and wife

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[57] *Id.* at 755, 505 P.2d at 1036, 106 Cal. Rptr. at 196.

[58] Seal v. Seal, 212 Kan. 206, 510 P.2d 167 (1973).

executed a typical joint and contractual will whereby each of their wills was set forth in a single document using the familiar pronoun approach of "we bequeath and devise." The thrust of the contractual wills was to create a life estate in the surviving spouse. It was agreed that the remainder interest would be preserved for and would ultimately be distributed to their children. In this rather unusual action, the remaindermen—the children—sought and obtained the appointment of a trustee over the property to prevent the surviving wife from disposing of the property without consideration. The court concluded that under the joint and contractual wills of the husband and wife, the survivor's right of disposition did not include the right to dispose of the property without consideration, and that the contractual limitation extended to all property in the hands of the survivor, regardless of whether it came to the survivor under the will or was in survivor's own name at the time of the other's death. Thus, the court specifically held that the provision in the will, giving the survivor the right to sell, mortgage, lease, encumber or dispose of said property during his or her lifetime, did not include the right to dispose of the property without consideration.

CONTRACT VICTORY: TAX DEFEAT

The basic purpose of the marital deduction granted by section 2056 of the Internal Revenue Code of 1954 is to equate for federal estate tax purposes spouses living in common law jurisdictions to those living in community property states.[59] The Code accomplishes this basic purpose by permitting a deduction in the decedent's estate equal to the value of the property interests which are included in his or her gross estate, and which property is transferred or "passed" to the surviving spouse. The maximum deduction allowable is 50 percent of the "adjusted gross estate" which is defined as the gross estate less the aggregate amount of certain deductions such as claims, losses, etc.[60] In order for the marital deduction to apply, however, it is critical that the property interests passed from the decedent to his or her spouse are not so-called terminable interests. A terminable interest is defined as an interest which will terminate or fail upon the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur.[61] With respect to such terminable interests, no marital deduction will be allowed.[62] It is precisely

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[59] *See* United States v. Stafp, 375 U.S. 118 (1963).

[60] INT. REV. CODE OF 1954 §§ 2053, 2054, 2056(c)(1)-(c)(2)(A).

[61] INT. REV. CODE OF 1954 § 2056(b)(1).

[62] *Id.* The congressional philosophy behind denying the marital deduction to decedents' estates to the extent of any terminable interests passed is based on a desire to prevent the wholesale evasion of the federal estate tax by skillful use of terminable interests. For example, but for the terminable interest rule, a husband in a common law jurisdiction could bequeath a life estate in property to his surviving spouse, which property would then escape taxation in the husband's estate by application of the marital deduction. In turn, the property would escape taxation in the wife's estate because, possessing only a life estate, the property would not be included in her estate at death.

on this point that contractual wills create problems. Courts have held that a contractual obligation superimposed on the testamentary disposition converts what would otherwise have been a bequest or devise in fee simple into a mere life estate, an interest which is obviously terminable upon the death of the surviving spouse.[63]

The general rule that terminable interests do not qualify for the marital deduction has been compromised by a somewhat liberal exception. The exception provides that a life estate, in or out of trust, with the power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or the estate of such surviving spouse, or in favor of either), shall under certain specified statutory conditions qualify for the marital deduction.[64] However, this exception is further restricted by the concluding paragraph of the statute which provides that the exception "shall apply only if such power in the surviving spouse to appoint the entire interest, . . . whether exercisable by will or during life, is exercisable by such spouse alone and in all events."[65] As related to contractual wills, the court in *Estate of Opal v. Comm'r*[66] concluded that

> [t]he power to appoint the entire interest . . . as unqualified owner must include the power to appoint to one's self or one's estate in such a manner that the property will be free of conditions imposed by the testator on the devolution of the property on the survivor's death.[67]

Thus, contractual wills relate to the surviving spouse not having absolute power of appointment over the terminable interest (life estate) passed under the will.[68]

In view of the recent federal court decisions[69] holding that husband and wife contractual wills result in the surviving spouse taking only a life

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[63] Estate of Krampf v. Comm'r, 464 F.2d 1398 (3d Cir. 1972); Estate of Opal v. Comm'r, 450 F.2d 1085 (2d Cir. 1971); Batterton v. United States, 406 F.2d 247 (5th Cir. 1969). A will does not necessarily have to be contractual to impose conditions which will make the interests passed thereunder terminable. In Hansen v. Vinal, 413 F.2d 882 (8th Cir. 1969), a decedent's estate was denied the marital deduction under a will which, while not contractual, devised and bequeathed all of the decedent's property to his wife, conditioned upon the wife's living long enough to survive the probate of the husband's will. Under such a condition, the court found the interests passed to be terminable.

[64] INT. REV. CODE OF 1954 § 2056(b)(5).

[65] *Id.*

[66] 450 F.2d 1085 (2d Cir. 1971).

[67] *Id.* at 1089.

[68] Note, however, that a contractual will imposes obligations on the surviving spouse only as to property passing by the will. Contractual wills do not prevent allowance of the marital deduction as to the following non-probate assets: bank account held in the joint names of the husband and wife with right of survivorship; real estate held by the spouses as joint tenants with right of survivorship, and insurance on one spouse's life payable to the other spouse. United States v. Ford, 377 F.2d 93 (8th Cir. 1967).

[69] *See* cases cited note 63 *supra.*

estate with the subsequent loss of the marital deduction in the estate of the first spouse to die, it would indeed take a most sanguine outlook to view the judicial enforcement of the contract as overshadowing the tax loss. Since the marital deduction grants a maximum deduction of 50 percent of the decedent's adjusted gross estate passing to the surviving spouse, one need not resort to an abacus to grasp the tax impact of losing the marital deduction in the face of federal estate tax rates which range from 3 to 77 percent.[70]

CONCLUSION

It would be indulging in random speculation to proffer definitive reasons and rationale for what seems to be an increasing quest of spouses for the euphoric comfort of executing their wills pursuant to a contract which commits them not to change the testamentary dispositive pattern agreed upon. Not only have such wills resulted in a proliferation of litigation with the resultant uncertainty and delay in estate administration and distribution, but also the transcendent and superimposed contract burden has been held by an increasing number of federal courts to grant the surviving spouse only the legal equivalent of a life estate which does not qualify for the marital deduction under the federal estate tax law. The loss of the marital deduction in the estate of the first spouse to die and the possibly disastrous tax consequence associated with that loss suggest the obvious; devises under contractual wills should be avoided in favor of inter vivos and testamentary trusts. Professional management of the trust assets by a bank trust department to protect the surviving spouse from profligate spending and ingenuous unawareness of the predatory schemers can be gained, with the preservation of the marital deduction by use of trust disposition which conforms to the provisions of the marital deduction provision of the Code. For example, it would seem that the device of the inter vivos trust or the testamentary trust would best serve to allay anxieties beyond the grave while at the same time giving the spouse an interest which, while not the complete equivalent of fee simple title, is certainly a close approximation in that there is a right to income for life with a general power of appointment. Then too, the marital deduction trust which is a frequently used device in estate tax planning (often in response to the qualms of one spouse about the ability or desire of the surviving spouse to appropriately manage and conserve assets and to prevent profligate spending thereof) may be coupled with a supplementary trust whereby the wife is given only a limited power (not a general power) of appointment. The resulting life estate is only a terminable interest and as such is not taxable as a part of the wife's estate at her death. Hence, one tax generation is "skipped" because the trust usually provides for a remainder over to the children of the married couple. It is

[70] INT. REV. CODE OF 1954 § 2001.

beyond the scope of this paper to fully explore "marital deduction trusts" and nonmarital deduction trusts which tax-skip a generation by granting to the surviving spouse only slightly less than the benefits of full ownership, without causing the trust assets to be taxed in the estate of the first spouse to die. Suffice to point out that the benefits of the marital deduction may be preserved if the various requisites of the federal estate tax law are complied with.

Although attorneys, as estate tax planners, can perhaps effect little increase in the marital confidence inspired by trust and devotion, it is suggested that recent court decisions should temper any enthusiasm by attorneys to draft wills for husband and wife clients who seek contractual assurance that things will go as they planned even after death. For judicial enforcement of the contractual wills may turn to bittersweet regrets when the Internal Revenue Service rules that the contractual wills have resulted in only a terminable interest being passed to the surviving spouse, thus depriving the decedent's estate of the marital deduction.

In summation a caveat is appropriate: Avoid contractual wills where death taxes are a planning consideration.