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Iwerson v. Dushek

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NOTES

NOTE: IWERSON v. DUSHEK

Frank and Ida Beals, husband and wife, executed a joint and mutual will in which, after certain bequests to charity, each left the residue of his or her estate to the survivor for life with one half the remainder to go to Ida's brother and sister and the other half to Frank's daughter, pursuant to a common scheme of disposition. In addition, the life tenant was given power to dispose of the property for his or her "care, maintenance, comfort, convenience, recreation and pleasure."¹

Ida died first and Frank, after probating the will and taking Ida's property, attempted to exclude Ida's relatives from the remainder, first, by executing a will leaving it to his daughter, and, second, by placing the property in a trust which, as amended, named his daughter as sole beneficiary.

After Frank's death, Ida's relatives, Dushek and Mabbot, sought to realize their remainder interests by suit against appellant Bettina Iwerson, Frank's daughter, both individually and as executrix of Frank's estate, to compel specific performance of an alleged contract to make joint and mutual wills and to subject Ida's property in her hands to a constructive trust. The Arkansas Supreme Court, affirming the chancellor's decision below, upheld the existence of the claimed contract and struck down Frank's attempts to defeat it. *Iwerson v. Dushek*, 260 Ark. 771, 543 S.W.2d 942 (1976). While a large part of the litigation dealt with the extent of the power of disposition, the principal case is of primary interest for having given supreme court approval to a joint and mutual will and for having indicated how the reciprocal provisions would be enforced.

The definitions of joint, mutual, and joint and mutual wills appear simple and straightforward. A joint will results when two or more persons execute separate wills in one document.² Mutual wills are separate wills of two or more persons having reciprocal provisions.³ A joint and mutual will is a joint will with reciprocal provisions.⁴ While it is possible to have a joint will that is not reciprocal

1. *Iwerson v. Dushek*, 260 Ark. 771, 776, 543 S.W.2d 942, 945-46 (1976).

2. *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909).

3. *Id.* at ____, 90 N.E. 216.

4. *Id.*

in nature, most joint wills are joint and mutual.

The history of joint wills indicates that they had a turbulent beginning. Early cases in England and the United States ruled that joint wills were invalid,⁵ but the general rule today is to the contrary.⁶ They are sometimes ruled invalid today when the devise of a predeceasing testator is not to take effect until the death of the surviving testator.⁷ This results from the rule that a will takes effect, if at all, at the death of the testator.⁸

When the terms of a joint and mutual will are reciprocal only, leaving the estate in fee simple to the survivor with no provisions for third party remaindermen, the survivor is free to make a new will or to die intestate.⁹ The joint and mutual will is valid in this situation only with respect to the first decedent; the will is not effective with respect to the survivor because all terms of the will are fulfilled by the predecease of the co-testator.¹⁰ This could be characterized as a "winner-take-all" situation.

Although reciprocal wills without remainder provisions create relatively few problems, the situation is different when the joint or mutual wills specify a common scheme of distribution to third parties as remaindermen following the life estate of the surviving testator. Complications arise in the determination of the intentions of the joint testators, however, when there is a devise of a remainder pursuant to a common scheme of disposition. The courts must determine whether the common scheme of third party remaindermen is the result of a contract to make reciprocal wills. If the joint will is made pursuant to a contract, either implied, oral or written, the surviving testator is estopped from defeating the provisions of that will after the death of the predeceasing testator.¹¹ If there is no contract, however, the survivor may revoke the joint will.¹²

5. T. Atkinson, *Law of Wills*, 223 (2d ed. 1953).

6. *American Trust & Safe Deposit Co. v. Eckhardt*, 331 Ill. 261, 162 N.E. 843 (1928); *Anderson v. Anderson*, 181 Iowa 578, 164 N.W. 1042 (1917).

7. *Epperson v. White*, 156 Tenn. 155, 299 S.W. 812 (1927); *Hershey v. Clark*, 35 Ark. 17 (1879).

8. *Epperson v. White*, 156 Tenn. 155, 299 S.W. 812 (1927); *Hershey v. Clark*, 35 Ark. 17 (1879).

9. See *Culver v. Hess*, 234 Iowa 877, 14 N.W.2d 692 (1944); *In re Pennington's Estate*, 158 Kan. 495, 148 P.2d 516 (1944).

10. *Culver v. Hess*, 234 Iowa 877, 14 N.W.2d 692 (1944).

11. *Nye v. Bradford*, 144 Tex. 618, 193 S.W.2d 165 (1946); *Culver v. Hess*, 234 Iowa 877, 14 N.W.2d 692 (1944); *Smith v. Thompson*, 250 Mich. 302, 230 N.W. 156 (1930); *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909).

12. In the instance of joint wills with reciprocal terms, many courts address the problem of whether a contract exists by finding an implied contract from the terms of the will and surrounding circumstances, rather than by proof of an oral contract. *Janes v. Rogers*, 224 Ark.

Written contracts to make reciprocal wills may be contained in the will or wills of the testators, or may be represented by separate documents. The terms of these contracts are enforceable as are other written contracts for consideration. The problems concerning contracts to make reciprocal wills arise when there is no written agreement contained either within the will or wills or in separate documents. In such cases an oral contract must be proved or a contract must arise by implication from the wills and surrounding circumstances.¹³

The Statute of Frauds¹⁴ appears to be a bar against the enforceability of oral or implied contracts to make reciprocal wills because such contracts are required to be in writing.¹⁵ However, using the equitable theory of part performance, the courts have upheld such contracts on the basis of equitable estoppel.¹⁶ Although some courts have considered such wills revocable during the concurrent lifetimes of the co-testators, when notice is given,¹⁷ the general rule is that the survivor who takes the benefits of a joint or mutual will made pursuant to a contract is equitably estopped from breaching such a contract even though the contract was not in writing.¹⁸ The courts' language is occasionally to the effect that once the first testator dies, other parties to the contract are estopped from breaching it, and the deceased party is considered to have fully performed thus leaving it unclear whether acceptance of benefits is invariably required.¹⁹

In a situation where an oral or implied contract is alleged, there is still a major problem of proving its existence. It is generally held that the making of joint or mutual wills with reciprocal terms does not suffice to prove the existence of a contract.²⁰ Extrinsic evidence

116, 271 S.W.2d 930 (1954); *Nye v. Bradford*, 144 Tex. 618, 193 S.W.2d 165 (1946); *Culver v. Hess*, 234 Iowa 877, 14 N.W.2d 692 (1944); *Williams v. Williams*, 123 Va. 643, 96 S.E. 749 (1918); *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909).

13. In *Smith v. Thompson*, 250 Mich. 302, 230 N.W. 156 (1930), an oral contract was found to exist for the making of mutual wills.

14. Courts in this particular type of case generally do not specify which Statute of Frauds is being violated.

15. *O'Connor v. Immele*, 77 N.D. 346, 43 N.W.2d 649 (1950).

16. *Id.*

17. *Anderson v. Anderson*, 181 Iowa 578, 164 N.W. 1042 (1917); *McClanahan v. McClanahan*, 77 Wash. 138, 137 P. 479 (1913); *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909).

18. *Nye v. Bradford*, 144 Tex. 618, 193 S.W.2d 165 (1946); *Smith v. Thompson*, 250 Mich. 302, 230 N.W. 156 (1930); *Anderson v. Anderson*, 181 Iowa 578, 164 N.W. 1042 (1917); *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909).

19. *E.g.*, *O'Connor v. Immele*, 77 N.D. 346, 43 N.W.2d 649 (1950) (survivor had accepted benefits under deceased's will.).

20. *Monninger v. Koob*, 405 Ill. 417, 91 N.E.2d 411 (1950); *Knox v. Perkins*, 86 N.H.

is usually required in proving such an agreement,²¹ although the burden of proof appears less difficult to satisfy in the case of joint wills, than when mutual wills are involved.²² This is true because most courts treat the contracts as arising by implication in the instance of joint wills.²³ A court will look at the terms of the will and its form and surrounding circumstances to determine if a contract should be inferred.²⁴ Some courts have gone as far as stating that the contract may be inferred from the joint will document itself.²⁵

Another problem arises in the enforcement of such contracts, written, oral or implied, because the theory of wills differs from that of contracts in that wills are ambulatory while contracts are mutually binding.²⁶ Nevertheless, an injured party such as a beneficiary excluded in a subsequent will finds his remedy not in a contest of the subsequent will in probate, but in an action in equity for specific performance of the contract, or at law for breach of contract.²⁷ In the situation where the contract is oral or implied, the injured party's remedy is usually in equity because of the assertion of equitable doctrines of part performance and equitable estoppel in a suit for specific performance.²⁸

Arkansas law pertaining to reciprocal wills appears to follow the generally prevailing views. A joint will was first held valid in *George v. Smith*.²⁹ However, joint wills which do not take effect until the death of the survivor have been held invalid.³⁰

66, 163 A. 497 (1932); *Canada v. Ihmsen*, 33 Wyo. 439, 240 P. 927 (1925); *Wanger v. Marr*, 257 Mo. 482, 165 S.W. 1027 (1914).

21. *Nye v. Bradford*, 144 Tex. 618, 193 S.W.2d 165 (1946); *Canada v. Ihmsen*, 33 Wyo. 439, 240 P. 927 (1925); *Anderson v. Anderson*, 181 Iowa 578, 164 N.W. 1042 (1917).

22. In *Wanger v. Marr*, 257 Mo. 482, 165 S.W. 1027 (1914), the court discusses the reasoning as to why the burden of proof is less in the situation concerning a joint will. *Cf. Rolls v. Allen*, 204 Cal. 604, 269 P. 450 (1928) (California statute declaring all wills revocable construed to require clear and convincing evidence of any contract binding parties to joint and mutual will agreements.).

23. See note 12 *supra*.

24. See note 12 *supra*.

25. *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909).

26. *Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763 (1924); *Williams v. Williams*, 123 Va. 643, 96 S.E. 749 (1918).

27. *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909).

28. Where the plaintiff invokes the doctrine of part performance to avoid the bar of the Statute of Frauds, he is normally required to sue in equity for specific performance. Estoppel, however, may be invoked at law as well as in equity. Some courts permit either doctrine to be applied at law. See D. Dobbs, *Remedies* 961-64 (1973). Other considerations, however, may make specific performance the more appropriate remedy for enforcement of contracts pertaining to testamentary dispositions. *Supra* note 18, for cases applying equitable estoppel.

29. 216 Ark. 896, 227 S.W.2d 952 (1950).

30. *Hershey v. Clark*, 35 Ark. 17 (1879).

*Janes v. Rogers*³¹ addressed the particular problems concerning implied contracts to make reciprocal wills. The court discussed the ambulatory nature of wills and determined that the remedy was a suit in equity based on specific performance of the provisions of the mutual wills.³² The court held that oral contracts would be enforceable in equity.³³ In the situation where reciprocal wills were made pursuant to an oral contract, the death or acceptance of benefits of the first testator would equitably estop the survivor from breaching the contract by revoking the reciprocal will. The court determined that the burden of proof in such cases would be "clear and convincing evidence."³⁴ This would appear to be a major obstacle in proving the existence of a contract, but the court applied the general rule that such contracts may arise by implication from the will itself and the circumstances surrounding the will's execution.³⁵ The court, using extrinsic evidence, found that an implied contract existed in this particular situation.

To ascertain the reasoning in *Iwerson v. Dushek*,³⁶ attention must be directed to its sister case, *Iwerson v. Mabbott*,³⁷ which involved a construction of the joint will. The court, with knowledge of the pending appeal of *Iwerson II*, limited its determination to the issue of whether the devisee, Frank Beals, given a life estate with powers of disposition during his life, could dispose of such property by his subsequent will. The probate court held that such a disposition was beyond the powers granted to Frank Beals by the life estate.

The appellant, Bettina Iwerson, contended that the power granted with the life estate, although not amounting to a fee simple in the property, was an unlimited power of disposition tantamount to a general power of appointment which included a power to appoint by will. The court was extremely careful to abstain from deciding what powers were granted to decedent Frank Beals during his life. Justice Fogleman hypothesized that, even if Frank Beals had full power to dispose of the property during his life, the general rule is that a person granted a life estate with general powers of disposi-

31. 224 Ark. 116, 271 S.W.2d 930 (1954).

32. *Id.*

33. *Id.* at 119, 271 S.W.2d at 932.

34. *Id.* See also *Crews v. Crews*, 212 Ark. 734, 207 S.W.2d 606 (1948).

35. *Janes v. Rogers*, 224 Ark. 116, 271 S.W.2d 930 (1954).

36. 260 Ark. 771, 543 S.W.2d 942 (1976), hereinafter referred to as *Iwerson II*.

37. *Iwerson v. Mabbott*, No. 75-241 (Ark., July 19, 1976), hereinafter referred to as *Iwerson I*.

tion for life cannot exercise those powers by will.³⁸ The powers granted by such a life estate are *inter vivos*, not testamentary.

The appellant further contended that since the will was executed during Beals' life, he had exercised his general power of disposition during his lifetime. The court held that the execution of a will during an individual's lifetime is not equivalent to an *inter vivos* exercise of the power. A will is not effective until the death of the testator and thus the exercise of the power is not effective until the testator's death.³⁹

Bearing in mind the determinations made in *Iwerson I* and considering the extreme caution used by the court not to determine the extent of Frank Beals' *inter vivos* powers, it is possible to understand the court's reasoning in *Iwerson II*. This case was an appeal from the chancery court decision pertaining to specific performance of a contract to make reciprocal wills between Frank and Ida Beals by Frank Beals' conveyance of Ida Beals' property to a trust.

The court began its discussion by addressing the issue of whether there was a contract to make reciprocal wills. There was no express agreement included in the instrument, and no separate written contract was admitted as evidence. If there was such a contract, it had to be an oral agreement subject to inference from the will and surrounding circumstances.⁴⁰

The court looked at the surrounding circumstances and assumed that the will was drafted primarily to protect Frank Beals' daughter. Frank Beals was thirty years older than Ida Beals and undoubtedly expected to predecease her. Frank had also transferred the bulk of his property to Ida to avoid paying alimony to a previous spouse. Apparently, the purpose of the will was to insure that his daughter would retain a one-half interest in the total estate in case he predeceased Ida Beals. These facts coupled with the simultaneous execution of the joint will were found by the court to be sufficient to permit an inference that Frank and Ida Beals had agreed to a common scheme of distribution. In fact, the form of the will was viewed as being very much like a contract.

With regard to the extent of the powers of disposition granted

38. See *United States v. Moore*, 197 Ark. 664, 124 S.W.2d 807 (1939); *Archer v. Palmer*, 112 Ark. 527, 167 S.W. 99 (1914).

39. The court in *Iwerson I* refers to *State v. Gaughan*, 124 Ark. 548, 187 S.W. 918 (1916), but only states that the opinion appears to stand for the proposition that a general power of disposition during one's life does not authorize the disposition of such property by will. This derived from the fact that the transfer of property does not take effect until the death of the testator.

40. *Janes v. Rogers*, 224 Ark. 116, 271 S.W.2d 930 (1954).

under the life estate, the appellant contended that the terms "recreation and pleasure" in the life estate should allow the transfer of the estate to her by trust. Citing *Galloway v. Sewell*,⁴¹ the court stated the general rule that "the use of a thing does not mean the thing itself, but means that the user is to enjoy, hold, occupy, or have in some manner the benefit thereof"⁴² The use of the life estate did not include the corpus but only the income derived from the corpus. Beals had a limited power of disposition and could not use the property for purposes other than those provided for in the will.⁴³ This did not include the trust arrangement Beals attempted to create.

The court thus determined that a valid contract, arising by implication from the instrument itself as well as extrinsic circumstances, was in effect with regard to the joint and mutual will. This contract could not be rescinded after the death of Ida Beals because she had fully performed and equity would require specific performance of the terms of the joint will. The court concluded by ruling the trust invalid because it violated the contract found in the joint will in addition to having exceeded the powers of disposition granted to the survivor in the life estate from the decedent.

That there was some form of agreement between the Beals pursuant to the making of the will is fairly apparent. However, the court's comparison of the will to a contract presents an interesting prospect. The court in effect found sufficient indication of a contract from the will itself. Granted, the court took into account the surrounding circumstances and found the probable intentions of the will were to insure a one-half interest in the remainder estate to Bettina Iwerson, but there was very little extrinsic evidence of an express oral contract between Frank and Ida Beals.

It is not unusual for a court to find an implied contract from the will,⁴⁴ but the court's comparison of the will to an express written contract significantly reduces the burden of proof required for finding such a contract. In that regard it is noteworthy that the court included the document as an appendix to the opinion. This might be interpreted to mean the court intended to endorse this particular form as a valid and acceptable example of draftmanship of joint wills made pursuant to a contract. However, before whole-

41. 162 Ark. 627, 258 S.W. 655 (1924).

42. *Id.* at 632, 258 S.W. at 656.

43. *Owen v. Dumas*, 200 Ark. 601, 140 S.W.2d 101 (1940); *See also*, *Badgett v. Badgett*, 115 Ark. 9, 170 S.W. 484 (1914); *Chase v. Cartwright*, 53 Ark. 358, 14 S.W. 90 (1890).

44. *See* note 12 *supra*.

sale utilization of this form of joint reciprocal will is implemented, it should be recognized that some problems could arise from this use.

The first warning in regard to the specific form of joint will used in this case is that it does not contain a written contract with definite terms stating the provisions of the agreement. Although the remainder was eventually divided between the named third parties according to the provisions of the joint will, the costs in enforcing the individuals' specific rights most assuredly reduced that amount substantially. When individuals must carry two appeals to the supreme court before a final determination can be reached, it is not beneficial to use such an instrument. A written contract specifically stating the intentions of the parties would seem preferable because it would clarify the issues as to what was intended by the contracting parties. However, considering the extremes to which the court went in affirming this style of joint reciprocal wills, litigation in the future regarding contracts when this specific form is used should be greatly reduced.

In reference to the court's determination that Frank Beals' power of disposition granted under the life estate was limited, it is interesting to note that the court, after being extremely careful not to decide that issue in *Iwerson I*, did not elaborate on it in *Iwerson II*. This again reflects the importance the court placed upon the finding of a contract to make reciprocal wills. Although the court could have easily disposed of this case initially on the basis of limited powers of disposition at least if only Ida's property was involved, they purposely deferred judgment until the issue of reciprocal wills made pursuant to a contract was before them. This conclusion is substantiated by the court's knowledge at the time of *Iwerson I* that *Iwerson II* would be forthcoming.

In particular instances like the present case where spouses have children from previous marriages or specific persons in mind whom they wish to share in the remainder estate, the joint will appears to be an adequate solution to their problem. The binding aspects of the contract insure that the remainder estate will be devised according to a common scheme agreed upon by the co-testators. Unfortunately, this common intent may be frustrated in other ways. Can the survivor frustrate the remainder clause of the joint will by the use of *inter vivos* transfers? Granted, a similar attempt by Frank Beals was disallowed by *Iwerson I*, but these transfers were barred by the specific provisions of the life estate and not by the contract. In fact, Frank Beals did transfer some of what apparently was his separate property to Mrs. Iwerson during his lifetime, but these transfers

were not contested in this litigation.

To place the above question in a better perspective, suppose that Ida Beals had survived Frank Beals. Bearing in mind that the bulk of the property was in her name and not limited by a life estate, assume that she transfers the bulk of the estate to third parties using *inter vivos* transfers. This, in effect, frustrates the purpose of the joint reciprocal will and leaves Mrs. Iwerson out in the cold. Would Mrs. Iwerson have a cause of action to bar or set aside such transfers because they were for the purpose of defeating her remainder share? It must be remembered that the remainder clause of the joint will does not specify particular property but speaks in terms of shares in the bulk estate. This question is not answered in the present case, nor is it addressed in the cases reviewed by this writer. Nevertheless, it is an important question which must be resolved before the joint will becomes a common method of planning clients' estates.

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