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## Joint and Mutual Wills in West Virginia

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against a continuing trespass could be obtained even though the title is in dispute if there is an action of ejectment pending or about to be brought at law.<sup>13</sup> If the situation is such that the court would grant an injunction if the title were not in dispute, it seems that an injunction should be granted if an action of ejectment is pending where the title is in dispute.<sup>14</sup>

From the foregoing discussion it is easy to see that although equity will settle title where the dispute involves merely a question of law, and will also grant an injunction to restrain trespasses when an enjoinment action is pending or immediately to be brought at law, equity still refuses to exercise its jurisdiction to *settle* a title dispute where issues of fact for the jury are involved.

R. A. K.

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JOINT AND MUTUAL WILLS IN WEST VIRGINIA.—The question of the validity of joint and mutual wills was presented before the court in the case of *Underwood v. Myers*.<sup>1</sup> The court, deciding against the defendant's contention that such wills are invalid, recognized the following principle:

"When mutual and joint wills were first considered by the English courts, they were disapproved and the earlier American decisions also pronounce against them; but the more modern views of the courts of both countries sustain the validity of such wills and declare they are not contrary to public policy."<sup>2</sup>

Therefore, it is seen that the West Virginia court clearly recognizes the validity of joint and mutual wills. With this as a starting point it will be the intended purpose to present the legal effect of such wills as determined from an examination of the West Virginia cases involving joint and mutual wills. It should be noted that this discussion will not consider the effect of attempted revocation prior to the death of either of the makers of the will.

In order to discuss intelligently joint and mutual wills, it is necessary that the terms be clearly defined. In West Virginia a joint will is a testamentary instrument with reciprocal provisions executed pursuant to an agreement or compact jointly signed by two or more persons. Perhaps, an extract from a West Virginia case will best illustrate:

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<sup>13</sup> See *Henline v. Miller*, 117 W. Va. 439, 443, 185 S.E. 852, 853 (1936).

<sup>14</sup> Cf. *West Virginia Development Co. v. Preston County Development Co.*, 76 W. Va. 492, 495, 85 S.E. 668, 669 (1915).

<sup>1</sup> 107 W. Va. 57, 146 S.E. 896 (1929).

<sup>2</sup> *Id.* at 59, 146 S.E. at 896.

"We hereby will and bequeath to Mary Belle Myer all of the land . . . of which we, or either of us, may die seized or possessed, but the said real estate . . . shall not pass to the said Mary . . . so long as either of us . . . shall live, but after the death of the last survivor of this will the said real estate shall pass to . . . the said Mary . . . in fee."<sup>3</sup>

In *Black's Law Dictionary*,<sup>4</sup> mutual wills are defined as "the separate wills of two people which are reciprocal in provision. *Child v. Smith*, 225 Iowa 1205, 282 N.W. 316, 321." A further definition of mutual wills in the same authority is "Or those executed pursuant to agreement or compact between two or more persons to dispose of their property in particular manner, each in consideration of the other." *Maloney v. Rose*, 224 Iowa 1071, 277 N.W. 572, 574." The West Virginia court generally refers to mutual wills by the former definition.<sup>5</sup>

It is apparent herefrom that the term "mutual wills" may be subject to several meanings which are clearly ambiguous. For example, two wills may be reciprocal in provisions, and yet completely devoid of any contractual agreement or compact. As far as can be determined, the ambiguity, although existing, has not effected any misunderstanding in the court's decisions in West Virginia. However, for the purpose of clear understanding, in this note executed wills with reciprocal provisions will be referred to as mutual wills; and if such wills were executed pursuant to an agreement between the parties to dispose of their property in a particular manner, the wills will be referred to as "mutual contractual wills."

In the *Underwood* case, the validity of the joint will was upheld, and the reciprocal provisions therein were held to be prima facie evidence of the contractual agreement between the parties. It is therefore seen that in order to establish joint and mutual contractual wills, it is necessary to prove a contractual agreement. It is important to recognize that certain presumptions in establishing the contractual agreement are applied by the West Virginia court. However, in reference to these presumptions, our court makes a distinction as to the presumption which is applicable, depending upon whether a joint or mutual will is in controversy. In the *Underwood* case, the only West Virginia case which involved a joint will, the court held that the reciprocal provisions of the will evidenced that the will was the result of a contractual agreement between the parties. However, in the *Wilson* case, the court

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<sup>3</sup> *Id.* at 57-58, 146 S.E. at 896.

<sup>4</sup> 4th ed. 1951.

<sup>5</sup> See *Wilson v. Starbuck*, 116 W. Va. 554, 182 S.E. 539 (1935).

held that the making of separate wills with reciprocal provisions was insufficient to establish the necessary contractual element; but the court further declared that where the circumstances surrounding the making of separate but identical wills by husband and wife, by the terms of which each was made the sole beneficiary of the other, are such that all the elements of the making of a joint will are present, the wills will be regarded as tantamount to a joint will with their reciprocal provisions evidencing a contractual agreement between the makers.

Again, it is seen that loose usage of terminology is being applied in these cases. The court speaks of separate wills which is a requisite of mutual contractual wills. Yet, the language clearly states: "... if the *elements* of the making of a joint will are present . . . ."<sup>6</sup> An important element of making a joint will is that the same instrument be signed by two or more persons. The legal principles set forth are sound and seemingly understandable, but the language of the court, in itself, is completely conflicting. If the language is to be construed literally, it would be necessary, in order to establish mutual contractual wills, to establish the elements of a joint will which hardly seems to be within the realm of possibility.

Upon further examination of the cases, it appears that the difference between joint and mutual wills, in addition to their form, lies in the fact that a joint will enjoys a presumption that the parties intended a contractual arrangement; whereas in a mutual will, reciprocal provisions are only some evidence of a contractual agreement, and surrounding circumstances, such as preparation of the separate wills at the same time, and attested to by the same witnesses, are required to show the contractual intent of the parties.

It is interesting to compare the results of two West Virginia cases involving mutual wills of similar nature. In the *Wilson* case, the court held that the two separate wills involved were mutual wills and sufficient to establish the contract to dispose of their property in a particular manner. However, in *Matter of Werkman*,<sup>7</sup> the court reached a contrary result, and held that the mutually executed wills did not create the necessary contractual agreement. In the former case, the surrounding circumstances were found to be sufficient to establish the intent to enter a con-

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<sup>6</sup> Pt. 1 of the syllabus by the court. Italics supplied.

<sup>7</sup> 122 W. Va. 583, 13 S.E.2d 73 (1940).

tractual agreement; while as has been shown in the latter case a contrary decision was reached.

What then was the distinguishing feature that brought about the diverse decisions? In the *Wilson* case, the evidence showed that on the same day in the presence of each other, husband and wife executed separate but identical wills, subscribed to by the same witnesses, in which each was made the sole and absolute beneficiary of the entire estate of the other. In the *Werkman* case, the evidence showed that on the same day in the presence of each other, husband and wife executed separate wills in which each was made the sole and absolute beneficiary of the entire estate of the other. The provisions of the wills were practically identical. They were signed by husband and wife and witnessed by the same witnesses, at the same time, all in the presence of each other. Also, it was found that the wills were written on the same typewriter and were placed in the same safety deposit box under the joint names of the makers of the wills.

It would seem that, upon the immediate facts available, there was not any distinguishing features involved in the cases that would justify two completely different decisions. The court in the *Werkman* case attempted to distinguish the *Wilson* case upon the basis that the record before them failed to show, except by inference, that the wife had any knowledge of the contents of the will of her husband. The court further said that they could surmise that she did have such knowledge. However, the court subsequently refused to say that from this inference, they could find that, based thereon, the wife must have had such knowledge, and that the two wills must in effect be held as joint and to come within the holding of the *Wilson* case.

Certainly, if the court is to be consistent with its stated policy of relying on presumptions in cases of this nature, it is necessary for it to resort to evident inferences. However, in the *Werkman* case, the court stated that the fundamental rule in the construction of wills is that the intention of the testator, if not inconsistent with some established rule of construction, must control. It is worthy to note that in the Illinois case of *Kaiser v. Cobbey*,<sup>8</sup> it was held that contracts to make wills are not favored, and the court will be more strict in examining into the nature of such contracts than with other contracts. Perhaps, the court in the *Werkman* case was directing its decision upon the same line as the Illinois court.

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<sup>8</sup> 400 Ill. 214, 79 N.E.2d 604 (1948).

Also, in arriving at the intention of the parties, it would seem that a more equitable result was reached by holding that the necessary contractual agreement was not present in the *Werkman* case, as the survivor of the original makers seemed to be more inclined toward his wife's heirs than his own heirs.

If the parties desire the separate wills to serve as a contract, it is only necessary for them to make a mere recital of this fact. It is submitted that the parties should be explicit in expressly providing for their desired results, for if reliance is made upon the supposed existing presumptions, their intended desires may be wholly denied due to insufficient evidence to indicate that the wills were made pursuant to a testamentary agreement.

Assuming now that we have joint or mutual contractual wills with sufficient facts and surrounding circumstances to evidence a contractual agreement between the testators, what validity is to be given the will of the survivor? For purposes of simplicity, joint and mutual wills shall be considered separately, in discussing what validity, if any, will be given to the will of the survivor in West Virginia.

The legal effect of a joint will upon the death of one of the makers appears to be well settled in West Virginia by the *Underwood* case. In that case the court declared that when the survivor has accepted the benefits under the will, the agreement becomes obligatory upon him and may be enforced in equity against his estate by a remainderman under the will. This would seem to be in accord with the prevailing view.<sup>9</sup>

Ordinarily, it would make no difference if the survivor's will is held to be operative or inoperative, upon the death of the predeceaser. Generally, upon the death of the survivor, the issue of the marriage would be the beneficiaries either by intestacy, if the will is considered inoperative, or by virtue of the anti-lapse statute in the event that the survivor's will is held to be operative. However, circumstances may arise whereby part or all of the issue of the predeceased are of a former marriage or illegitimate children. Had the survivor been the beneficiary of the provisions in the predeceaser's will, will the court now probate the survivor's will to pass all the property back to the predeceaser, which by operation

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<sup>9</sup> "If one of the parties to a joint or mutual will die without having revoked it, and the survivor benefit thereby, the will may be revoked in equity, as a compact, against revocation by the survivor, or, after the survivor's death, the agreement is enforceable in favor of third persons whose rights he disregarded by a new subsequent will." WOERNER, *AMERICAN LAW OF ADMINISTRATION* § 37 (3d ed. 1925).

of the anti-lapse statute,<sup>10</sup> gives what was formerly the predeceaser's property, plus the property of the survivor, to the predeceaser's issue? The court, in the case of *In re Reed*,<sup>11</sup> by declaring the will of the survivor inoperative, has obviated this seemingly illogical result, that is, passing the property through the predeceaser's heirs.

Grounding their decision on the oft-mentioned contractual agreement, the court in the *Reed* case declared that the contract was performed when the first dies, and that the survivor "shall take an indefeasible estate in all the property of the first to die." As is stated in the *Wilson* case, "The full and absolute power of alienation is certainly repugnant to the notion that the survivor is under a contractual obligation to keep his property intact and his will unrevoked so that it will pass by virtue of the contract to the heirs and distributees of the first to die."<sup>12</sup> Thus, the survivor may alienate the devised or bequeathed property at his volition, and may, *a fortiori*, make a new will disposing of his property as he sees fit.

Attention is now directed to the holding of the court in *Turner v. Theiss*,<sup>13</sup> the latest West Virginia case on mutual contractual wills.

"An agreement, duly established by proof and pursuant to which mutual and reciprocal wills are executed, providing for the testamentary disposition of the estates of the parties to such agreement, will, upon the death of a party thereto, and acceptance by the survivor of benefits under the will of the party so dying, be specifically enforced, after the death of the survivor, at the suit of beneficiaries under said mutual and reciprocal wills."<sup>14</sup>

At first blush, this case appears wholly repugnant to prior decisions. The earlier cases held the will of the survivor inoperative; here the court affirms a decree for specific performance. It is then necessary to compare the *Turner* case with the prior cases on mutual contractual wills to determine the reason for the court's apparent deviation. In each of the prior cases, the object of the mutual contractual wills was to vest in the survivors the substantial part or entire estate of the first to die; therefore once having attained that object, the will of the survivor became inoperative. However, the questions presented in the *Turner* case had no relation to lapsed devises or legacies. The makers, after devising and bequeathing their respective estates to the survivor thereof, went

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<sup>10</sup> W. VA. CODE c. 41, art. 3, § 3 (Michie, 1949).

<sup>11</sup> 125 W. Va. 555, 26 S.E.2d 222 (1943).

<sup>12</sup> 116 W. Va. at 561, 182 S.E. at 542.

<sup>13</sup> 129 W. Va. 23, 38 S.E.2d 369 (1946).

<sup>14</sup> *Id.*, syl. 1.

further and provided that the estate of the survivor should go to certain named kinsmen of both. As previously stated, in the earlier cases the effect given to the survivor's will was to declare it inoperative due to the necessity of avoiding the results of the anti-lapse statute. Here definite gifts-over were provided after the death of the last survivor; therefore, the anti-lapse statute would have no effect upon the result.

Thus the distinction: where the agreement to make mutual contractual wills contains specific provisions for limitations over, followed by the execution of the wills, the survivor's will not only remains operative, but is held to the terms of the testamentary agreement. Any attempt by the survivor to make an inconsistent testamentary disposition will thereby be nullified.

It has been shown previously that in the *Werkman* case the will of the surviving spouse was held to be operative. The same result was reached by the court in the *Turner* case. Yet, in the former case the parties protesting the probate of the will failed to show that there was any contractual agreement existing between the makers of the mutual wills; whereas, in the latter case, the wills were found to be mutual contractual wills, and the survivor's will was operative upon his death. This comparison is noted only for the purpose of illustrating that if the wills are merely mutual that obviously the validity of the wills has no effect upon each other. Conversely, if the wills are mutual contractual wills, the provisions of the separate wills have a significant effect upon each other. This has been seen from the prior comparison of the will in the *Turner* case with other wills in West Virginia which have been found to be mutual contractual wills.

It is therefore submitted that the useless litigation created by the execution of joint, mutual, and mutual contractual wills may be avoided by proper draftsmanship. By confronting the makers of the wills with the problems involved, any undesirable law can be avoided and the testamentary intent of the parties may be satisfied. By expressing the intent of the parties in explicit and absolute terms, the drafting attorney will prevent possible attack and meritoriously perform the service which his clients expect and deserve.

I. M. L.