Contracts -- Contracts to Devise -- Effect of Excluded Forced Heirs

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more than a clarification of the meaning of § 1-282, in which case Rule 50 would not be an implicit declaration by the supreme court that § 1-282 is invalid as an infringement on the court’s right to promulgate procedural rules for the appellate division.

As a word of warning to the practicing bar, it should be emphasized that Rule 5 itself does not specifically authorize the trial court to enter successive orders extending the time for docketing the case on appeal. Possibly, then, a trial judge may have jurisdiction to issue only one order extending the time for docketing the appeal. Thus, it may become necessary for the supreme court to adopt a docketing rule, similar to Rule 50, authorizing the trial judge to grant successive extensions of time for docketing the appeal within the one hundred and fifty day limit of Rule 5. Hopefully, in making future rulings on appellate procedure, the new intermediate court will be less narrow in its view of the processes of appeal and will accommodate its interpretation of the rules to the practicalities involved.

ROBERT A. WICKER

Contracts—Contracts To Devise—Effect of Excluded Forced Heirs

A contract to make a will necessarily juxtaposes the law of contracts and of decedent’s estates and brings into conflict the policy of compelling performance of a promise with that of allowing free testamentary disposition. A recent case, In re Estate of Stewart, injected a third basic consideration: the effect of an excluded forced heir upon the distribution of property willed pursuant to an antenuptial contract to devise. The California Supreme Court held the contract beneficiaries’ interest paramount to the forced heir’s claim, thus upholding the policy for contractual certainty of performance against the challenge posed by the conflicting policy disfavoring spousal disinheretance. The court’s treatment of the problem brings the factors involved sharply into focus.

In 1936, Walter Stewart, his wife Jennie, and his brother John, cotenants of specific real property, entered into a written contract to devise
their respective one-third interests in the property to the survivors for life
and to their respective children on the death of the last survivor. Each
made a will pursuant to the contract. Upon John’s death in 1947, Walter
and Jennie held as cotenants for life, with Walter, due to a lapse in John’s
will, taking the remainder in John’s one-third interest in fee. When
Jennie died in 1949, Walter took her interest in the property for life,
and became vested with John’s interest in fee simple. Walter subse-
quently remarried. When he died in 1965, his survivors included his
widow, a brother, and six stepchildren (Jennie’s children by a previous
marriage). His estate consisted of the one-third interest in the realty
he owned in 1936 plus the one-third interest he inherited from his brother
John. The widow was appointed administratrix, and the decedent’s 1936
will was admitted to probate. As administratrix, the widow petitioned
for a decree determining interests in the decedent’s estate.

The trial court found that, as a California statute revoked the will
as to the pretermitted spouse, Walter’s widow took one-half of the
estate, with the remaining one-half passing under the will to the step-
children. The court of appeals determined that the contract was made

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9 Id. at —, 444 P.2d at 338, 70 Cal. Rptr. at 546.
4 Id. Walter left his interest to Jennie and John, or the survivor, remainder in
equal shares to his daughter, who predeceased him, and his six stepchildren.
6 In re Estate of Stewart, 63 Cal. Rptr. 548 n.1 (Dist. Ct. App. 1968). Walter
and another brother, Sankey, were John’s heirs, but for reasons undisclosed in the
record, Sankey did not share in the property. Hence Walter had a life estate in
cotenancy by virtue of John’s will with a remainder in fee by intestate succession,
which, upon Jennie’s subsequent death extinguishing the intervening life estate in
cotenancy, merged into a fee (the court’s language is imprecise here).
8 The remainder of Jennie’s one-third interest passed to her six children (Walter’s stepchildren) under her will when Walter died, and was not included as part of Walter’s probate estate.
7 Cal. Prob. Code § 70 (West 1956). It provides that
[i]f a person marries after making a will, and the spouse survives the maker,
the will is revoked as to the spouse, unless provision has been made for the
spouse by marriage contract, or unless the spouse is provided for in the will,
or in such a way mentioned therein as to show an intention not to make such
provision... Cal. Prob. Code § 23 (West 1956) provides that a mutual will may be revoked “in like manner as any other will.”
8 Cal. Prob. Code § 223 (West 1956) provides:
If the decedent leaves a surviving spouse and no issue, the estate goes one-
half to the surviving spouse and one-half to the decedent’s parents in equal
shares, or if either is dead to the survivor, or if both are dead to their issue
and the issue of either of them, by right of representation.
9 Two supreme court justices would have affirmed the trial court’s decision.
— Cal. 2d at —, 444 P.2d at 340, 70 Cal. Rptr. at 548.
10 In re Estate of Stewart, 63 Cal. Rptr. 548 (Dist. Ct. App. 1968).
"expressly for the benefit" of the stepchildren as required by Civil Code § 1559, and reasoned that the decedent could not have effectively willed the property to anyone except them, thus reversing the trial court. The California Supreme Court, however, vacated the decision of the court of appeals, and held that the widow was entitled only to half of that half of the estate that the decedent had inherited from his brother John.

Although the decedent's post-testamentary marriage resulted in partial revocation of the will, the supreme court stated that such revocation "does not impair the stepchildren's right to enforcement of the contract, for such a partial revocation can no more prejudice their rights than could a total revocation in repudiation of the contract." The court reasoned that since the decedent had received the benefits of the contract, he "became estopped from making any other or different disposition of the property . . ." nor could he "avoid this estoppel . . . by a subsequent marriage. . . ." As the property belonged in equity to the stepchildren the widow's right could attach only to property both legally and equitably owned by the decedent, which was the one-third interest he had inherited from his brother John. This half of that interest, the court concluded, is all she would have taken had the decedent died intestate; to give her more when the decedent performed his contract than she would have received had he breached it "would be anomalous."

Numerous courts in other jurisdictions have been confronted with the problems involved in contracts to make mutual wills and have resolved them upon widely disparate principles. That contracts to make wills are valid and enforceable both in law and in equity seems well-
settled. But the time such contracts become enforceable and the extent and manner in which they can be enforced are not so clear.

Generally, bilateral contracts are enforceable from the time a promise is given in exchange and as consideration for another promise. Contracts to make mutual wills, however, do not seem to be treated in accordance with the rules governing ordinary bilateral contracts. Some cases state that parties may repudiate without liability for breach of contract while both are still living; indeed, this has been said to be the general rule. According to this view, the contract becomes binding when, as in Stewart, one party dies with a will pursuant to the contract in effect. If the survivor probates such a will and receives its benefits, the surviving party is held estopped from repudiating his contract.

The reason usually advanced to support the application of these principles is that the privilege of free testamentary disposition should not be subject to the usual rules of contract law. Enforceability of a contract as of the time of creation might shackle the essentially ambulatory and revocable attributes of wills. "Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience." Consequently, contract law attempts to balance between this freedom to change one's mind and the interests of others that merit protection. Such flexible principles of equity as mutual assent, consideration, and fraud were developed to avoid undue harshness resulting from compelling performance of a promise. Since future actions are

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29 RESTATEMENT OF CONTRACTS §§ 74, 77 (1932).
30 [W]hile both or all of the parties to such an agreement are yet alive, any party may recede therefrom, and revoke his will or make a different disposition . . . on giving proper notice . . . or where such other or others have actual knowledge . . . provided such other is afforded an ample opportunity to make a new will, and has not changed his position, to his detriment, in reliance on the agreement.
33 But see Schramm v. Burkhart, 137 Ore. 208, 2 P.2d 148 (1931), which suggests that the contract is binding when the mutual wills are executed.
34 E.g., Brown v. Superior Ct., 34 Cal. 2d 559, 212 P.2d 878 (1949). In some jurisdictions the contract may not be binding until that time. See Tooker v. Vreeland, 92 N.J. Eq. 346, 112 A. 665 (Ch. 1921).
36 See 1 A. CORBIN, CONTRACTS § 1 (1963).
37 The proposition that an agreement to make mutual wills is unenforceable without estoppel, is perhaps the result of a latent dislike for the rule . . . that a
naturally subject to change, as is a will, the power to break a contract always exists; it is the right to do so without incurring liability that contract law seeks to determine. This determination is guided by principles sufficiently flexible to derive just results. The application of the estoppel doctrine in the Stewart context seems an unnecessary importation; the contract should be enforced, if at all, on contract principles. While in Stewart the result is the same under either analysis, in cases of a breached contract to make a will, the conclusion reached can vary with the theory applied. The use of the estoppel doctrine rather than normal contract rules to implement enforcement seems a deviation from sound jurisprudence, the principal result of which is confusion.

The extent and manner of enforcement of contracts to make mutual wills presents difficulty especially where, as in Stewart, third-party beneficiaries seek enforcement. Third-party beneficiary rights are enforceable in most American jurisdictions, and are established in California by both case law and statute. The theories upon which these rights rest, however, are frequently disputed. The court in Stewart seems to regard equitable title to the property as vested in the remainder-promise may serve as consideration for another promise.” Note, Separation Agreements to Make Mutual Wills for the Benefit of Third Parties, 18 Hastings L.J. 423, 439 (1967). “What logical justification is there for holding mutual promises good consideration for each other? None, it submitted.” Williston, Consideration In Bilateral Contracts, 27 Harv. L. Rev. 503, 508 (1914) (quoting Pollock). “[I]t is also true that whatever may be the requirements of sufficient consideration, those requirements, like all rules of law, are in a broad sense dictated by public policy.” Id. at 504-05.

26 “Our law has no separate concept of ‘will made in pursuance of contract’; we must treat the will part as a will and the contract part as a contract.” T. Atkinson, Wills 224 (2d ed. 1963). See B. Sparks, Contracts To Make Wills (1956) [hereinafter cited as Contracts To Make Wills].

29 For a study of the evolution of estoppel doctrines to enforce contracts to make wills in California, see Note, Separation Agreements to Make Mutual Wills for the Benefit of Third Parties, 18 Hastings L.J. 423, 425-27 (1967), where it is asserted that the concept developed through error.

30 Lawrence v. Fox, 20 N.Y. 268 (1859) (concerning a creditor-beneficiary), is perhaps the leading case and is said to be the forerunner of third-party beneficiary rights in the United States.

31 The right to enforce such a contract to make a particular disposition of property on death is not restricted to the promisee. Where two parties agree to make mutual wills... to [benefit] certain third persons... the intended devisees and legatees are entitled to enforce their rights as beneficiaries under the agreement.


32 CAL. CIV. CODE § 1559 (West 1954): “A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.”

33 See Sparks, supra note 21.
men prior to decedent's remarriage, and cites with approval cases treating the life tenant as a trustee for the remaindermen. At the time the contract was entered into, however, no present transfer of any interest was intended; it was simply a promise to execute a document effectuating such a transfer in the future. Perhaps a more accurate statement is that the equitable title vests at the time of the promisor's death, subject to funeral and administrative expenses. The closest analogy is said to be that to a contract to sell at a future date. "Hence the beneficiary has an equitable right to demand a conveyance or transfer at [death] . . ., but does not have equitable title." The distinction is important where the subject of the contract is "all my estate" or some other indefinite quantity; fortunately, the imprecision here, where specific realty was concerned, was not fatal to correct adjudication.

The difficulties inherent in a contract to make mutual wills are sharply compounded when the policies underlying its enforcement are confronted with a contest by a pretermitted spouse. "[T]he rights of the wife and widow [are] vested under a contract most strongly favored by the law . . ." and the tendency of courts to give spousal rights prefer-

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24 — Cal. 2d at —, 444 P.2d at 339, 70 Cal. Rptr. at 547.
25 Id. Several cases cited therein rely on "constructive trust" theories to enforce breached contracts to make mutual wills. But see Sparks, supra note 21, at 215.
27 Sparks, Legal Effect of Contracts To Devise or Bequeath Prior To the Death of the Promisor (pt. I), 53 Mich. L. Rev. 1, 3-4 (1954); Sparks, supra note 21, at 219.
28 Sparks, supra note 21, at —. This view also avoids "the technical responsibilities attaching to life tenancies with frequent accounting to the probate court . . . . " Meador v. Manlove, 97 Kan. 706, 711, 156 P. 731, 733 (1916).
29 This theory creates very serious difficulties in case of contracts to will all or a fractional part of one's estate. What is there to have a life estate in and in what does the promisee have a remainder? The promisor may consume any or all of his property during his life or he may exchange any or all of it . . . . Even it is explained that the life estate is a life estate with the power to consume, there is the further difficulty of explaining how the future acquired property is brought within the life tenant-remainderman status. It is difficult to conceive of a relationship wherein one party owns a life estate in everything possessed by him and another owns the remainder in fee, but the life tenant is capable of disposing of any or all of the property in fee simple, and any future property coming to him immediately assumes the status of a mere life estate in him and a remainder in the other party. Not only would this be a new and unusual estate, but it would be a new and unusual estate which served no useful purpose.
30 See Contracts To Make Wills 106.
31 See Contracts To Make Wills 167-78.
ential treatment increases the complexity of an already complicated area of the law. Furthermore, manifestation of the deference accorded surviving spouses excluded from testamentary disposition is to be noted in various state statutes giving such spouses rights of dissent from their decedent spouses’ excluding wills. Most states provide for some extent of revocation, by operation of law, of wills executed prior to marriage.

This legislation has recognized one or a combination of four types of such revocation. A subsequent marriage may be deemed to revoke the will absolutely, or merely partially revoke it, giving the surviving spouse an intestate share. Or the statute may revoke the will unless it was executed in contemplation of the marriage, or revoke except when a marriage contract or other arrangement provides for the surviving spouse or the spouse is so mentioned in the will as to indicate an intention that the will not be revoked by marriage. These statutes reflect varying legislative appraisals of the extent to which marital rights should outweigh the privilege of free testamentary disposition.

Judicial efforts to balance the interests of excluded surviving spouses and those of the beneficiaries of the decedent’s bounty in another area, inter vivos alienation of property to avoid the claims of the surviving spouse, may also prove helpful by analogy, as the policies involved are similar to those considered in Stewart. The courts have taken various approaches to reconciling such conflicts. Perhaps these might be outlined as the “fraud” approach or New York rule, the “balancing of hard-

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42 See, e.g., N.C. Gen. Stat. § 30-1, -3 (1966) (right of dissent); id. § 29-30 (election of life estate or “statutory dower”).
43 For an annotation of state legislation in this area, see 95 C.J.S. Wills § 291 (1957).
49 These efforts have focused particularly on cases where a spouse, to avoid leaving a substantial estate to his surviving spouse, has established revocable and tentative (“Totten”) trusts with rights of survivorship in third parties.
ships” approach or Maryland rule, and the “estate inclusion” approach taken by the Restatement of Trusts, in which the value of the inter vivos transfer is included in the decedent’s estate for the purpose of determining the surviving spouse’s forced heir’s share, but is subjected to that obligation only if necessary and only to the extent necessary to satisfy it. While these considerations in an area involving similar conflicts to those found in Stewart bear some relevance to that determination, their application is limited. All to some degree give weight to the decedent’s intention or lack of intention to defraud the surviving spouse’s marital rights. Where, as in Stewart, the decedent in good faith contracts several years prior to the marriage, and indeed contracts with his then spouse, any application of policies based on fraudulent intent is clearly incorrect.

The status of the contesting parties is relevant, but here hardly determinative. The widow was not mentioned in the will, a circumstance in which California legislation seems to presume an oversight by the decedent, rather than an intention to exclude her. In her pretermitted status, then, the widow would seem deserving of judicial indulgence. Her status, however, as a second wife who did not jointly contribute to the acquisition of the property in question tends to nullify this consideration. Whether the status of the contract beneficiaries entitles them to more protection is also questionable. As donee-beneficiaries, they gave “no consideration in the past, [give] none in the

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63 These various approaches were compared in Jeruzal v. Jeruzal, 269 Minn. 183, 130 N.W.2d 473 (1964), noted in 34 U. CIN. L. REV. 179 (1965). The court, criticizing the New York rule as inequitable and the Maryland rule as uncertain, concluded that the RESTATEMENT OF TRUSTS approach was the most satisfactory. Id. at 196, 130 N.W.2d at 481. See generally B. BOGERT, TRUSTS AND TRUSTEES § 47 (2d ed. 1965); 4 R. POWELL, REAL PROPERTY ¶¶ 569-71 (1949); A. SCOTT, LAW OF TRUSTS § 58 (3d ed. 1967); Note, Totten Trust: The Poor Man’s Will, 42 N.C.L. REV. 214 (1963).
64 Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937) rejects such a subjective test and implements a “real or illusory nature of the transfer” test instead; but this would seem to be merely one of a number of means of ascertaining the presence of fraudulent intent.
66 CAL. PROB. CODE § 70 (West 1956). See note 7 supra.
67 For a legislative manifestation of this view, see N.C. GEN. STAT. § 30-3(b) (1966) (giving second or successive surviving spouse dissenting from a will only one-half the amount otherwise provided as a forced heir’s share by the Intestate Succession Act where the decedent has lineal descendants by a former marriage surviving, but none surviving the second or successive marriage).
present, and [promise] nothing for the future.\textsuperscript{68} Although they are stepchildren of the decedent, he seemed by his contract and will to be disposed to treat them as his children. The decedent’s intent seems on balance to have been that the property go to the stepchildren, but when the widow is taking under a forced heir’s statute, this intent is clearly not entitled to much weight. Other factors entitled to judicial consideration in a given case\textsuperscript{69} might include the length of the marriage, the widow’s age and ability to support herself, and the quantum of inter vivos gifts given to her by the decedent spouse. Evidence of such factors, however, is lacking in this case.

Correct distribution of the estate involved in Stewart thus requires a balancing of the policy of protecting the widow from destitution against the policy of upholding the certainty of contractual obligation, and this balancing must control the decision almost to the exclusion of other factors. This approach, rather than a formal application of real property theory, should be accepted. "[O]nly those economic advantages are ‘rights’ which have the law back of them . . . [w]hether it is a property right is really the question to be answered."\textsuperscript{60} That such a decision, in the absence of legislation on the point, should appropriately rest in equity jurisdiction has long been accepted. It is submitted that in the absence of a showing of hardship by the pretermitted spouse the contractual obligation should hold sway.\textsuperscript{61}

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\textsuperscript{69} See Ruch v. Ruch, 159 Mich. 231, 124 N.W. 52 (1909).

\textsuperscript{60} \textit{United States v. Willow River Power Co.}, 324 U.S. 499, 502-03 (1945) (opinion by Mr. Justice Jackson). It is asserted that the property theory has been consistently applied by the Court: "It is incorrect to say that the judiciary protected property; rather they called that property to which they accorded protection." Hamilton \& Till, \textit{Property}, in 12 \textit{Encyclopedia of the Social Sciences} 528, 536 (1934).

\textsuperscript{61} While the arguments on both sides are cogent, it is submitted that it is better to permit a person to disinherit his future spouse than to break his contract. Hirsch, \textit{Contracts to Deive and Bequeath} (pt. II), 9 \textit{Wis. L. Rev.} 388, 391 (1934); \textit{see} Ralyea v. Venners, 155 Misc. 539, 280 N.Y.S. 8 (Sup. Ct. 1935); Burdine v. Burdine’s Ex’r, 98 Va. 515, 36 S.E. 992 (1900); \textit{but see} Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 129 S.W.2d 905 (1939).