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RIGHTS UNDER JOINT WILLS IN TEXAS

*Moss Wimbish**

THE terms "joint", "mutual", and "reciprocal", when applied to wills, unfortunately do not have well-defined meanings. It has been said that when such terms are used, one can be sure that the will or wills of two or more testators are involved but that beyond that the use of any of these terms tells little or nothing.¹ And it has been said that in many instances it is impossible to deduce the meaning of a decision in a particular case unless the reader looks beyond the terminology applied by the court and considers the real nature of the will and its provisions.²

In a recent Texas case³ the following definitions were approved:

"A 'joint' will is best defined as 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." "Mutual' wills have been defined as wills executed pursuant to an agreement between two or more persons to dispose of their property in a particular manner, each in consideration of the other." "Reciprocal' wills are those in which the testators name each other as beneficiaries under similar plans."

A will may be both joint and mutual, or it may be joint, mutual, and reciprocal.

Testators frequently join in disposing of property owned by them jointly or in common, or in severalty. They may execute jointly a single instrument giving their property to third persons. Or they may give the survivor of them their property. One of the commonest situations is that in which joint testators, usually husband and wife, give their property to the survivor for life,

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¹ 1 PAGE, WILLS (Lifetime ed. 1941) 221.

² Note, 169 A. L. R. 11 (1947).

³ Dickerson v. Yarbrough, 212 S. W. 2d 975, 978 (Tex. Civ. App. 1948); see also Note, 169 A. L. R. 11, 12 (1947); 1 PAGE ON WILLS (Lifetime ed. 1941) 215-221.

remainder to a third person or persons, usually the children or other relatives of the testators.

It is the purpose here to analyze the Texas law with regard to the rights and interests conferred by joint wills, with particular attention to joint and mutual wills wherein the survivor is given a life estate with remainder to a third person or persons.

For present purposes the Texas cases involving joint wills may conveniently be divided into three groups as follows:

1. Where testators bequeath or devise to third persons.
2. Where testators, pursuant to contract, give the survivor of them a life estate with remainder over.
3. Where testators give the survivor of them a fee.

WHERE TESTATORS BEQUEATH OR DEVISE TO THIRD PERSONS

The first case involving a joint will that came before the appellate courts of Texas was that of *Wyche v. Clapp*.⁴ A husband and wife (*H* and *W*, respectively), by joint testamentary instrument, directed the survivor of them to pay certain legacies to their children. If the legacies were not paid by the survivor, it was directed that the executors, after the death of both parties, should pay them from the proceeds of sales of the land on which testators lived. There were no reciprocal gifts and no provision for a life estate in the survivor with a remainder over. *H* died and *W* probated the joint instrument as his will. Thereafter a creditor of *W* sued her on an account. Pending suit, she conveyed the home place, less 200 acres homestead, to the children in satisfaction of the legacies. The creditor had judgment against *W*, bought the home tract less homestead at execution sale, then sued *W* for partition, and had judgment for the land. Next he sued the grantees of *W* and all the heirs of *H* for recovery of the land, cancellation of the deed, and partition. Defendants relied upon title from *W*, contending that the grantees, by virtue of the joint will of *H* and *W*, took the estate as against the execution sale.

⁴ 43 Tex. 543 (1875).

Judgment was rendered for the plaintiff for an undivided one-half of the tract of land, and commissioners were appointed to make partition between him and the defendants. On appeal the Supreme Court affirmed the judgment, the court holding that probate of the joint instrument as the will of *H* did not bind *W* nor her community interest in the property for the payment of the legacies; that the legatees, therefore, had no personal demand against *W* for the payment of the legacies; and that the deed, to the extent of *W*'s community interest in the land, not including the homestead, was a mere voluntary advancement without consideration. Recognizing the rule that a joint will, if otherwise unobjectionable, may be admitted to probate as the will of either of the parties upon his decease, the court stated:

"But from the very nature of such an instrument it cannot operate or have effect as the joint or mutual will of the parties while one of them survives; for during such time, if it is a will it is subject to revocation. It is, indeed, well established that agreements to make mutual wills are valid. But the effect of such agreements is not to render wills made in pursuance of them irrevocable, though they may be enforced in equity against the estate of the defaulting party after his decease on the ground of an attaching trust. . . . But when one of the parties to such an agreement is a married woman, it could have no binding force against her estate, it would seem, unless it was consummated in the manner prescribed by law for the execution of contracts by *femes covert*, or she had in some way bound or estopped herself from denying it after she became free from coverture. Be this, however, as it may, it has been held in no case which has come under our observation, and could not in sound principle be so held, as we think, that the mere execution of an instrument in the form of a joint will can be given by construction the effect of a contract or agreement to make mutual wills which will authorize a court of equity to fasten a trust upon the estate of the defaulting party, much less to warrant its dealing with the survivor as a debtor previous to his death for his half of a legacy so bequeathed."⁵

This language, in whole or in part, has been quoted frequently in later cases without careful consideration of the facts that the

⁵ *Id.* at 548.

will involved in the *Wyche* case did not give the survivor a life estate with a remainder over, that no contract to make a mutual will was involved, and that there was no question of estoppel of the survivor to renounce the provisions of the will.

The only other Texas case that seems squarely to involve the same question is *Aniol v. Aniol*.⁶ There, by joint will, a husband and wife (*H* and *W*) made bequests and devises to their children and authorized the survivor to carry out the terms of the will. After the death of *W* and probate of the instrument by *H* as her will, certain of the devisees, by fraudulent representations, induced *H* to convey to them all real estate owned by himself and *W* at the time of her death. On appeal from a judgment for *H* canceling the conveyances the devisees contended that the instrument was a mutual or reciprocal will, that it bound *H* and his estate even though he was still living, and that it could not be revoked by him. Passing the question of whether the instrument was technically a joint will, the court treated it as the valid separate will of *W*, the sole question before the court being its effect upon the estate of *H* while he was still living. *Wyche v. Clapp* was said to be directly in point in principle and direct authority for the proposition that prior to the death of *H* his estate was in no manner bound by any of the provisions of the will. There was nothing in the will that put him to an election and nothing to estop him to revoke or avoid the terms of the will, since he had the right to remain in possession of the property under his homestead right and as part owner. As to payment of the legacies, the *Wyche* case was also relied upon for the proposition that they were to be paid entirely out of the estate of *W*. In this case, as in the *Wyche* case, there was no gift to the survivor of a life estate with a remainder over, no contract to make a mutual will, and no question of estoppel of the survivor. In both cases the court treated the instrument as the separate will of the testator who had died, and in both the

127 Tex. 576, 94 S. W. 2d 425 (1936), *aff'd* 62 S. W. 2d 668 (Tex. Civ. App. 1933).

court held that the survivor was free to dispose of his own estate as he chose.

WHERE JOINT TESTATORS, PURSUANT TO CONTRACT, GIVE THE
SURVIVOR OF THEM A LIFE ESTATE WITH REMAINDER
TO A THIRD PERSON OR PERSONS

The question raised in these cases is this: after one testator dies and the survivor probates the joint instrument as his will and accepts benefits thereunder, what are the rights and interests of the survivor and remaindermen in the property of the testators? The general rule is that the survivor, in such case, has no right to make any disposition of the property contrary to the terms of the joint and mutual will and the contract pursuant to which it was made. Of course, the intent of the testators, as expressed in the will, is controlling, and the survivor may make any disposition of the property authorized by the terms of the instrument. But in many cases the instrument provides only that the survivor shall have a life estate and that upon his death the property shall go to the remaindermen. Or the language may be to the effect that the survivor shall have the care, custody, or control of the property for life with the right to the income therefrom. The question may be whether a disposition was one that an ordinary life tenant could make, or it may be whether the disposition was within the powers conferred by the will. Affecting these questions is the further consideration of whether the property disposed of by the survivor was originally his own or whether it was property he received by the joint and mutual will from his deceased co-maker. And a distinction may be drawn between a disposition by the survivor during his lifetime and a later testamentary disposition contrary to the terms of the will.

The Texas courts recognize that the survivor may elect to repudiate the will upon the death of the other testator and refuse to take any benefits under it, thereby continuing as owner of his own interest as before and taking whatever he is entitled to, if

anything, under the laws of descent and distribution.⁷ But when the survivor probates the will and takes benefits thereunder, the rights of the remaindermen will be enforced, both as to the property that belonged to the deceased co-maker and as to that originally belonging to the survivor. In applying this rule the Texas courts have adopted one or more of the following theories: (1) The will becomes irrevocable by the survivor. (2) By electing to take under the will, the survivor becomes estopped to renounce it and thereafter is bound by its terms. (3) The remainder interests vest in fee and the survivor is reduced to a life estate in the entire property—both the interest he receives under the will from his deceased co-maker and his own original interest as well.

The leading case for the rule that the survivor who has probated the joint instrument as the will of the other maker and has accepted benefits thereunder cannot thereafter make a disposition that will defeat the rights of the remaindermen is *Larrabee v. Porter*.⁸ A husband and wife, by agreement, executed a joint and mutual will by which they gave the survivor a life estate in all their property, joint and several, with remainders to their five daughters. *W* died and *H* probated the instrument as her will, continuing in possession of the entire estate. Two years later *H* agreed with *L* that if *L* would marry him he would convey to *L* all his property. *H* and *L* were married, and two days later *H*, by warranty deed and bill of sale, conveyed to *L* all property of the estate. At the same time he executed a will giving all of said property to *L* and expressly revoking the joint and mutual will of himself and *W*. *H* died and the second will was admitted to probate over objection of the daughters, who also filed in the district court an action to recover all the estate. They contended that the joint and mutual will was a binding and irrevocable contract and that all property then owned or later acquired by *H* and *W* became impressed with a trust in their favor. Their appeal from the decree admitting the second will to probate was consolidated in the dis-

⁷ *Gorman v. Gause*, 56 S. W. 2d 855 (Tex. Civ. App. 1933).

⁸ 166 S. W. 395 (Tex. Civ. App. 1914) *er. ref.*

strict court with their action pending there, and, after trial, judgment was rendered for the daughters for the property belonging to the estate. In affirming, the appellate court held that when *H* probated the joint and mutual will and took possession of the property devised, the instrument became irrevocable, and that *H* became estopped thereafter from disregarding it or its terms.⁹ The will in this case contained no provision as to the authority of the survivor to dispose of the property but merely gave him or her a life estate. And the court drew no distinction between an attempted disposition by deed and one by will; *H* attempted both, and both were held ineffective.

In *Sherman v. Goodson's Heirs*¹⁰ two sisters, by joint and mutual will, gave to the survivor all the property of the one who should die first, "to be used by such survivor as she may choose during her lifetime for her comfort and support"; at the death of the survivor the property was directed to pass to named beneficiaries. The survivor probated the instrument upon the death of her co-maker and took benefits thereunder. Thereafter she made another will, revoking the joint and mutual instrument. Upon the death of the survivor the probate court rejected the second will and probated the joint and mutual will. An appeal to the district court was consolidated with an action brought there by the remaindermen named in the joint and mutual will to recover the entire estate. Judgment was rendered in favor of the remaindermen, and the joint and mutual will was admitted to probate as the last will of the survivor, the later will being rejected. In affirming, the

⁹ In holding that the will became irrevocable, the court ran counter to the generally accepted doctrine that a will is always revocable during the lifetime of the testator but that if made pursuant to contract it may be enforceable in equity. 1 PAGE, WILLS (Lifetime ed. 1941) 228, 230; see *Wyche v. Clapp*, *supra* note 4; *Pullen v. Russ*, 209 S. W. 2d 630 (Tex. Civ. App. 1948) *er. ref. n. r. e.* Cf. *Ellsworth v. Aldrich*, 295 S. W. 206, 209 (Tex. Civ. App. 1927) *er. ref.* As to the rule announced that the survivor who probates the will and takes benefits thereunder becomes estopped, cf. *Graser v. Graser*, 147 Tex. 404, 215 S. W. 2d 867, *rev'g* 212 S. W. 2d 859 (Tex. Civ. App. 1948), noted, 1 Baylor L. Rev. 470 (1949) and 3 Southwestern L. J. 277 (1949), holding that where such survivor had failed to execute the intended joint and mutual will validly, she was not bound by the terms of the will or the contract.

¹⁰ 219 S. W. 839 (Tex. Civ. App. 1920) *er. ref.*

appellate court relied upon *Larrabee v. Porter* for the proposition that when the survivor probated the will upon the death of her co-maker and took benefits under it, the will became irrevocable and the survivor was estopped to make a contrary disposition. Against the contention that the terms of the will itself gave the survivor the power to dispose of all the property during her lifetime and that this included the power to dispose of it by will, the court stated that such a construction would be in direct conflict with the express direction in the will as to who should receive whatever property might be left on hand at the death of the survivor.¹¹

Where the will gives the survivor a right to dispose of the property, the question may arise whether a disposition was within the authority granted. In *Heller v. Heller*¹² the joint and mutual will of a husband and wife gave their property to the survivor for life, remainder to their children. The will contained this provision: "The survivor . . . shall have the right to sell or otherwise dispose of any part of our community property and invest the proceeds of such sale or disposition as he or she may think best." *H* died and *W* probated his will, taking possession of the community property, which consisted of 2000 acres of land and some cattle and other personalty. Thirteen years later *W* conveyed to one of the sons of herself and *H* a tract of 147 acres of land, the deed reciting that the conveyance was by virtue of the power vested in *W* by the last will of *H* and in consideration of \$10.00, love, and affection. After the death of *W* the other remaindermen sued to cancel the deed and to recover title and possession, asserting that the will did not authorize a conveyance for the purposes and consideration recited in the deed and also contending that *W*, having probated the will and accepted benefits under it,

¹¹ *Accord*, *Kirtley v. Spencer*, 222 S. W. 328 (Tex. Civ. App. 1920) *er. ref. Cf.* *French v. French*, 148 S. W. 2d 930 (Tex. Civ. App. 1941) *er. dism'd. judgt. cor.* (involving separate mutual wills); *McWhorter v. Humphreys*, 161 S. W. 2d (Tex. Civ. App. 1942) *er. ref. w. o. m.* (involving a joint and mutual will); both recognizing the rule of the *Larrabee* case, judgments going against remaindermen on other grounds.

¹² 233 S. W. 870 (Tex. Civ. App. 1921).

was estopped to dispose of the property otherwise than as authorized by the will. The grantee set up in defense that the conveyance was made in consideration of services rendered by him to *W* for 16 years in managing the estate, as well as for the consideration recited in the deed. The court construed Section 10 of the will, granting authority to the survivor to sell or otherwise dispose of the property, in connection with Section 9, directing that upon the death of both testators all of the property should be divided among their children equally. Taken alone, the authority to sell was unrestricted. Considered with the other provision, it granted no authority to give or devise the property contrary to the provisions directing distribution upon the death of both *H* and *W*. To construe it otherwise, it was said, would defeat the purpose of the testator as shown by the will as a whole. But the court further stated that Section 10 did authorize a sale or disposition by the survivor of any part of the property if made in good faith for the purpose of reinvesting the proceeds, or for using the same for the benefit of the estate; and that under this provision *W* was authorized to convey the land to the grantee in consideration of necessary services to the estate, since she could have sold the land and used the proceeds to pay for necessary services of a manager. But if the consideration was only that recited, the conveyance was without authority and would not be upheld.¹³

Likewise, a will granting the survivor authority to sell if he or she should so desire will not authorize the survivor to defeat the rights of the remaindermen by a gift of the property to another.¹⁴

¹³ Judgment of the trial court sustaining plaintiff's demurrer to defendant's answer was reversed and the cause remanded on the issue of whether there was such consideration as would bring the conveyance within the authority conferred by the will.

¹⁴ *Nye v. Bradford*, 144 Tex. 618, 193 S. W. 2d 165 (1946), 169 A. L. R. 1 (1947), *affg* 189 S. W. 2d 889 (Tex. Civ. App. 1945). The original opinion of the court of civil appeals in this case is outstanding as an example of the confusion that results from failure to keep clear the distinction between such cases as *Wyche v. Clapp* and *Aniol v. Aniol* on the one hand and *Larrabee v. Porter* and *Sherman v. Goodson's Heirs* on the other. In this opinion, written by Hall, C. J., the court said the will in the instant case was similar to that in *Sherman v. Goodson's Heirs* and under authority of that case the court was inclined to hold, and except for *Aniol v. Aniol* would hold, that the survivor had estopped herself from disposing of any of the joint property except as provided in the will. But the holding in the *Aniol* case, it was said, was contrary to that in the

Beginning with the case of *Rossetti v. Benevides*¹⁵ an additional basis for enforcing the rights of the remainderman was introduced—namely, that upon the death of one of the co-makers and probate of the joint and mutual instrument as his will and acceptance of benefits under it by the survivor, the remainder vests in fee and the survivor is reduced to a life estate, not only in the share of the estate received by him from his deceased co-maker but also in his own estate as well. The *Rossetti* case involved a joint and mutual will of husband and wife, giving the survivor a life estate with remainder to named persons. *H* died and *W* probated the will. Later she and one of the remaindermen conveyed a part of the devised property to satisfy notes given by them for a debt of the latter. In a suit by the child and widow of the other remainderman it was held that the conveyance did not affect his one-half interest for the reason that it had vested upon the death of *H* and probate of the will by *W*. Without discussion the court cited as authority for this proposition the case of *Larrabee v. Porter*; but, as has been seen, that case was decided upon the theory that the will had become irrevocable and binding upon the survivor and that he was estopped to make a disposition contrary to the terms of the joint and mutual will, nothing being said to the effect that the interests of both testators had vested in the remaindermen.

And where the survivor left a note and mortgage given by her after the death of her co-maker and probate of the will by her, it was held that she had no right to sell or mortgage the fee and that the note and mortgage, left unpaid at the survivor's death, was a charge against her life estate only and not against the

Goodson case and drove the court to the conclusion that the act of the survivor in probating the will as that of her husband and in taking under its terms did not estop her from afterward disposing of her part of the estate. On motion for rehearing, opinion by Harvey, J., Hall, C. J., dissenting, the court distinguished *Aniol v. Aniol* and *Wyche v. Clapp*, concluded that the instant case came squarely within the decision in *Sherman v. Goodson's Heirs*, set aside the original opinion, and held that the survivor's deed passed no title.

¹⁵ 195 S. W. 208 (Tex. Civ. App. 1917) *er. ref.*

remainder interests.¹⁶ The court said that after *W* probated and ratified the will as that of *H*, she owned only a life estate in the lands devised and that the remaindermen owned the fee. In support of this conclusion the court quoted from *Larrabee v. Porter* as follows: "It seems clear from the authorities, *G. W. Larrabee* at any time prior to his death, after having probated the will and accepted the benefits thereunder, could not himself have abrogated it."

And similarly, where the survivor, after probating and taking benefits under the joint and mutual will, executed a later will making a contrary disposition of the property, it was held that the estates of the remaindermen had vested and that upon the death of the survivor his estate had no interest in the property.¹⁷

In *Dickerson v. Yarbrough*¹⁸ the property was given by joint and mutual will of husband and wife to the survivor, with the direction that said survivor should keep the property, especially any real estate, as nearly as possible in as good condition as circumstances should permit during the life of the survivor, the property then to be distributed to the next of kin of *H* and *W*. After the death of *W* and probate of her will by *H*, the latter executed and delivered to the daughter of *W* by a former marriage a warranty deed purporting to convey the "one-half undivided interest" of *H* in a tract of land devised by the will. In a suit for construction it was held that *H* had nothing to convey except his life estate in the land, "the remainder already having vested in the devisees referred to as next of kin."

The fullest statement of the rule is found in the case of *Wagnon v. Wagnon*,¹⁹ where a husband and wife executed at the same time separate wills that were identical except that each named the other as beneficiary. Each gave the other his estate to use, possess, and control as his or her own individual property for life, and

¹⁶ *Moore v. Moore*, 198 S. W. 659, 661 (Tex. Civ. App. 1917) *er. ref.*

¹⁷ *Wipff v. Wipff*, 209 S. W. 2d 947 (Tex. Civ. App. 1948) .

¹⁸ 212 S. W. 2d 975 (Tex. Civ. App. 1948).

¹⁹ 16 S. W. 2d 366 (Tex. Civ. App. 1929) *er. ref.*

upon his or her death "title and possession" of the property were to pass to the testator's children. *W* died and *H* probated her will. Thereafter *H* married again, and at his death his will, identical with that of *W*, was probated. His second wife, who survived him, sought to establish a debt against his estate, to have set aside to her a homestead and certain statutory exemptions or money in lieu thereof, and to partition the community estate of herself and *H*. The children of *H* and *W* contested her claims, and after trial a judgment was rendered to which both parties excepted and from which the children appealed. Judgment was reversed and the cause remanded upon the issue of whether the wills were contractual. For guidance of the trial court upon retrial of the cause the appellate court declared the rules applicable to the case as follows:

"If the wills in question were mutual and reciprocal and executed pursuant to agreement, though executed as separate instruments, the right of the beneficiaries fixed thereby would be the same as if both had joined in a single instrument. . . . That is to say, if said wills were mutual and reciprocal, R. M. Wagon, upon probate of his first wife's will, became vested with only a life estate in the entire community property, with remainder to their children. The wills gave him no authority to sell or dispose of same, but only to use, possess, and control it as a life tenant.

"If, on the other hand, said wills were not mutual and reciprocal, a life estate in only half of the community—that is, the community interest of his first wife—passed to him, he owning the other half as his own separate estate."²⁰

²⁰ *Id.* at 370. There has been little discussion in the Texas cases as to what extent the survivor who has been given a life estate, with no express authority to dispose, is governed by the rules as to conventional life tenants and to what extent by the rules as to trustees. It was said in the *Wagon* case:

"We do not sustain appellant's contention that R. M. Wagon held all of said personalty as a pure trust for his children. In a sense, any life tenant holds the estate in trust for the remaindermen, but 'he differs from a trustee in a pure trust in that he may use the property for his exclusive benefit and take all of the income and profits.' . . . The estate which R. M. Wagon took under the will was, we think, clearly an ordinary life estate, and held by him subject to the rules governing such estates—whether in half or in the whole of the community estate of himself and his first wife depending upon the question of mutuality of their wills. . . .

"... Though we do not hold that the estate which passed to R. M. Wagon under his wife's will was a pure trust estate, we think it was a quasi trust in his hands, and

In most cases that arise it may make little difference in results which theory the court adopts—that the will becomes irrevocable, that the survivor is estopped to renounce its provisions, or that the remainders have vested and the survivor is reduced to a life estate in the whole property. But situations arise in which the difference is significant. An illustration is found in the case of *Chadwick v. Bristow*,²¹ where there was the usual case of a joint and mutual will by husband and wife, giving the survivor a life estate. Specific devises in remainder were made to their daughters Ima and Ora May and to their son F. W., and the residue was given to these children in equal shares. Upon the death of *H*, the will was probated by *W*. Thereafter, and during the lifetime of *W*, Ora May died leaving a husband but no children and leaving a will giving all her property to her husband for life and then to her sister Ima. *W* died and the joint instrument was probated as her will. The son brought an action against his sister Ima and the husband of Ora May to recover the specific devise and the residuary share given to Ora May by the will of *H* and *W*. He contended that these devises in remainder did not become a vested estate either as to the interest of *H* or as to that of *W* in the community property of the two but were contingent upon Ora May's surviving *W*; and since she did not survive *W*, he argued that the devises to her had lapsed. And even if they had not lapsed as to the interest of *H*, he contended that they had lapsed as to the interest of *W*. The rule laid down in the *Wagon* case was held controlling. The remainders were held to have vested upon the death of *H* and probate of his will by *W*. Hence, the devises to Ora May passed under her will to her husband for life and then to her sister Ima. And this was true as to the community interest of *W* as well as that of *H*.²²

that the said rules and presumptions applicable to trust estates should apply, under the circumstances of this case, to the corpus of such life estate...." *Ibid*.

²¹ 146 Tex. 481, 208 S. W. 2d 888 (1948), *aff'g* 204 S.W. 2d 65 (Tex. Civ. App. 1947), noted, 1 Vanderbilt L. Rev. 157 (1947).

²² *Cf. Bomar v. Carstairs*, 124 Tex. 492, 79 S. W. 2d 841 (1935), *rev'g* 48 S. W. 2d 786 (Tex. Civ. App. 1932), relied upon by plaintiff. There a father, for a valuable

Three cases from other jurisdictions were distinguished by the court on the ground that in each of them the language of the will was such as to give the property to the survivor absolutely.²³ In these cases it was held that upon the death of one joint testator and probate of his will by the survivor the remainders do not vest but are contingent upon the death of both testators. Hence, the gift will lapse if the remainderman dies before either of the testators. In one case the court said that estates are vested under a joint and mutual will in the same manner as under ordinary wills; that it is only the right of action to enforce the contract, if anything, which vests in the beneficiary at the death of one of the testators; and that no claim of vesting under the will can be laid upon the ground of its irrevocability.²⁴

One English case, upon similar facts, supports the Texas cases in holding that the remainder vests upon the death of one joint testator and probate of his will by the survivor; hence, as in the *Bristow* case, it was held that where the death of the remainderman occurred after that of one joint testator but before that of the survivor his gift did not lapse. And this applied to the property of both joint testators.²⁵

consideration, devised one-fourth of his estate to his daughter. She predeceased him, and thereafter the father made a new will, omitting her. It was held that the gift was personal to the daughter, that all she had was a valid promise from the father to make the devise, that no present interest was conveyed, and that upon her death without children her will passed to her husband no interest in the devise. This case was distinguished on the ground that it involved construction of a contract to make a will, while the *Bristow* case involved construction of a will itself, which had become fully operative and binding upon the survivors. See *Waller v. Gilliland*, 231 S. W. 2d 939 (Tex. Civ. App. 1950) *er. ref.*, holding that where a devisee died during the lifetime of both testators, the gift lapsed and went under the laws of descent, first to the survivor upon the death of the other testator, and after her death to her heirs.

²³ *In re Lage*, 19 F. 2d 153 (D. C. N. D. Iowa 1927), *app. dism'd. on other grounds*, 25 F. 2d 288 (C. C. A. 8th, 1928), noted, 41 Harv. L. Rev. 106 (1927); *Brown v. Brown*, 101 Kan. 335, 166 Pac. 499 (1917); *Keasey v. Engles*, 259 Mich. 178, 242 N. W. 878 (1932).

²⁴ *Keasey v. Engles*, 259 Mich. 178, 242 N. W. 878, 879 (1932). In this case the court, distinguishing *Freeman v. Arscott*, *infra* note 25, said: "But in that case, in addition to being a testament, the joint will was a contract by which the estate of the survivor became subject to the terms of the will on the death of the other party, thereby, in effect, working a conveyance of the survivor's estate." But in the next paragraph the court stated: "... [T]he estate is conveyed by the will itself, not by the contract to make a will...."

²⁵ *Freeman v. Arscott*, [1930] 2 Ch. 190.

The doctrine that the remainder in the entire estate vests was invoked in a federal case in determining, for the purpose of ascertaining the amount due as gift tax, what property interests constituted the subject matter of gifts made by the survivor to the remaindermen.²⁶ The joint and mutual will of husband and wife embodied a contract that all their property, which was community, should be disposed of as provided in the will and that both should be bound by its terms and for such purposes should waive their community rights in the estate. The survivor was given no right of sale or disposition except for paying legal claims against the estate, providing for support of the survivor, and for distributing the estate among the children in case the survivor desired to do the latter. The survivor was given the estate for life with the right to receive all rents and revenues. Upon the survivor's death the estate was to be distributed to the children. In 1931 *H* died and *W* probated the will as the executrix. She paid federal estate taxes only upon the one-half interest of *H*. She administered the estate until 1935, when she executed to the children a release of one-half of what she then owned. The instrument of release concluded, "It being distinctly specified that this relinquishment relates to my community one-half in the joint estate formerly belonging to R. B. Masterson and myself, and not to the one-half formerly belonging to him." The Commissioner contended that the gift was a full

²⁶ Commissioner of Internal Revenue v. Masterson, 127 F. 2d 252 (C. C. A. 5th, 1942), rehearing denied, 128 F. 2d 526 (C. C. A. 5th, 1942), aff'g 42 B. T. A. 419 (1940). Cf. Scofield v. Bethea, 170 F. 2d 934 (C. C. A. 5th, 1948), cert. denied, 336 U. S. 944 (1949), rev'g 74 F. Supp. 31 (W. D. Tex. 1947), where the court relied upon *Wyche v. Clapp* in holding that the corpus of a trust was includible in the gross estate of a decedent for estate tax purposes, the testators having jointly devised to third persons their respective interests in their community property, neither having attempted to devise more than his or her one-half of the whole. The Texas court of civil appeals, in *Bethea v. Sheppard*, 143 S. W. 2d 997 (1940) *er. ref.*, held the same trust corpus subject to state inheritance taxes as a transfer made or intended to take effect in possession or enjoyment at or after the death of the grantor, without reference to the rule of *Wyche v. Clapp*. In *Scofield v. Bethea*, *supra*, Waller, Circuit Judge, specially concurring, approved the solution of the Texas court, adding that it was implicit in its holding that the survivor's interest in the community property was not divested out of her upon probate of the will of her husband. See *Masterson v. Commissioner of Internal Revenue*, 141 F. 2d 391 (C. C. A. 5th, 1944), rev'g 1 T. C. 315 (1942), involving a question of federal income tax on the Masterson estate for 1935.

one-half interest in fee in the entire community estate, plus accretions on hand at the time of the gift. In the alternative he contended that the gift consisted of a full life interest in one-half of the original community estate, plus accretions on hand. *W* contended that upon the death of *H* she was divested of all her community property; that thereafter, as survivor, she had only the personal right to be supported for her lifetime; and that the gift consisted only of this personal right to support from one-half of the entire property. The court held that the gift consisted of a full life interest in one-half of the original community estate, plus a fee interest in the accretions on hand. It was said that by the terms of the joint will and covenant, when *H* died, a life interest in his one-half vested in *W* and the remainder in fee vested in his six children, and that when *W* had the will probated and took over the property and accepted benefits under the will she thereby became bound by its terms and thereafter retained only a life interest in the one-half formerly belonging to her, the fee remainder vesting in the six children. *Larrabee v. Porter, Rossetti v. Benevides*, and *Wyche v. Clapp* were cited as recognizing the proposition stated.

Holmes, Circuit Judge, dissenting, drew a sharp distinction between the theory of the *Larrabee* case that the survivor became bound by the terms of the will and the conclusion that the will had the effect of divesting her of her one-half interest and reducing her to a life estate in the whole. Against the majority view Judge Holmes advanced the following arguments:

By the words of the release itself²⁷ *W* gave the children her community one-half in the joint estate formerly belonging to her and *H*—that is, what she had always owned and not what she took under the will. What she owned before the death of *H* was an undivided one-half of the whole in fee. The joint will undertook to dispose of all of it, one-half upon the death of the one dying

²⁷ "It being distinctly specified that this relinquishment relates to my community one-half in the joint estate formerly belonging to R. B. Masterson and myself, and not to the one-half formerly belonging to him."

first, the other one-half upon the death of the survivor. Neither intended to part with title to his or her property prior to his or her death. *W*, by probating the will separately as the will of *H* and by paying taxes on only his half of the estate, was estopped to contend that the instrument divested her of her one-half interest. The covenant was not to give or convey her property to the children, but only to will it to them. *W* took nothing under her own will, but agreed to retain her estate intact as a part of the joint property until her death or until she disposed of it by distribution to the children. *H* and *W* waived their respective community rights only for the purpose of making a joint testamentary disposition of their community property upon the death of the survivor or upon their contemporaneous deaths. The provision that neither of them should execute any other will indicated that each was retaining title to his or her one-half interest until his or her death; otherwise, it was not necessary to obligate the survivor not to execute any other will. The doctrine of election was not applicable, for this was not a case where *H* made a separate will undertaking to dispose of their joint property. Under the rule of *Wyche v. Clapp* such an instrument could not take effect as a joint will while one of the parties survived, and execution of such an instrument does not authorize equity to deal with the survivor as a debtor for his half of a legacy prior to his death. Since the *Wyche* case is a decision of the Texas Supreme Court and has never been overruled, the decisions of lower courts should be disregarded to the extent, if any, that they may be out of harmony therewith.²⁸

The gift, Judge Holmes concluded, consisted of an undivided one-half interest in fee and should have been taxed as such.

When this case was before the Board of Tax Appeals,²⁹ Mellott, Member, dissenting, made a similar assault on the doctrine that the remainders had vested in fee and that *W* had been divested of

²⁸ In *Chadwick v. Bristow*, *supra* note 20, the Texas Supreme Court reaffirmed the rule that the remainder vests as to the property of both testators.

²⁹ *Masterson v. Commissioner of Internal Revenue*, 42 B. T. A. 419 (1940).

her title. He pointed out that the holding was bottomed upon *Rossetti v. Benevides* and *Larrabee v. Porter*, the former of which relied upon the latter and both of which involved a controversy between those who would have been entitled to the property after the joint will had been probated following the death of the survivor and persons asserting claims contrary to its provisions. Neither of these cases, it was said, is authority for the proposition that probate of the will after the death of one of the joint makers passes the interest of both.

Mellott concluded that by means of the release *W* had transferred to the children property worth three-fourths of a million dollars which would never be subjected to the estate tax, and that the effect of the majority holding was to exempt it from the gift tax also.³⁰

One case is out of line with the Texas rule that the entire estate vests. In *Wallace v. Peoples*³¹ there was the usual case of a joint and mutual will of husband and wife, the survivor to have the property for life, remainder one-half to the heirs of *H* and one-half to the heirs of *W*. After the death of *H* and probate of his will by *W*, the latter, joined by the heirs of *H*, conveyed part of the realty of the estate, the heirs of *H* being paid by *W* for their interest. In a suit by *W* to foreclose a deed of trust and vendor's lien the vendee set up in defense that she had been induced to make the purchase by the false representation by *W* that the latter had marketable title. In holding that the defense had failed, the court stated:

"Mr. Peoples alone having died in the meantime, this jointly executed act between himself and his wife had taken on testamentary character only as affected his community one-half of the property, leaving her as one living free to otherwise dispose of her own like half. So regarded, its plain effect as to his portion . . . was to vest

³⁰ There was no federal gift tax in force in 1931, the time at which the majority considered the transfer of *W*'s one-half of the corpus to have occurred.

³¹ 89 S. W. 2d 1030 (Tex. Civ. App. 1930) *er. dism'd*.

in her an absolute or complete life estate, which she could convey . . . with remainder to his children by his prior marriage. . . ."³²

Suppose that *W* had also died and that her heirs, who had been named to receive one-half of the proceeds of the estate in remainder, had been asserting their claim. Under the rule of the foregoing cases they would have prevailed. But the result of the *Peoples* case is in accord with the general rule that in absence of a clear expression in the will of an intent to limit the right of disposition of his own property by each party during his lifetime the courts will not consider that such was their intent.³³ And while the survivor will hold in trust the property received under the will from his deceased co-maker, he does not become a trustee of his own property.³⁴

The New York Court of Appeals has stated the rule to be that what the joint testators disable themselves from doing is the making of a different testamentary disposition after accepting the benefits of the agreement; that the survivor must carry out the agreement in good faith and cannot make a gift in nature, or in lieu, of a testamentary disposition or to defeat the purpose of the agreement, but that each remains the absolute owner of his own property, with all the rights of an owner; and that nothing short of plain and express words to that effect will be sufficient to limit the use of, or to impress a trust upon, the property of the owner during his or her lifetime so as to prevent disposition thereof by the owner in good faith after the death of the other spouse.³⁵

³² *Id.* at 1032.

³³ Note, 108 A. L. R. 868 (1937).

³⁴ *Id.* at 869.

³⁵ *Rastetter v. Hoenninger*, 214 N. Y. 66, 108 N. E. 210 (1915). *Cf.* *Dickerson v. Yarbrough*, 212 S. W. 2d 975, 979 (Tex. Civ. App. 1948), *supra* note 17, where it was said in a footnote:

"It is the holding of many cases that the element of trust relates only to property received by the survivor under a mutual will, in this instance the wife's undivided one-half interest, the survivor not becoming a trustee of his own property. This he could dispose of in fee simple during survivorship without resulting injury or prejudice to next of kin or devisees of the testator who had pre-deceased him. See *Wallace v. People*, Tex. Civ. App., 89 S. W. 2d 1030; *Hutton v. Gonser*, 159 Wash. 219, 292

WHERE THE SURVIVOR IS GIVEN A FEE

This group of cases should cause no confusion. If each joint testator gives the other his property in fee, the foregoing rules have no application. In *Curtis v. Aycock*³⁶ a husband and wife, by joint will, each gave the survivor his or her property, one-half thereof "to be held by the survivor, absolutely and in fee simple", the other one-half to be held in trust for their son and to vest in said son when he should reach the age of thirty years. If both *H* and *W* should die before the son reached that age, all their property was to vest immediately in the son in fee simple. This will was construed as giving the survivor an undivided one-fourth of the entire community estate absolutely, and as devising to the son the other undivided one-fourth interest upon the conditions set forth in the trust. The provision that if both testators should die before the son reached thirty years of age, their entire estate should then vest in him was construed to mean that in that event the trust should then terminate and the one-fourth held in trust should vest, and that if the survivor had not made other disposition of his or her three-fourths held absolutely, that should also vest in the son. The survivor did not hold her three-fourths in trust; it was hers absolutely.

And where one clause of the will gave the survivor the property in fee simple but a later clause provided that any of the property of which the survivor should die seized and possessed should go to various beneficiaries, it was held that the instrument created in the survivor a conditional or defeasible fee, the condition of defeasance being that if the survivor should die seized and possessed of any of the property it should pass to the named bene-

Pac. 743; *Rastetter v. Hoenninger*, 214 N. Y. 66, 108 N. E. 210; 108 A. L. R., Annotations, 868. Under these authorities, Mr. Payton was fully enabled to convey his one-half interest in the described acreage, rights of next of kin of the survivor not vesting until his death."

³⁶ 179 S. W. 2d 843 (Tex. Civ. App. 1944) *er. ref. w. o. m.*

ficiaries. But during the lifetime of the survivor he had absolute power of disposition.³⁷

Under a similar instrument, where the contingent devisee died after the death of one joint testator but during the lifetime of the survivor, it was held that the gift to him had lapsed, or had not vested, so as to pass title to his heirs at the time of the death of the survivor of the joint testators.³⁸

Testators sometimes execute joint or separate instruments by which each gives his estate to the other absolutely but names a third person to take in case the other predeceases him. In such cases there is no question of remaindermen or their rights. The contingent gift contained in the will of the testator who dies first never takes effect, since the contingency named—that the other testator die first—did not occur.³⁹ Therefore, the survivor has an absolute right to dispose of the property as he chooses—by deed⁴⁰ or by a later will executed by the survivor after the death of the other testator.⁴¹

SUMMARY AND CONCLUSION

The rule of *Wyche v. Clapp* that probate of a joint will by the survivor does not bind his estate has no application where the will was made pursuant to contract and gives the survivor a life estate with a remainder over. In such a case, under the theory that the will becomes irrevocable by the survivor who probates it and takes benefits under it, that such survivor becomes estopped to renounce its terms, and that the estate of the remaindermen vests, the Texas courts give effect to the will as regards the property of both parties to it. As to the property of the party who dies first, it operates to

³⁷ Harrell v. Hickman, 147 Tex. 396, 215 S. W. 2d 876 (1949), *rev'g* 211 S. W. 2d 374 (Tex. Civ. App. 1948), noted, 3 Southwestern L. J. 275 (1949).

³⁸ Amos v. Amos, 217 S. W. 2d 902 (Tex. Civ. App. 1949) *er. ref. n. r. e.*

³⁹ Winston v. Griffith, 133 Tex. 348, 128 S. W. 2d 25 (1939), *aff'g* 108 S. W. 2d 745 (Tex. Civ. App. 1937).

⁴⁰ Garland v. Meyer, 169 S. W. 2d 531 (Tex. Civ. App. 1942), where testators executed a single instrument.

⁴¹ Pullen v. Russ, 209 S. W. 2d 630 (Tex. Civ. App. 1948) *er. ref. n. r. e.*, cited *supra* note 9, where separate instruments were involved.

pass a life interest to the survivor; as to the property of the survivor it operates "exactly the same as if the instrument had been . . . a separate deed of conveyance" to become effective upon the death of the other party.⁴² That it still may operate as the survivor's will at his death can in no way affect the fee remainders, which have vested.⁴³ The holding that the survivor is reduced to a life estate in his own property runs counter to the general rule that the survivor does not, in the absence of clear language in the will to that effect, become a trustee of his own property but remains the absolute owner thereof.

In cases involving joint wills that clearly give the survivor a fee and in which neither party attempts to dispose of the property of the other, the question of remaindermen does not arise, and the survivor has an absolute power of disposition. This is true where the will provides that any property remaining in the survivor's hands at his death shall go to a third person, or where each testator gives his estate to the other but provides that if the other predeceases him the estate shall go to a third person.

⁴² *Masterson v. Commissioner of Internal Revenue*, 42 B. T. A. 419, 426 (1940), *supra* note 29; *cf.* *Keasey v. Engles*, cited *supra* note 23.

⁴³ *Masterson v. Commissioner of Internal Revenue*, *ibid.*

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