

April 1941

Wills--Mutual Wills of Husband and Wife--Intent of Survivor

A. A. A.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Estates and Trusts Commons](#)

Recommended Citation

A. A. A., *Wills--Mutual Wills of Husband and Wife--Intent of Survivor*, 47 W. Va. L. Rev. (1941).

Available at: <https://researchrepository.wvu.edu/wvlr/vol47/iss3/14>

This Recent Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.

possibly consistent with the principle of convenience.⁵ In giving effect to the first principle it has been uniformly held that where there is a devise "to the children of A" and no life estate intervenes, the class closes at the testator's death and after-born children are precluded from taking under the will.⁶ When, on the other hand, a life estate intervenes, that is, "to A for life and then to the children of B", the class is held to increase at least until the death of the life tenant.⁷ Nevertheless, in the instant case, the court construed the devise to the widow only as a testamentary confirmation of her dower rights, and then held the class closes at the testator's death. While the doctrine favoring the early vesting of estates should normally control, it is obvious that no inconvenience would result here (at least as to the mansion house) where the devise was "to A for life, and after her death to the children of B". "Here the remainder vests at once in the children living at the death of the testator, but will open and let in all children of B born after that time, but before the death of A."⁸ In other words, the remainder to the children living at the testator's death might have been regarded as vested, subject to partial divestment by the birth of more children after the testator's death. Presumably this possibility was not sufficiently apparent in the disposition of the present litigation.

L. R. M.

WILLS—MUTUAL WILLS OF HUSBAND AND WIFE—INTENT OF SURVIVOR.—*H* and *W* executed wills, each leaving all of his or her estate to the other. *H* had typed both wills, and the provisions were practically identical. They were signed by *H* and *W* and witnessed by the same witnesses, at the same time, all in the presence of each other. *W* died, and *H* probated her will. Fifteen months later *H* died, and his will, leaving his estate to *W*, was offered for probate by the illegitimate daughter of *W*. There was ample evidence that *H* informally indicated an intent that his will continue in effect. Heirs-at-law of *H* contested the probate, which was denied. The lower court held that the testamentary intent was to make the survivor the sole beneficiary, and that on the death of one of the parties, the remaining will became inoperative. *Held*, that mere

⁵ 2 SIMES, LAW OF FUTURE INTERESTS (1936) § 378.

⁶ KALES, FUTURE INTERESTS IN ILLINOIS (1905) c. 10, § 226.

⁷ *Id.* at pp. 326-327; *Hamletts v. Hamlett's Ex'r*, 12 Leigh 350 (Va. 1841); *Cooper v. Hepburn*, 15 Gratt. 551 (Va. 1860); *Bently v. Ash*, 59 W. Va. 641, 53 S. E. 636 (1906); *Sleeper v. Killion*, 182 Iowa 245, 164 N. W. 241 (1917).

⁸ Note (1899) 4 VA. L. REG. 624 (*italics supplied*).

execution of mutual wills by husband and wife is not sufficient to establish a contract which will have the legal effect of making the two wills a joint will, and thus render inoperative the will of the survivor. *In re Werkman's Will*.¹

Wills involving the testamentary disposition of two or more persons may be classified as joint, reciprocal or mutual. In joint wills, the same instrument is made the will of two or more persons and is jointly signed by them. It may be probated as the single will of each maker and is revocable at any time by any of the testators during their joint lives, or, after the death of any of them, by the survivors.² Much confusion exists as to the use of the terms "mutual" and "reciprocal" wills. Often they are used interchangeably, but again they are used to indicate two different types of wills, that is, reciprocal wills contain similar provisions and can be probated as the will of each,³ but while mutual wills also contain similar provisions, they are generally based on a compact. It is often claimed in the case of mutual wills that only the will of the first to die is operative, it being the intent of the parties to vest title to all the property in the survivor, the two wills in reality constituting but a single will, the will of the first to die. But again, the compact may be so interpreted as to vest all of the property in the heirs and distributees of the first to die—the will of the last to die remaining operative so that on his death title to all the property is vested in the heirs and distributees of the first to die. In other cases, the compact may expressly provide that each one shall leave his property to the other with the understanding that the survivor shall devise and bequeath all to a designated third party.⁴

As to the right to revoke, this right is found to be absolute if the wills are reciprocal;⁵ if the wills are mutual, this right is qualified. If the one revoking is the first to die the will may be revoked, for the survivor may still dispose of his property in furtherance of his intent. However, if the first to die follows out the intent, the question arises whether or not the survivor is bound by the

¹ 13 S. E. (2d) 73 (W. Va. 1941). The evidence showed the great affection held by *H* for the proponent, and the seeming lack of it for his heirs-at-law, the contestants.

² 1 JARMAN, WILLS (6th ed. 1910) 41; 1 SCHOULER, WILLS, EXECUTORS & ADMINISTRATORS (6th ed. 1923) § 716; Goddard, *Mutual Wills* (1919) 17 MICH. L. REV. 677; Gerbrich v. Freitag, 213 Ill. 552, 73 N. E. 338 (1905).

³ Goddard, *supra* n. 2, at p. 682. Under lapse statutes the heirs of the first to die could take.

⁴ 1 SCHOULER, *op. cit. supra* n. 2, at § 719; 28 R. C. L. § 122.

⁵ 1 PAGE, WILLS (2d ed. 1928) § 88.

agreement he has made. As a will, such an instrument is revocable till death, but as a contract, it is enforceable.⁶ A trust may be established as to the property in the hands of the survivor, and a new will made by the survivor may be declared inoperative.⁷ If it can clearly be shown that the two wills are to be in effect only one will,⁸ or that the wills form a compact providing for each other,⁹ and possibly a third person, such agreement will be upheld. But proof of such a compact must be clear and unequivocal. It requires more than a mere making of "reciprocal" testamentary dispositions to convert a revocable instrument into an irrevocable compact.¹⁰

The holding of *Wilson v. Starbuck*¹¹ was that the will of the survivor, while not revoked, was rendered inoperative by the prior death of the other spouse. The real issue here, then, was whether that decision constituted a more or less rigid rule of law, applicable even as against the clear intent of the survivor that his instrument

⁶ *Ibid.* 1 SCHOULER, *op. cit. supra* n. 2, at § 720.

⁷ *Rastetter v. Hoeningner*, 214 N. Y. 66, 108 N. E. 210 (1915); *Underwood v. Myer*, 107 W. Va. 57, 146 S. E. 896 (1929).

⁸ *Wilson v. Starbuck*, 116 W. Va. 554, 132 S. E. 539 (1935).

⁹ *Anderson v. Anderson*, 181 Iowa 578, 164 N. W. 1042 (1917); *Comment* (1925) 24 MICH. L. REV. 85.

¹⁰ *Canada v. Ihmsen*, 33 Wyo. 439, 240 Pac. 927 (1925); *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265 (1898); *Flowers v. Flowers*, 32 Ohio App. 350, 166 N. E. 914 (1928); *Wanger v. Maxr*, 257 Mo. 482, 165 S. W. 1027 (1914). See *Stevens v. Myers*, 91 Ore. 114, 177 Pac. 37 (1918) where the court found evidence of a contract. But see the dissent in *Maurer v. Johansson*, 223 Iowa 1102, 274 N. W. 99 (1937). In *Clement v. Jones*, 166 Ga. 738, 144 S. E. 319 (1928) X and D executed wills, each devising to the other all his or her estate, naming each other as executor and executrix. The wills were drawn on the same day, with the same witnesses present. The survivor threatened to make a new will, and the plaintiffs, heirs-at-law of the deceased, sought a petition to restrain D from so doing, and asked that a trust be imposed on the property. The petition was denied. The court held that there was no evidence of "mutual wills" and that if D wanted to change her will she was at liberty to do so.

¹¹ 116 W. Va. 554, 102 S. E. 539 (1935). Both H and W had been previously married and had had children by their former marriages. Shortly after their marriage they executed wills which were almost identical. Each knew the provisions of the other's will. Neither will was offered for probate till after the death of both. There was no particular evidence that the survivor desired his will to remain operative. "To say it was intended that then the contract was to bind the survivor by his own will to permit his estate to pass to the heirs-at-law and distributees of the first to die, to the exclusion of his own next of kin, we think reached an unnatural result." (At page 560.) In the instant case the court said: "We think it improbable, under the circumstances developed by the record, that the testator intended that all of his estate, including that derived from his wife under her will, should go to his kindred, and that the child of his wife, for whom he had this deep affection, should be deprived of any interest whatever in his estate and that of her mother. We think the probabilities strongly rest with the proposition that, with knowledge of the legal consequences of allowing his will to become operative at his death, he purposely refrained from revoking the same." (At page 78.)

should retain its former validity. Apart from the accepted doctrine that the testator's intent is the polestar of construction, it is axiomatic that a canon of construction as a rule of presumed intent does not apply where there is actual evidence as to the testator's wishes.¹² Hence, *Wilson v. Starbuck* can hardly prevail against the indicated desire of the testator that the operation of his testamentary instrument continue.

A. A. A.

¹² *Hooper v. Woods*, 97 W. Va. 1, 125 S. E. 350 (1924).