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WILLS, ESTATES AND SURROGATE'S PRACTICE

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Mutual or Joint Wills—Promises? Promises?

Recently, the Appellate Division, Second Department discussed (and dispelled) the distinction between joint and mutual wills in the context of a testator's promise not to revoke his or her will.

The court held that the Estates, Powers & Trusts Law (EPTL) § 13-2.1(b) only applies to joint wills and not to mutual wills, but that the same strict requirements codified in the statute for an agreement not to revoke a joint will already exist at common law with respect to mutual wills. See *Schloss v. Koslow*, 20 AD3d 162 (2d Dept. 2005).

Constructive Trust Remedy?

However, the case leaves open the question of whether the equitable remedy of a constructive trust is available in situations where the provisions of the statute (or the requirements of the common law) are not satisfied.

Although "joint will" is not defined in the EPTL, it is generally understood to mean "a single testamentary instrument, which contains the wills of two or more persons, is executed jointly by them, and disposes of property owned jointly, in common, or in severalty by them." *Schloss* at 165. On the other hand, "mutual wills" are understood to be "separate instruments, usually executed at the same time and making similar provisions." *Id.*

In 1983, EPTL § 13-2.1 (the Statute of Frauds for Wills) was amended by the addition of a new paragraph (b), which provides that:

A contract to make a joint will, or not to revoke a joint will, if executed after the effective date of this paragraph can be established only by an express statement in the will that the instrument is a joint will and that the provisions thereof are intended to constitute a contract between the parties. L. 1983, c. 292, § 1. The amendment was enacted to provide certainty so that courts would not find a contractual arrangement between parties to joint wills by inference, where the intent of the parties was otherwise. Although common law required "clear and convincing" evidence to establish a contractually binding joint (or mutual) will, rejecting the notion that



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the mere existence of a joint will was sufficient in and of itself, this principle was inconsistently applied and gradually eroded by the courts.¹

Prior to the amendment, most cases involving joint or mutual wills were in the context of constructive trusts. The classic situation is where a husband and wife execute joint or mutual wills, the surviving spouse obtains the property from the deceased spouse's estate and then changes his or her will thereafter, sometimes disinheriting a child or stepchild. In such situations, the courts have invoked their equity powers to enforce an express or implied agreement to make joint or mutual wills irrevocable. See *Estate of Cohen*, 83 NY2d 148 (1994).

Sometimes the court's task in finding an agreement between the testators was easy, where such wills contained express provisions that the parties intended the instrument(s) to be binding on the survivor. For example, in *Margulis v. Teichman*, 125 Misc2d 729 (Surr. Ct. Nassau Cty. 1984), a joint will executed by a husband and wife contained an express provision that stated that the will was forever binding on each of them and was not to be revoked by either of them without a writing signed by both. In *Schwartz v. Horn*, 31 NY2d 275 (1972), a husband and wife signed mutual wills together with a separate instrument that expressly stated that the wills could not be changed or altered by the parties without the written consent of the other. More often, however, the courts have had to look to other evidence, such as language and circumstance, to find the existence of such a promise or agreement.

Use of Plural Pronouns

A number of cases looked to the existence of collective language and the use of plural pronouns as evidence of a contract to make a contractually binding will. For example, in *Glass v. Battista*, 43

NY2d 620 (1978), the court relied on inferences provided in the joint will between a husband and wife, such as the mutual dependence of the dispositive provisions, through the use of plural pronouns, in holding that the survivor was bound by the will.²

The Law Revision Commission said that the standard of proof used by the courts, such as the existence of plural pronouns, was too lenient. Accordingly, the purpose of the amendment to EPTL § 13-2.1 was to "provide explicit requirements which must be satisfied to establish a contract to make a joint will."³

However, underlying many cases that granted the remedy of constructive trust was an issue of unjust enrichment and courts intervened to provide an equitable remedy to litigants. For example, in *In re Buehler's Estate*, 186 Misc 306 (Surr. Ct. N.Y. Cty. 1945), a testator entered into an oral agreement with his second wife, which provided that he would name her as sole beneficiary under his will in consideration for her promise that she would bequeath all of her property to the testator's daughters. The testator executed his will leaving all his property to his second wife but she did not provide for her stepdaughters as promised. The court stated that "where one obtains a bequest or devise of property upon his representation that he would devote it to the use of one who would otherwise be an object of the testator's bounty and he thereafter refuses to put it to the use promised, a court of equity will enforce the obligation by impressing a trust upon the property in favor of the intended beneficiary."

The basis for imposing a constructive trust is that "equity will not permit the surviving party to accept the benefits of the performance of the agreement by the first decedent and then to breach the agreement by disposing of the parties' estates in a manner inconsistent with their agreement." *Estate of Cohen*, 83 NY2d at 154. However, the Court of Appeals, in *Oursler v. Armstrong*, 10 NY2d 385 (1961), stated that the renunciation of the right to alter or revoke a will is not a casual matter and that the existence of a promise, express or implied, was a vital necessity before a court should impose a constructive trust. The court stated that "the power to dispose of one's property by will is not lightly to be denied even if judges think that the testatrix should have disposed of her estate differently." In that vein, the Law Revision Commission, when recommending the

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passage of EPTL § 13-2.1(b), believed that "strict proof requirements should be enacted to insure courts will no longer find that a joint will was executed pursuant to a contract when this was not the intent of the testators." Memorandum of Law Revision Commission, 1983 Legis. Ann. at 131.

'Schloss v. Koslow'

In *Schloss v. Koslow*, the Second Department, while holding that EPTL § 13-2.1(b) only applies (by its plain terms) to joint wills (see also *Matter of Blake*, New York Law Journal, March 7, 2000 (Surr. Ct. N.Y. Cty.), n.1), also emphasized that the same requirements in the statute for joint wills already existed at common law for mutual wills; that is, there must be some express contractual language as evidence of a testator's intent not to revoke his or her will.

The mutual wills in *Schloss* were signed by husband and wife and included a provision that it was the testator's intention to insure that (i) the total assets accumulated by the testator and his or her spouse during their lives were to be used for the survivor's care, maintenance and nurture and (ii) the remainder of the total estate left by both spouses would be shared equally by the wife's niece and the husband's daughter. The wills also contained an acknowledgment that the other spouse agreed to make a similar disposition in his or her will.

After the wife's death, the husband made a new will which left the bulk of his estate to his daughter. The court found that there was no express contractual language in the wills nor a "clear and unambiguous" statement that the husband promised not to revoke his will, as required by common law, and held that the wife's niece was not entitled to the remedy of a constructive trust.

Some decisions over the past several years, however, continue to raise the question of when a court will invoke its equity powers in the context of joint or mutual wills, i.e., when it will find an underlying agreement or promise notwithstanding that the requirements of the statute are not satisfied.

In *Matter of Pascale*, NYLJ, May 16, 1997, at 27, col. 2 (Surr. Ct. Bronx Cty.), a husband and wife executed mutual wills that divided what was left of the estate of the second spouse between the husband's children of a prior marriage and the wife's nieces and nephews. After the wife's death, the husband changed his will, which effectively left most of his estate (including what he received from his wife's estate) to his children. At the time the husband and wife executed their mutual wills, they did not enter into a written agreement not to revoke their wills. The attorneys-draftspersons testified that the spouses did not indicate they wanted a joint testamentary plan and that the wife had indicated that she planned to execute a new will if her husband died first. The attorneys also testified that they advised their clients that they could change their wills at any time. Nevertheless, the court refused to grant a motion for summary judgment and determined that, although the statute of frauds was not satisfied, the circumstances raised issues of fact of whether the spouses had an implied agreement that would warrant a constructive trust.

'Matter of Blake'

Matter of Blake, NYLJ, March 7, 2000, at 27, col. 3 (Surr. Ct. N.Y. Cty.), involved domestic partners who executed mutual wills in 1990, each leaving his entire estate to the survivor and each providing that one-half of the estate of the survivor would pass to the nephews of one testator and one-half would pass to the nieces and nephews of the other. Three years after one of the testators died, the survivor changed his will, wherein he left his residuary estate to his own nieces and nephew. The petitioners were the nieces and nephews of the predeceased testator. They alleged that based on the identical provisions in the 1990 wills and based on statements to family members, the partners had an agreement to provide for the relatives of the other. The court, acknowledging that the testators failed to comply with the requirements of EPTL § 13-2.1(b), ruled that the remedy of constructive trust was nonetheless available.

'Oursler' Analysis

It is arguable under the *Oursler* analysis, where equity will not intervene absent an underlying promise or agreement, that the remedy of constructive trust is not available if parties to joint or mutual wills choose not to include an express provision that they agree not to revoke the will(s). By their omission, the parties are, in essence, affirmatively stating that mutual promises are not the driving forces to their disposing of their estate in a certain way; they are not executing their wills by virtue of an agreement not to revoke.

Although the omission is a passive act, it is nonetheless an expression of the parties' intent not to bind the survivor forever to the provisions of the instrument. Moreover, through the use of the word "only" in the EPTL, the Legislature provided an exclusive way by which parties could manifest their intent to bind the survivor and, arguably, the exclusive remedy for enforcement.⁴

Traditionally, equity has been used where the law fails to address a particular situation or where the law fails to provide a remedy and EPTL § 13-2.1(b) seems to do both. And, based on the *Schloss* decision, in the context of mutual wills, it would seem that if there is no clear expression of a testator's intent not to revoke his or her will, then there can be no implied promise to that effect, and the remedy is therefore unavailable.

However, in light of the *Pascale* and *Blake* decisions, it is difficult to predict what circumstances will induce a court to invoke its equity powers. Thus, the practitioner has a dilemma as to how to advise his or her clients who are about to execute mutual wills. As recognized by the Second Department in *Estate of Gold*,⁵ "it must be noted that circumstances surrounding the life of the survivor will change after the death of the spouse; events will occur not contemplated at the time of the execution of the joint will. Wills, by their nature, are ambulatory and are not irrevocable.... A surviving spouse may remarry and there may be children of the new marriage. Property subject to the joint will may be destroyed or depleted."⁶

Conclusion

Until the Legislature amends the statute to include mutual wills, perhaps testators should sign a separate statement indicating their intent not to be bound or have a provision to that effect in their wills, to insure no inference is made in the future that the parties agreed to be bound to their existing wills.

Such a signed statement may have other benefits as well, such as the preservation of the marital deduction. Before the Internal Revenue Code (IRC) was changed to allow terminable interest property to qualify for the marital deduction, the marital deduction was not allowed in cases where there was a finding in a joint or reciprocal will situation of a contractual obligation to dispose of the estates of the testators in a specified way.⁷

Notably, such added statements may create their own problems. If a statement appears in one set of wills and not another, does that mean that wills without the statement are meant to make the wills irrevocable? Testators should be able to rely on the strict requirements of the law, which necessitate an express statement for a contract to be found.

1. See *Estate of Lubins*, NYLJ Jan. 22, 1997, p. 30, col. 2 (Surr. Ct. Kings Cty. 1997).

2. See also *Rubenstein v. Mueller*, 19 NY2d 228 (1967) (where will disposed of property on "our" simultaneous death or on death of survivor of "us"); *Rich v. Mottek*, 11 NY2d 90 (1962) (use of plural pronouns "our" and "we"); *Tutunjian v. Verzigian*, 299 NY 315 (1949) (use of "we" instead of "I," "our" instead of "my," "our property," "survivor of us"). Compare *Matter of Aquilino*, 53 Misc2d 811 (Surr. Ct. Nassau Cty. 1967), where similar language was present but the court refused to find an irrevocable contract, stating that "[t]he intention to bind oneself not to alter or revoke a will must be manifested in clear and unambiguous language." 53 Misc2d 812.

3. See Memorandum of Law Revision Commission, 1983 Legis. Ann. at 131; see also *Margulis v. Teichman*, 125 Misc2d 729, 731, 479 NYS2d 953, 955 (Surr. Ct. Nassau Cty. 1984).

4. See Turano, 2002 Practice Commentaries (McKinney's Cons. Laws of N.Y., Book 17B, EPTL § 13-2.1, 2002 Pocket Part at 40).

5. 48 AD2d 851, 369 NYS2d 182 (2d Dept. 1975).

6. 48 AD2d 851. In *Blake*, the court emphasized that the decedent was free to change his will, but that he could not accept the benefits of a mutual promise and then renege on that promise. However, if a court is able to impose a constructive trust in the context of mutual wills, then a testator's right to change his will (or dispose of assets during his lifetime) is not absolute. See *Schwartz v. Horn*, 31 NY2d 275 (1972); *Blackman v. Battock*, 78 NY2d 735 (1991) (Kaye, J., dissenting).

7. In *Siegel v. Comm'r*, 67 TC 662 (1977), the contractual obligation was viewed as a life estate without a general power of appointment. The contractual obligation restricted the spouse's ability to dispose of the property freely and the marital deduction was denied. Query whether the "QTIP" provisions of IRC § 2056 may be employed to save the marital deduction in cases where a constructive trust is imposed or a contract is found.

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