Will Contracts: Contract Rights in Conflict with Spousal Rights

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CONFLICT WITH SPOUSAL RIGHTS

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Professor Lilly analyzes the postmortem conflict of claims to property between a decedent's surviving spouse and a third party beneficiary of an antenuptial will contract, the terms of which deny property to the surviving spouse. He reviews the most frequently encountered types of will contracts and the courts' attempts to distinguish them or avoid their enforcement. Also examined is the courts' distinction between a will contract promising future legacies to third party beneficiaries and a will contract which immediately vests property rights in such beneficiaries. After discussing the reluctance of courts to rely on public policy to resolve conflicts between will contract rights and spousal rights, Professor Lilly concludes that legislatures now have the opportunity to formulate that policy. Until that is done, courts can adopt uniform rules of construction which effectuate the probable intentions of the contracting parties.

I. INTRODUCTION: CREATING THE CONFLICT

Few would deny that estate planning by husband and wife is desirable, and the law makes available to them several devices to accomplish that end. As is often the case with alternatives, and especially in the law, selection of one may accomplish every goal and selection of another, as things turn out, may give rise to serious complications with undesired effects.

Let us suppose two similar couples. Husband and wife are in their twilight years with no issue to survive them. Their principal estate planning goal is to make an irrevocable agreement providing for the disposition to the collateral relatives of both of whatever property remains after their deaths. For both couples the goal is a desirable one; each chooses, however, a different method to accomplish the goal.

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The first couple transfers inter vivos all of their property, however title is held, into a trust, subject to these limitations:

1. During their joint lifetimes, they reserve the rights to revoke, to receive all net income and to invade corpus without restriction;
2. After the first settlor dies, the trust becomes irrevocable, but the survivor has the right to receive all net income and to invade corpus without restriction;
3. After the second settlor dies, the corpus is to be divided among designated collateral relatives of both settlors.

The second couple chooses to use a postnuptial contract rather than an inter vivos trust. The dispositive provisions of the contract will closely resemble similar provisions of the first couple's trust. The contract will also require, however, execution of wills with legacies conforming to the contract and will provide that the contract and wills may be revoked by agreement of both husband and wife, but not otherwise.

Both methods seem to solve the couples' estate planning problems and both appear to be valid. Suppose, however, that the circumstances turn out to be somewhat different than the couples expected at the time the estate plans were effectuated. Suppose, for example, that in both cases the husband died, the wife remarried and then she died, survived by her second husband. The question arises: What effects on the statutory rights of the surviving husbands do the trust and contract estate plan arrangements have?

In the trust situation, the widower's rights relate only to assets in the decedent wife's administered estate. In relation to that estate, he may assert whatever claims he has of homestead, exempt property and family allowances, dower, curtesy or forced share. The dollar value of these rights, and particularly that of the forced share right, is by hypothesis likely to be very small.

The widower would like to be able to exercise his forced share election right against the property embraced within the trust. General law is clear, however, that trust assets are not includible in the decedent's administered estate and that they cannot be reached by exercis-

1. Household and personal items and sums in checking accounts are usually not included in this type of trust, but are instead left to be disposed of by will or an intestacy statute.
2. The contract may be void if it is governed by the law of a place which has a strong public policy condemning postnuptial contracts which reduce postmortem statutory rights of the surviving spouse. The contract probably would be void in Oklahoma. See generally Lilly, Oklahoma's Troublesome Coverture Property Concept, 11 Tulsa L. J. 1 (1975).
3. See supra note 1.
WILL CONTRACTS

ing the forced share right; nor can they be reached under the Uniform Probate Code's broader "augmented estate" concept. Moreover, antenuptial knowledge of the trust, or lack of knowledge, does not alter the fact that the rights of the trust's remainder beneficiaries antedate and prevail over any claim of the surviving second spouse to the trust property.

No answer is so clear in the contract situation in spite of the fact that our contract couple probably expected the same result as that in the trust situation. Whereas there are two separate estates in the case of the trust, it is clear in the contract case that there is but one estate—that of the decedent. It is to that estate only that all claims of any type whatever must relate. As a result, the claims of contract beneficiaries and of a surviving spouse may be in conflict.

Otherwise, and unfortunately, the law is not clear. Not only has there been a "confused intermingling" by lawyers and judges of property, estates and contract law, but there has also been a "tendency of the courts to extend preferential treatment to the rights of spouses" on the basis of less than satisfactory reasoning and in face of established legal principles which appear in some cases to dictate otherwise.

Results in decided cases are not uniform. There is even less uniformity in the reasoning used in reaching those results. Outcomes may turn, for example, on whether the decedent's will is or is not in compliance with the contract, or whether the surviving spouse has or does not have antenuptial knowledge of the contract. Court views of public policy often also play an important role in determining superiority of rights.

This writing explores the problems encountered when there is a postmortem conflict of claims to property between a decedent's surviving spouse and a third party beneficiary of an antenuptial will contract which, if enforced, would deny property to the surviving spouse.


There probably is no statute in any Anglo-American jurisdiction which would extend the forced share right to this hypothetical trust.


6. B. Sparks, Contracts to Make Wills 167 (1956).
II. Classifications of Third Party Beneficiary Will Contracts

There probably is no "typical" third party beneficiary will contract. Since, however, contracts address problems, it is possible to classify these contracts by categories based on the particular problems addressed.

The most frequently encountered will contract, like our hypothetical one, has as its purpose the planning of an estate. Typically, in order to settle in their lifetimes the postmortem disposition of their property, spouses agree that all of their property, however title is taken, is jointly acquired, that the survivor of them takes all of the property of the first of them to die and that all of the property of the survivor shall descend in a manner specified. These dispositions frequently are to common issue of the spouses, to the spouses' issue resulting from previous marriages, or to designated collateral relatives of each of the spouses. The survivor's right to use and dispose of the property may be practically unrestricted or more narrowly circumscribed. The contract will provide that it and the conforming wills can be revoked only by mutual agreement of the parties to it, and, ideally, the contract is in writing.

The second most frequently encountered type of will contract results from reaching agreement on property settlement prior to divorce or separation. Typically in this type of contract, a spouse will agree to execute a will which devises property to the other spouse, to issue of the marriage, or to issue of that marriage and any later one. The contract may even be incorporated into the court decree in a case.

A third category is comprised of contracts utilized to facilitate an adoption. In order to obtain consent to an adoption from the natural parents, the adopting parents agree that the child shall be their "heir"
and agree to execute wills devising their property to the child. A variant in this category relates to children born out of wedlock. In consideration of forbearance of legal action, a natural father may agree with the natural mother that the child shall be his "heir" and agree to execute a will devising property to the child.

Finally, there are "services" contracts, which occasionally, though not usually, contemplate third party beneficiaries. In such a contract, a principal party may agree to provide services in consideration of the other party's agreement to devise property to a third person.

In all of the foregoing circumstances a contract is not only a lawful means, but also an apparently appropriate means of accomplishing results desired by the parties. Assuming that at the time of contracting there is no infringement of existing rights of persons not parties to it, the will contract is consistent with public policy and valid. Once any right of rescission is extinguished, the rights of a third party beneficiary in the subject matter of the contract clearly are vested, and the beneficiary should be able to enforce those rights according to the contract's terms. Only in cases where the law accords supervening rights in the subject matter of the contract to another person may full enforcement of the third party rights properly be denied.

III. JUDICIAL RECOGNITION OF THE CONFLICT

The 1769 English case of Dufour v. Pereira is the leading authority on enforceability by a third party donee beneficiary of rights under a will contract. Husband and wife executed a joint will by which the residuary estate of each was pooled into one common fund and bequeathed to the survivor for life with limitations over.

After the husband died, his widow probated the joint will and accepted the benefits it provided her. She subsequently executed a new will which was inconsistent with the joint will. After her death, beneficiaries under the joint will sued to obtain the benefits it provided them.

23. See 4 A. CORBIN, supra note 21, at § 782 (1951).
24. 1 Dickens 419, 21 Eng. Rep. 332 (Ch. 1769). A better report of the case is in Re Oldham, [1925] 1 Ch. 75 (Ch. 1924).
25. Re Oldham, [1925] 1 Ch. 75, 84 (Ch. 1924).
Applying third party beneficiary enforcement principles, the chancellor stated of the first will:

It might have been revoked by both jointly; it might have been revoked separately, provided the party intending it, had given notice to the other of such revocation.

But I cannot be of opinion, that either of them, could, during their joint lives, do it secretly; or that after the death of either, it could be done by the survivor by another will.

It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract? Certainly not.\(^{26}\)

It is clear in *Dufour* that only general third party beneficiary enforcement principles were of concern to the court: no rights of a surviving spouse were at issue.

*Dufour* principles are applicable in surviving spouse cases, however, and have been applied in England as recently as 1950. In *In re Green*\(^{27}\) the survivor husband's last will purported to confer greater benefits upon his second wife than permitted by the mutual and contractual wills of himself and his first wife. Following *Dufour*, the chancellor held that a trust in favor of the third party beneficiaries attached to the property embraced within the terms of the interspousal contract.\(^{28}\) The strength of the *Green* holding may, however, be weakened because of the chancellor's interpretation that the husband's contract with his first wife permitted him to devise a substantial portion of his estate to his second wife.\(^{29}\)

*Rubenstein v. Mueller*,\(^{30}\) a 1967 New York case, is perhaps the strongest case upholding third party beneficiary rights in the face of a challenge by a surviving second spouse. Mueller and his first wife executed a joint will which provided that the survivor take the estate of the first to die and stated further that "the estate of the second decedent . . . is hereby bequeathed [to named beneficiaries]."\(^{31}\) After the first wife died, Mueller remarried and later died after having executed a will naming his second wife as his sole beneficiary. After this last will was

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27. [1951] 1 Ch. 148 (Ch. 1950).
28. *See id.* at 156 (by implication). The point is clearer in the report of *Green* in [1950] 2 All E.R. 913, 919 (Ch.).
31. *Id.* at 232, 225 N.E.2d at 542, 278 N.Y.S.2d at 848.
admitted to probate, a beneficiary named in the earlier joint will commenced an action seeking its specific enforcement as a contract.

The right of ownership to only two significant items of property was in issue. First, there was real property which Mueller and his first wife had owned as tenants by the entirety and which had ripened into sole ownership because of his survival. The other item was a joint bank account which was in his and his second wife’s names but which was funded with money he received as surviving owner of joint accounts with his first wife. Concurring with the result in the two lower courts, the Court of Appeals of New York agreed unanimously that the joint will constituted a binding agreement which transformed the spouses’ collective property into a life interest in the survivor with the power to consume principal. A majority of the court rejected the argument that New York’s public policy would be frustrated by sustaining a testamentary arrangement which denies a widow a distributive share in her husband’s estate. Instead, the court held that Mueller had no interest in the property against which his widow’s right of election could operate and affirmed the trial court’s order that the provisions of the joint will be specifically performed.

Mueller is not alone in recognizing priority of third party beneficiary rights when they antedated a second marriage. When confronted with the same issue as in Mueller, courts in California, Illinois, Iowa, Kansas, Kentucky and Wisconsin have reached the same result about priority as did the New York court. On the other hand, courts in Florida, Oregon and Washington have given priority to the rights of the surviving spouse.

Although it would appear that courts would give in other contexts the same priority to antecedent third party beneficiary rights that they do in husband-wife estate plan cases, they do not necessarily do so. In

37. See Estate of Chayka, 40 Wis. 2d 715, 162 N.W.2d 632 (1968), aff’d, 47 Wis. 2d 102, 176 N.W.2d 561 (1970).
38. See Tod v. Fuller, 78 So. 2d 713 (Fla. 1955); cf. Fuller v. Tod, 63 So. 2d 316 (Fla. 1953) (trial court erred in disallowing lack of notice of the contract as a trial issue).
cases of will contracts agreed upon as part of a property settlement in contemplation of divorce or separation, courts in California\textsuperscript{41} and Kansas\textsuperscript{42} have determined the priority to be the same as in estate plan cases. The priority appears to be reversed, however, in the courts of two states. Surrogates in New York frequently have held that settlement contract beneficiaries are legatees, not creditors, and that a surviving spouse's statutory forced share has priority in such a case.\textsuperscript{43} The court of appeals has viewed settlement contracts as calling for a \textit{future} legacy and not as creating an irrevocable obligation concerning collective property of the divorcing spouses.\textsuperscript{44} The Court of Appeals of Kentucky has said that it is both inequitable and against the state's public policy to deny a widow dower and a forced share, at least when she had no knowledge of the property settlement contract.\textsuperscript{45}

It is not surprising that courts have distinguished among categories of will contracts in order to find an apparently reasonable basis on which to confer priority in postmortem benefits upon a surviving spouse. After all, only one common law property state does not provide that a surviving spouse has a type of statutory forced heirship in the property of the decedent spouse.\textsuperscript{46} What is perhaps surprising is that courts have so frequently accorded preeminence to third party beneficiary rights.

**IV. Conflict Avoidance or Evasion**

The study of a substantial number of cases is convincing that courts are reluctant to deny property to a surviving spouse when to do so gives priority to third party beneficiary contract rights. As a consequence of this reluctance, the courts have utilized several methods and


\textsuperscript{42} See \textit{In re Estate of Davis}, 171 Kan. 605, 237 P.2d 396 (1951).


\textsuperscript{44} See Rubenstein v. Mueller, 19 N.Y.2d 228, 234, 225 N.E.2d 845, 850 (1967) (dictum). It should not be inferred from the New York cases that \textit{present} property rights cannot possibly be created in third party beneficiaries of settlement contracts.

\textsuperscript{45} Wides v. Wides' Ex'r, 299 Ky. 103, 114, 184 S.W.2d 579, 584 (Ky. Ct. App. 1944).

\textsuperscript{46} See E. Scoles & E. Halbach, Jr., \textit{supra} note 5, at 82. South Dakota has abolished dower and curtesy without providing a forced share. S.D. Codified Laws Ann. § 29-1-3 (1976). The eight community property states do not provide forced shares. There, "the main protection is the spouse's one-half interest in the community property." E. Scoles & E. Halbach, Jr., \textit{supra} note 5, at 82.
theories which allow them to avoid finding or having to enforce a contract which would produce the undesired effects.

A. Evidence is Insufficient to Establish a Contract

A legitimate means of inhibiting claims of the existence of will contracts is to establish high evidentiary requirements. If those requirements cannot be met, there is no provable contract to conflict with postmortem spousal rights.

Frequently, statutes require that all contracts relating to succession must at least be evidenced by a writing. Section 2-701 of the Uniform Probate Code is typical in that it "requires that either the will must set forth the material provisions of the contract, or the will must make express reference to the contract and extrinsic evidence prove the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract."\(^{47}\) In some states, statutes which require written contracts for the "sale" of real property have been broadly interpreted to be applicable in cases of agreements concerning succession if real property is included in the bargain.\(^{48}\)

It is clear that many states do not require a contract to be in writing, merely because it relates to succession, when its subject matter is personal property. These states, however, do not often make proof of a contract concerning succession easy. Evidence of such a contract is frequently required to be "clear and convincing."\(^{49}\) "Dead man" statutes\(^{50}\) and statutes declaring spouses incompetent to testify for or against each other\(^{51}\) may make proof of an oral will contract practically impossible. In addition, if a relative is a party to the contract, a presumption of gratuitous performance of services may be encountered.\(^{52}\)

The reporter systems are replete with reports of cases in which contracts concerning succession have not been proved because of insufficiency of evidence. That usual result is appropriate. As one court has aptly pointed out, "[i]t would be easy to destroy all wills if [less

\(^{47}\) UNIF. PROBATE CODE § 2-701 comment (1982).


\(^{49}\) See B. SPARKS, supra note 6, at 24 & n.6.

\(^{50}\) See, e.g., OKLA. STAT. tit. 12, § 384 (1971) (repealed 1978).

\(^{51}\) See, e.g., OKLA. STAT. tit. 12, § 385.3 (1971) (repealed 1978).

\(^{52}\) See E. SCOLES & E. HALBACH, JR., supra note 5, at 182.
than clear and convincing oral] evidence were held sufficient for the purpose . . . .” 53

There are, on the other hand, a number of cases reported in which contracts were found to exist where one may well question whether the clear and convincing standard was in fact met. 54 These findings occur with some frequency in cases of joint or mutual wills. 55

B. Joint or Mutual Wills Do Not Presume a Contract

The execution by husband and wife of a joint will 56 or the presence of contemporaneous or near contemporaneous mutual wills with reciprocal provisions does not give rise to a presumption that they were made pursuant to a contract. That is the “clear weight of authority” and the “sounder view.” 57 Though originally judge-made, the rule has been included in the Uniform Probate Code. 58

The English case of Re Oldham 59 is typical. The decedents had, while married, executed mutual wills with identical terms in favor of each other. The court rejected the argument that the mere existence of the mutual wills eliminated the necessity of proving a contract between the spouses. 60 The court reasoned that the wills indicated only that the

A contract may not, in fact, be intended by the parties. One court seems to have held that the survivor’s rights to deal with property are so unrestricted that no contract was made. See In re Lowe’s Estate, 24 App. Div. 2d 983, 265 N.Y.S.2d 257 (1965), aff’d mem. sub nom. In re Estate of Zeh, 18 N.Y.2d 900, 223 N.E.2d 43, 276 N.Y.S.2d 635 (1966).


55. The courts do not always display the desired amount of diligence in the application of the “clear and convincing” rule and this tendency becomes especially pronounced when they are confronted with the wills of two or more persons which, when considered together, show on their face, by their reciprocal provisions or otherwise, that they were intended as part of one integrated scheme or plan . . . . Where wills of this kind are concerned the courts still give verbal adherence to the rule that clear and convincing evidence is required to prove the existence of a contract, but an examination of the results reached raises a very real question as to the exactitude with which the rule is applied. When two people execute a common document as the will of each of them or when they execute separate documents at approximately the same time and in identical or almost identical language there is a tendency to pass too easily to the conclusion that such action must have been the result of a contract.

56. It is clear that joint wills may be executed by any two or more persons; in fact, they are usually utilized by spouses only.

57. See B. Sparks, supra note 6, at 27.

58. See Unif. Probate Code § 2-701 (1982): “The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.” Colorado had a similar statute which predated her adoption of the Code. See 1953 Colo. Sess. Laws 672.

59. [1925] 1 Ch. 75 (Ch. 1924).

60. See id. at 87.
spouses had agreed to make them in identical terms; that the wills were contractual in nature would have to be proved. Professor Sparks has said that nothing more is revealed than
the parties must have talked the matter over and must have arrived at an understanding or agreement concerning their testamentary dispositions. Such discussions and such understandings between persons of close affinities, especially between husbands and wives, are not unusual and the fact that they have taken place is no indication that there has been any thought of a binding contract.

Not all states have adopted the “sounder view,” however. Six decades ago the Supreme Court of Wisconsin stated:

The fact that these [mutual and reciprocal] wills constitute but a single document, that they were executed at the same time, that each of the testators knew of the provisions made in the will of the other... conclusively indicates that the two wills resulted from a mutual agreement between the testators and that their provisions were in accord with such prior agreement.

As recently as 1968, the same court recognized that a joint will raises a presumption that it is executed pursuant to a contract, though that presumption may be rebutted by evidence. Mutuality in contemporaneous husband-wife wills appears to call for an assumption that they are contractual in nature in Iowa, Kansas, Kentucky, and New York. Professors Scoles and Halbach have noted, as a recent trend, “that many courts have been increasingly willing to imply a contract merely from the jointness or similarity of the wills of spouses, with little or no extrinsic evidence of contractual intention.”

Although the recent cases do not present a contract-forced share conflict, that contracts

61. See id. at 87-89.
64. Estate of Chayka, 40 Wis. 2d at 717, 162 N.W.2d at 634 (emphasis added) (footnote omitted).
65. Estate of Chayka, 40 Wis. 2d at 717, 162 N.W.2d at 634.
68. See Boner’s Adm’x v. Chesnut’s Ex’r, 317 S.W.2d 867 (Ky. 1958); Price v. Aylor, 258 Ky. 1, 79 S.W.2d 350 (1935).
70. E. SCOLES & E. HALBACH, JR, supra note 5, at 190, where the authors cite the following cases: In re Estate of Maloney, 178 Ind. App. 191, 381 N.E.2d 1263 (1978); Woelke v. Calfee, 45 Or. App. 459, 608 P.2d 606 (1980); Pruitt v. Moss, 271 S.C. 305, 247 S.E.2d 324 (1978); Fisher v. Capp, 597 S.W.2d 393 (Tex. Civ. App.—Amarillo 1980, writ ref’d n.r.e.).
are more readily found because of relaxed proof requirements will no doubt more frequently give rise to conflicts in future cases.

C. Contract is Interpreted to Avoid Conflict

When a contract's existence cannot be avoided, either because it is in writing or because the evidence of it is clear and convincing, the contract may not, in fact, create a conflict with forced share or other rights by its literal terms or by interpretation.

1. Some Property Not Covered by the Contract

The English case of *In re Green* is illustrative of interpretation problems which may face a court. Husband and wife had little property of their own other than a vested reversionary interest, subject to another's life estate. The reversion was given to them in equal shares or to the survivor if only one survived the life tenant. The spouses executed mutual wills which referred to the reversion and which were deemed contractual by the court. The wife died before the life tenant, and the husband remarried. He executed a second will which made some bequests different from those in his first will and which left the residue to his second wife.

In a suit by the executor for instructions, the court had to interpret provisions in the contractual will which applied in case the testator's first wife did not survive him. His estate was to be divided into half-shares, "one . . . half-share . . . shall be considered as my own personal estate as distinct from the other half-share which shall be considered as equivalent to any benefit I have received by the previous death of my wife or by reason of her predeceasing [the life tenant]." The first half-share was to be distributed among one group of specified individuals and charities; the second half-share was to be distributed among a different group of specified individuals and charities.

The court interpreted the will contract as not covering the hus-

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70. [1951] Ch. 148 (Ch. 1950).
71. The testator . . . referred to their interests in reversion, and recited that they had similarly agreed to carry out the terms of each other's wills as to these interests, in the event of only one of them surviving the tenant for life, and succeeding to the whole estate, just as if both had survived.
72. *Id.* at 149.
73. *See id.* at 154.
74. *Id.* at 149.
75. *Id.* at 151.
76. *Id.*
band’s half-share: “the husband’s moiety was his own personal property to do as he liked with . . . .” Thus a conflict was avoided because there was property in the husband’s estate which his second will could properly leave to his second wife. Only the first wife’s half-share was bound to the terms of the will contract.

The Supreme Court of Oregon, in Florey v. Meeker, was confronted with the necessity of interpreting a contractual joint will to determine whether the surviving husband alone could by codicil change will provisions to provide for his second wife. While she was alive, the first wife and the husband had changed one provision of the joint will by a codicil they both executed. After her death and his remarriage, the husband alone executed a codicil purporting to devise five-eighths of his residuary estate to his second wife. After that codicil was admitted to probate along with the joint will, three of his five original residuary legatees brought an action claiming that the husband’s codicil breached the contract.

In reviewing the trial court’s decision that there was no breach, the supreme court exhaustively examined the provision of the joint will which stated that the husband

may from time to time, by codicil to this will, executed by him in accordance with the statute, substitute other devises [sic] and legatees for the five last above named and provide that such substituted devises [sic] and legatees shall receive said five-eighths of said residuary estate of the survivor of us in such proportions as he may see fit. The court viewed the provision as “a renunciation of any interest in the residuary estate of the last survivor to the extent of five-eighths thereof” on the part of the first wife, and it affirmed the trial court’s decision.

Although the parties to many will contracts will indicate clearly that not all of their property is intended to be included, that intent may not be so clear in many cases. Thus, interpretation may be a useful judicial tool in avoiding conflicts where there is reasonable doubt as to what property of the parties is covered by a contract. Interpretation should not, however, be used to distort a clear intention of the parties that all property they own is to be embraced in the provisions of a contract.

76. Id. at 155.
77. See id.
78. 194 Or. 257, 240 P.2d 1177 (1952).
79. Id. at 268, 240 P.2d at 1182.
80. Id. at 285, 240 P.2d at 1189.
2. Gifts Are Contemplated by the Contract

A will contract may expressly address the issue of whether and to what extent the survivor may make gifts of property covered by the contract. It is likely, however, that gifts will not be mentioned in the contract. Therefore, courts will be called upon to determine whether and to what extent contracts impliedly authorize gifts. Whether testamentary "gifts" can be made is likely to be considered a question of whether all property of a survivor is embraced within the terms of a will contract. Whether gifts can be made inter vivos by a survivor is usually the decisive issue in a case to recover property allegedly transferred in violation of contract terms.

The hypothetical estate plans discussed in the Introduction of this writing grant a surviving spouse, during his lifetime, plenary control over disposition of property embraced within the terms of the trust and of the contract; by hypothesis, that is all property of both spouses. Therefore, a survivor who remarried certainly could make inter vivos gifts to a second spouse, and, although remarriage of the survivor may not have been contemplated by the original spouses, a literal view of the survivor's power would permit an inter vivos gift of all of the property to a second spouse.

In In re Estate of Beauchamp, the Court of Appeals of Arizona was called upon to interpret provisions of a property settlement agreement incorporated into a divorce decree. The agreement required the husband to leave his entire estate to the six children of the spouses. It provided further that, subject to this limitation, property currently owned or acquired in the future by the husband could be disposed of inter vivos in any manner. The husband executed a will conforming to the agreement. He remarried and later died without having executed a new will. In a dictum, the court stated that "[h]e could have made a gift to [his second wife] of all his property without violating the terms of the agreement." Though a total gift might literally have been permissible, such a gift would clearly have violated the spirit of the agreement. It is also clear, however, that literal compliance with the agreement would have prevented the husband from making any testamentary provision for his second wife.

A California appellate court had a problem similar to that in

81. See supra text accompanying notes 70-80.
83. Id. at 221, 564 P.2d at 910 (emphasis added).
Beauchamp before it in Reid v. Asanovic.\textsuperscript{84} A property settlement agreement incorporated into the divorce decree required the husband to execute a will leaving all of the property he owned at his death to the couple’s daughter, or in equal shares to that daughter and any subsequent children he might have. He remarried and fathered a second daughter. He conveyed two parcels of land to his second wife and placed most of his remaining property in joint tenancy with her. His last will specifically disinherited the daughter of his first marriage and made his second wife his sole beneficiary.

After her father’s death, the older daughter sued, seeking to have a constructive trust for the benefit of herself and her half sister impressed upon the property acquired by her stepmother. The trial court awarded the two deeded parcels to the stepmother as reasonable gifts. Half of the remaining property was also found to be a reasonable gift, but the other half was awarded to the daughters equally because the father’s acts were found to have defeated the spirit and purpose of the settlement agreement. The result was to award the stepmother nearly sixty percent of the total property in issue.

Since only the stepmother appealed, the only issue before the appellate court was whether too much had been awarded to the daughters. In affirming the decision, the court stated in a dictum that the father’s “agreement necessarily implied a covenant ‘not to make unreasonable use of the property, as by conveying it all away so that the named third party beneficiaries will receive nothing.’ ”\textsuperscript{85} At the least, the Reid case appears to be some evidence of a willingness on the part of California courts to find implied provisions for reasonable gifts in marital property contracts.

It cannot be determined from decided cases the extent to which courts are willing to find reasonable gifts provisions implied: the question apparently has not been a frequent judicial issue. Nor can it be determined whether any court would find impermissible every gift regardless of how reasonable it was in the prevailing circumstances. There is support, however, for the proposition that conveyances of all or nearly all of the survivor’s estate to a subsequent spouse will be set

\textsuperscript{84} 224 Cal. App. 2d 632, 36 Cal. Rptr. 836 (1964).
\textsuperscript{85} Id. at 634, 36 Cal. Rptr. at 837 (quoting Brewer v. Simpson, 53 Cal. 2d 567, 589, 349 P.2d 289, 300, 2 Cal. Rptr. 609, 620 (1960)). In Brewer the trial court had found specifically that the spouses’ estate plan contract permitted the survivor “the reasonable use and enjoyment of their combined estates.” Brewer, 53 Cal. 2d at 576, 349 P.2d at 292, 2 Cal. Rptr. at 612.
One court described the situation this way:

What she in fact has done has stripped near all of the flesh from the bones, leaving only a skeleton for testamentary disposition to [the contract beneficiary]. This is a compliance in form, not in substance, that breaches the covenant of good faith that accompanies every contract, by accomplishing exactly what the agreement of the parties sought to prevent.

It is understandable that a surviving wife, remarrying, may desire, even in a brief period of time between remarriage and her death, to give what she has to her successor husband. It is equally clear that this may well have been the exact predictable change of circumstances against which her first husband sought to provide in agreeing to the execution of a joint, mutual and reciprocal will. The duty of good faith is an implied condition in every contract, including a contract to make a joint will, and the transfers here violate such good faith standard by leaving the will in effect but giving away the properties which the parties agreed were to be bequeathed at the death of both to a designated party. The contract to make a will, once partially executed and irrevocable, is not to be defeated or evaded by what has been termed "completely and deliberately denuding himself of his assets after entering into a bargain."87

A court may also limit the survivor’s authority over property interests acquired upon a spouse’s death to uses permitted by the terms of their agreement. In *Tiemann v. Kampmeier*,88 the agreement permitted the survivor to dispose of property it embraced “for his or her care and support within his or her sound discretion.”89 After his wife died, the husband remarried and deeded property to his second wife. After his death, third party beneficiaries of the agreement were successful in a suit to have the property conveyed to them on the basis that no showing was made that the transfers were made for his care and support.

Although it is clear that courts may properly find that reasonable gifts to a second spouse may be implied from spousal agreements, they should do so only on a case-by-case basis and by using a general methodology appropriate for finding all implied terms. Courts should not simply and routinely find that all spousal agreements impliedly permit reasonable gifts to a second spouse, as that would merely be a subterfuge for a well articulated public policy.90

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86. See e.g., Ralyea v. Venners, 155 Misc. 539, 280 N.Y.S. 8 (N.Y. Sup. Ct. 1935); Estate of Chayka, 40 Wis. 2d 715, 162 N.W.2d 632 (1968), aff’d, 47 Wis. 2d 102, 176 N.W.2d 561 (1970).
87. Estate of Chayka, 47 Wis. 2d at 592, 176 N.W.2d at 692 (emphasis added).
88. 252 Iowa 587, 107 N.W.2d 689 (1961).
89. Id. at 592, 107 N.W.2d at 692 (emphasis added).
90. See infra text following note 188.
3. Legacies Only Are Contemplated by the Contract

In relation to their property, spouses may clearly agree in a manner which creates third party beneficiaries of property embraced by the contract. On the other hand they may agree only that third party beneficiaries shall have certain legacies made to them in a will conforming to a contract. The difference is an important one when looked at in the light of the rights of a second and surviving spouse. In the first situation the beneficiaries are owners of the property, but subject to the antecedent rights of the contracting spouse who survives: the property is not ranked as an asset of that spouse's estate when he dies. In the latter situation the rights of the beneficiaries are the same as those of any legatees of the survivor and are subject to priority rights of a second and surviving spouse and of general creditors.

In re Hoyt's Estate91 illustrates the aforementioned principles. New York spouses entered into a separation agreement which was later incorporated into a Nevada divorce decree. In the agreement the husband obligated himself to execute a will which would create a trust of at least $1,500,000 for the benefit of his wife and their children or the children's issue. After he remarried he executed a will conforming to the agreement. His net estate at death amounted to approximately $490,000, and his widow elected to take her statutory one-third share as in intestacy. The children sought to establish themselves as creditors of the estate, but relying on In re Tanenbaum's Estate92 the court held that they were not creditors, but that the agreement merely created an enforceable obligation to make a testamentary provision for the benefit of the first wife of the testator and his children after her death. The testator performed that agreement. He undertook to do no more. The status of the claimants is therefore that of legatees or beneficiaries under the will. As such legatees or beneficiaries they take subject to the operation of the statutes relating to testamentary dispositions, including the right of the surviving widow to take her intestate share . . . . Their rights are also subordinate to all true creditors of the estate. The widow of the testator is therefore entitled to a one-third share of the net estate. The respective interests of the claimants as legatees or beneficiaries must be satisfied out of the balance.93

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93. In re Hoyt's Estate, 174 Misc. 512, 516, 21 N.Y.S.2d 107, 111 (Sur. Ct. 1940); see also Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 129 S.W.2d 905 (1939) (interpreting a non-spousal contract for services). With Hoyt, compare Estate of Stewart, 69 Cal. 2d 296, 444 P.2d
The Hoyt court appears to be correct in determining that the contracting spouses intended that their children be beneficiaries of legacies and not be owners of property rights. To have decided otherwise would have frustrated the intention of the contractors as they could have created property rights by using different language in the contract. The children's probable expectations were crushed by the size of their father's estate at death, not merely by the terms of the contract.

When legacies are intended, it is a clear duty of courts so to characterize them. When contract terms are sufficiently ambiguous, it may even be judicially legitimate to resolve doubt in a manner which gives preference to the statutory rights of a second and surviving spouse. On the other hand, when contract terms clearly create property rights in third party beneficiaries, courts should not downgrade those rights merely because they believe a surviving spouse should be provided for.

V. WILLS REVOKED BY REMARRIAGE, OMITTED SPOUSES, DOWER, FORCED SHARES, ETC.

A variety of statutory rights has been erected in the law in an attempt to assure some financial protection for a surviving spouse upon the death of the other spouse. One of these rights, revocation of an existing will by remarriage, is clearly directed to the protection of a second or subsequent spouse. The others protect a second or subsequent spouse, but are also available to a first spouse.

It takes no citation of authority for the proposition that statutory spousal rights may be rendered nugatory in a variety of ways by inter vivos acts of a spouse or of a prospective spouse. For example, an absolute gift of property to a third person is wholly effective as against the other spouse unless at that time the spouse has a currently vested interest in it.94

In the case of a will contract affecting property, the nature of the interest it creates for its beneficiaries is the critical determinant of pri-

337, 70 Cal. Rptr. 545 (1968) (acceptance of contract benefits creates an estoppel), discussed infra in text accompanying notes 99-103.

94. Oklahoma law is typical in that, except for a compulsory support obligation, "neither husband nor wife has any interest in the separate property of the other ..." OKLA. STAT. tit. 32, § 4 (1981).

[T]he law makes it possible for a man during his life to give practically all of his property to those to whom he owes no obligation, and deprive those of his own household of the comforts of life; but this is only an incident to the right of husband and wife to own and control separate property.

orities as between them and a surviving spouse. If a spouse agrees by contract only to make certain legacies, the rights of a surviving spouse may properly have priority over those of the prospective legatees. If, on the other hand, a spouse's contract creates immediate property rights in beneficiaries, those rights may have priority over the statutory rights of a surviving spouse.

England and a number of American states have statutes which revoke in whole or in part a spouse's existing will in case of marriage or remarriage. When no other will is made, the surviving spouse takes from the decedent's estate as in intestacy.

The opposing opinions in Estate of Stewart well illustrate the problem facing a court when confronted with a will contract and a revocation statute. Stewart, his wife and his brother entered into a contract respecting real property they owned equally as tenants in common. They covenanted not to revoke their wills which gave a life estate in the property to the survivors or survivor of them and then, on death of the last survivor, to their respective children in fee. The brother died first without issue, and Stewart was his heir. After the wife died, survived by six children, Stewart remarried and later died without having made a new will. A California statute revoked the will as to his second spouse. She claimed that she was entitled to one-half of the property as her intestate share. The six children claimed that she was entitled only to one-half of the interest he inherited from his brother and that they were entitled to the other one-half plus the entire interest Stewart originally owned and had contracted about for their benefit.

In an opinion for the court, Chief Justice Traynor sustained the children's claim. The court held that, by accepting the benefits of the contract, Stewart was estopped from making a different disposition of the property, which estoppel could not be avoided by a subsequent marriage. In a strong dissenting opinion, Justice McComb argued that "a contract to make disposition of property by will for all practical

95. See supra text following note 90.
96. Wills Act, 1837, 1 Vict., ch. 26, § 18.
98. E.g., Estate of Stewart, 69 Cal. 2d 296, 444 P.2d 337, 70 Cal.Rptr. 545 (1968).
99. Id.
101. See id. § 223.
purposes amounts to a testamentary disposition.” Since Stewart had fully performed the contract, its obligation terminated, and, since all of his property was transmitted through his will, it was, in the minority’s view, subject to the widow’s claim.

The Uniform Probate Code includes an omitted spouse statute which provides that such a spouse shall take from the decedent’s estate as in intestacy. The Arizona statute came before the court in Estate of Beauchamp. A property settlement agreement incorporated into the divorce decree provided, in part, that “[h]usband further agrees to execute a Last Will and Testament leaving his entire estate . . . to the children of the marriage of the parties.” The husband executed a will conforming to the agreement. He remarried and later died without having executed a new will, and his widow claimed one half of his estate as an omitted spouse.

The trial court determined that the children were entitled to their father’s entire estate. The Arizona Court of Appeals, however, found that the widow was an omitted spouse and entitled to one half of the estate as a priority over the children’s claim for breach of contract, which breach occurred because their father had failed to execute, after his remarriage, a new will or codicil leaving them his entire estate. The decision appears to be a correct one because the settlement agreement called for future legacies. Had that agreement created in the children immediate vested rights in the property of their father, their claim should have been sustained.

Like results should occur in dower cases. In Florida, the courts have held that a widow’s statutory dower right has priority over beneficiary rights claimed under contracts calling for future legacies. In contrast is the result in the Iowa case of Baker v. Syfritt. The Iowa

103. 69 Cal. 2d at 303, 444 P.2d at 342, 70 Cal. Rptr. at 550 (McComb, J., dissenting).
104. UNIF. PROBATE CODE § 2-301 (1982).
107. Id. at 220, 564 P.2d at 909.
108. Generally, dower rights attach to real property of which the husband was “seized” during coverture with his surviving wife. If a contract calls for future legacies, “seisin” is in the husband and the property is subject to dower when he remarries. In case a contract immediately vests a future interest in beneficiaries, the husband is not “seized” of an estate to which dower will attach when he remarries.
109. For a general discussion of dower, see C. SCRIBNER, A TREATISE ON THE LAW OF DOWER (2d ed. 1883).
110. See Barkley v. Barkley, 314 F.2d 188 (5th Cir. 1963); Tod v. Fuller, 78 So. 2d 713 (Fla. 1955). For a discussion of these cases, see infra text accompanying notes 125-31.
Supreme Court determined that husband and wife, in a joint will, agreed to unite their separate estates, first for the lifetime use of the survivor and then for third persons who would come into the legal title and right of possession. Title to real property in their separate names was, however, never changed. After the wife died, the husband remarried and later died without having executed a new will. His widow claimed her right to statutory dower of one third in value of all of the real property her husband separately owned. The court determined that the joint will was a contract which made the survivor a trustee and divested him of any heritable estate in the property he had separately owned. In denying the widow's claim, the court said: "[I]t must be remembered that unless the husband has at some time during the marriage relation held a heritable estate of some kind . . . in the property in question no right of dower could attach thereto in the wife's favor. The stream cannot rise higher than its source." 112

The results in cases of other statutory rights, such as forced shares,113 homestead,114 exempt property115 and family allowance,116

111. IOWA CODE § 3366 (1897) (currently IOWA CODE ANN. § 633.238 (West 1964)).
112. Baker, 147 Iowa at 62, 125 N.W. at 1003 (citations omitted).
113. A forced share statute typically grants a surviving spouse the right to elect to take in fee a fractional interest in property inventoried as assets of the decedent spouse's estates at death. The Oklahoma statute provides, in part, that "no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law . . . ." OKLA. STAT. tit. 84, § 44 (1981). If a will contract calls for future legacies only, property of the decedent subject to the future legacy is an asset of the estate and is thus subject to the forced share right which has priority over legacies. If a will contract immediately vests in beneficiaries a future interest in property, the affected property is not inventoried as an asset of the decedent's estate and is thus not property to which the forced share right attaches.

The Uniform Probate Code's "augmented estate" concept enlarges the estate of the decedent for purposes of the spouse's forced share by including in it certain transfers made by the decedent during marriage to the surviving spouse. See UNIF. PROBATE CODE § 2-202 (1982). If, however, a will contract immediately vests in beneficiaries a future interest in property prior to the marriage to the surviving spouse, the property affected is not included in the augmented estate and is thus not property to which the forced share right attaches. See id.

114. In a number of states, the homestead right is the right of a surviving spouse to possess and occupy real property. See, e.g., OKLA. STAT. tit. 31, § 2 (1981); id. tit. 58, § 311. If a decedent spouse owned real property subject to future legacies because of a will contract, a devisee of property designated as homestead to a contract beneficiary would be subservient to the surviving spouse's homestead right. See Meyer v. Security Nat'l Bank, 294 P.2d 572, 575 (Okla. 1955). If, on the other hand, a will contract vests a remainder following the contractor's life estate in beneficiaries, the property is not subject to a subsequent spouse's homestead right.

The Uniform Probate Code provides a homestead "allowance" expressed in dollars and is in no way tied to ownership of real property. UNIF. PROBATE CODE § 2-401 (1982). It "has priority over all claims against the estate." Id. (emphasis added). The promise of a future legacy is thus subservient to it. The homestead right will be valueless only if there is no money or property in a decedent's estate at death.

115. A right to exempt property may be stated in terms of categories of property without
should be the same. Each of these rights can attach only to assets included in a spouse's estate at his death. If a contract is treated as calling for future legacies, the decedent's property is ranked as an estate asset, and the statutory rights may have preference over legatees' claims. But if a contract is treated as creating, prior to a second marriage, vested property rights in third party beneficiaries, those rights vest in possession in the beneficiaries on the spouse's death and are not subject to claims based on statutes. The rights do not attach to property to which the deceased spouse held only legal title.\textsuperscript{117}

regard to value or in terms of a maximum value to be selected from categories of property. Compare, e.g., OKLA. STAT. tit. 58, § 311 (1981) (no limit on value) with UNIF. PROBATE CODE § 2-402 (1982) ($3,500 limit). In Oklahoma the property "is not to be deemed assets." OKLA. STAT. tit. 58, § 311 (1981). Under the Code, the exempt property allowance has priority over all claims against the estate except the homestead and family allowances. \textit{See} UNIF. PROBATE CODE § 2-402 (1982). Future legacies called for by a will contract are thus subservient to the exempt property right in either case. If a will contract has vested equitable title to all of the specified property in beneficiaries, there would be, under Oklahoma law, no exempt property at the time of the decedent's death. In the same circumstance under the Code, a deficiency in the $3,500 allowance would exist and could be made up if, but only if, there were assets in the estate available for that purpose. \textit{See} id.

116. In Oklahoma, an allowance for maintenance of the family has priority over all claims against a decedent's estate except homestead, exempt property, funeral charges and expenses of administration. \textit{See} OKLA. STAT. tit. 58, §§ 314-315. Under the Uniform Probate Code "[t]he family allowance is exempt from and has priority over all claims but not over the homestead allowance." UNIF. PROBATE CODE § 2-403 (1982). In either case the allowance is preferred over future legacies called for by a will contract, but in neither case can it be paid unless there are assets in the estate otherwise sufficient for the purpose.

England and some Commonwealth members have expanded the courts' power to provide a maintenance for the family out of a decedent's estate. In Dillon v. Public Trustee of New Zealand, 1941 A.C. 294 (P.C.), the Privy Council was called upon to apply § 33 (I) of New Zealand's Family Protection Act of 1908, which stated:

If any person (hereinafter called the "testator") dies leaving a will, and without making therein adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the court may at its discretion, on application by or on behalf of the said wife, husband, or children, order that such provision as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children.

\textit{Dillon}, 1941 A.C. 294, 294 (P.C.). Following the death of his first wife, the decedent entered into an agreement with his two sons to devise his real property in equal shares to three of his children. His last will, executed after his remarriage, was in accord with the agreement. The Council held that the estate was subject to additional provision for the widow in spite of the agreement. In a dictum, however, it approved a statement of the lower court "that if Henry Dillon, senior, had transferred his lands to his children during his lifetime, the Family Protection Act could not operate upon them." \textit{Id.} at 302 (dictum).

In England, the Inheritance (Provision for Family and Dependants) Act 1975, ch. 63, similarly allows a court to make additional provision for a decedent's family. Section 11 of the Act specifically applies to contracts to leave property by will: in limited circumstances a provision can be given preference over a will clause carrying out a contract which calls for future legacies. The Act does not, however, apply in cases where a contract has vested equitable title in beneficiaries.

VI. THE ROLE OF NOTICE OF A CONTRACT

Whether a second spouse has antenuptial notice or is in ignorance of the existence of a pre-existing contract binding the property of the other spouse is a matter often deemed relevant by courts in determining priority of rights among claimants to that property. Notice, or lack of it, is frequently said to be an important criterion to be utilized by a chancellor in determining whether and to what extent sound equitable discretion warrants a denial or a grant of specific performance of a contract.118 In other instances, the matter of notice is considered to be either immaterial to or the controlling determinant of the outcome in a case seeking to establish priority of spousal rights.

A. Notice—Immaterial or Controlling?

Kansas appears to be the only state which has squarely held that notice, or lack of it, is wholly immaterial in the determination of the rights of a surviving spouse in property affected by a contract. Two cases must be mentioned.

In the early case of Dillon v. Gray,119 the Grays entered into an oral contract for services with their daughter and son-in-law, the Dillons. Although the opinion does not set out the terms of the contract, the court says that “the farm and everything owned by [the Grays] should, upon the death of himself and his wife, become the property of the [Dillons].”120 The Dillons performed their agreement until after the death of the wife when Gray sold the farm and notified them to leave. Subsequently, Gray remarried and executed a will leaving all of his property to three of his sons, except for bequests of twenty-five dollars to Mrs. Dillon and $200 to her daughter. The second wife was joined as a defendant in an action brought by the Dillons for specific performance of the contract. The trial court decree ordered performance. In reviewing the court’s refusal to make a finding on notice, the Supreme Court of Kansas stated: “Notice to the wife of [the Dillons’] claim was not required in order to bind her. At her husband’s death she acquired no interest in property held by him which in equity belonged to others. Her marriage did not make her a purchaser.”121
The second case, *In re Estate of Davis*,\(^{122}\) concerns a property settlement agreement entered into by Texas spouses and affecting lands situated in Kansas. It provided that if the husband died before any sale of the Kansas lands, his interest in them “will pass” to his first wife “for her use and . . . she shall have the net income therefrom” until her death or remarriage, and that, upon her death or remarriage, “the remainder in said lands shall pass in fee simple to the bodily heirs” of the husband according to Texas law.\(^{123}\) After the divorce, the husband remarried and executed a will leaving one parcel of Kansas land substantially in accord with the agreement’s provisions. A second parcel was devised, however, to his second wife. The Kansas trial court construed the agreement as vesting equitable title to all Kansas lands in the first wife and their two daughters subject only to the right of sale, and, since that right was unexercised, the court ordered specific performance. In affirming the decree, the Supreme Court of Kansas recognized that, although specific performance is not a matter of right but of equity, the second wife’s lack of knowledge of the agreement is not a basis for denial of its enforcement according to the principle established in the *Dillon* case.\(^{124}\)

In Florida, a widow without notice is permitted to claim dower. In *Fuller v. Tod*\(^{125}\) the supreme court reversed a decree which included a finding, without admission of evidence, that decedent’s widow had no notice of her husband’s contract with his former wife. On remand the trial court properly found that the widow had no notice. The supreme court affirmed its decree awarding her one-third of her husband’s estate as dower.\(^{126}\)

The notice issue under Florida law came before the Fifth Circuit in *Barkley v. Barkley*.\(^{127}\) The husband’s will left his entire personal estate to his second wife; she, however, elected to take dower. In a declaratory judgment action, the court held that the contract with the divorced first wife was ineffective to cut off dower rights of the second

\(^{122}\) Id. at 605, 237 P.2d 396 (1951).
\(^{123}\) Id. at 609, 237 P.2d at 401.
\(^{124}\) See id. at 612, 237 P.2d at 403.
\(^{125}\) 63 So. 2d 316 (Fla. 1953).
\(^{126}\) Tod v. Fuller, 78 So. 2d 713 (Fla. 1955). Although dower has been abolished in Florida, *Fla. Stat. Ann.* § 732.111 (West 1976), the dower statute in effect in the time of Tod’s death, in part, that “in all cases the widow’s dower shall be free from liability for all debts of the decedent . . . .” 1945 Fla. Laws ch. 22,847, § 1.
\(^{127}\) 314 F.2d 188 (5th Cir. 1963).
surviving wife who married the decedent without notice of the contract. The court said:

Although it has not been clearly decided by the Florida Courts that actual or constructive notice on the part of the widow would bar her dower rights in the face of an agreement to make a will and the actual execution of a will, it is clear that the court has held that where there is no notice of the existence of such a contract or a will executed under it the promisee of the contract, who is the beneficiary of such will, may have his rights restricted where the widow claims her dower right.\(^{128}\)K

The Kansas and Florida cases are not inconsistent. The key distinction lies in the nature of the rights created in the spouses' contract for third party beneficiaries. In the *Davis* case, the Kansas court construed the husband's settlement agreement as immediately vesting equitable title to his property in his first wife and their children, subject only to his right of sale.\(^{129}\) In such a case, upon the husband's death that property embraced within the agreement is not ranked as an asset of his estate, for it now belongs legally and equitably to the beneficiaries. The courts in the *Barkley* case impliedly construed the settlement agreement as calling for future legacies to the third party beneficiaries. That agreement provided, in part, that "the parties . . . shall execute a good and valid will, which . . . shall will, bequeath, and devise the entire beneficial interest in all property . . ." to their sons.\(^{130}\) In such a case, no property interest immediately vests in the beneficiaries; the husband's property is an asset of his estate and, as such, is subject not only to the priorities of the statutory rights of his surviving spouse but also to the claims of his creditors.\(^{131}\) The Florida courts apparently have had no opportunity to determine the effect of lack of notice in a case where a contract immediately vests equitable title in third party beneficiaries.

It can readily be seen that under usual property rules, lack of notice, as the Kansas courts have determined, is immaterial where vested equitable rights are created by a spousal contract. The danger lies not in the matter of notice but in courts' misconstruing the rights created by a contract.\(^{132}\) It is clear, on the other hand, that a state may have a public policy which limits the rights of spouses to contract with respect

\(^{128}\) *Id.* at 192 (citation omitted) (emphasis added).

\(^{129}\) *See supra* text accompanying notes 122-24.

\(^{130}\) *Barkley*, 314 F.2d at 189 (emphasis added).

\(^{131}\) *See supra* text following note 90.

\(^{132}\) *See supra* text following note 93.
to their property in a manner which abridges the rights of a subsequent spouse. A state may also use notice or lack of notice of the contract as the determinant factor in the subsequent spouse's quest to obtain those rights. The distinction between the promise of a future legacy and a vested property interest should not be lost. Whether notice or lack of notice of a contract is a permissible factor in a chancellor's determination of the extent to which specific performance of such a contract is warranted is another issue altogether.

B. Discretionary Enforcement in Equity and the Role of Notice

When it appears to a beneficiary that the provisions of a will contract have not been met, the beneficiary may seek specific performance of the contract in equity. Technically, the remedy sought may more properly be called "quasi-specific performance" or "relief in the nature of specific performance." Since the promisor is dead, his performance cannot be compelled. Instead, it is performance by others, as trustees, that is sought.

Before a court sitting in equity will consider whether specific performance is appropriate relief, however, it must be satisfied that its jurisdiction is properly invoked. In will contract cases, as in any case in equity, traditional equity jurisdiction prerequisites must be established. For example, an equity court has no jurisdiction if the party seeking relief has an adequate remedy at law. Thus, where a party can be appropriately compensated by damages for breach of contract, the equity court will lack jurisdiction, and the party can only seek relief at law.

Once jurisdictional prerequisites are established and the case is properly one of equitable cognizance, "a contract to devise property is valid and enforceable unless superior equities have intervened." The equities here in favor of the surviving spouse, by hypothesis, must be based on after-acquired rights stemming from a marriage which occurred after the parties entered into a valid contract. Those rights

133. See infra text accompanying note 190.
134. See infra text accompanying notes 135-75.
137. See Owens v. McNally, 113 Cal. 444, 448, 45 P. 710, 711 (1896).
138. See id. at 454, 45 P. at 713.
140. Spousal rights were discussed previously. See supra text accompanying notes 94-117.
are proper considerations in equity, and, because of those rights, specific performance is not assured.

But the question whether relief should be granted or denied in a particular case addresses itself peculiarly to the conscience of the chancellor, and, before a plaintiff entitles himself to it, many considerations enter and are to be weighed. The specific performance must not be objectionable upon other grounds. The contract, therefore, must be definite and certain, and the remedy asked for must not be harsh or oppressive, or unjust to innocent third parties, or against public policy, or equity will with propriety withhold its assistance.

In addition, will contracts are subject to special scrutiny: "To be sure, the court would be more strict in examining into the nature and circumstances of such agreements than any others, and would require very satisfactory proofs of the fairness and justness of the transaction."

Although courts state the principles to guide the chancellor's exercise of discretion in general terms, the study of will contract cases which affect subsequent spouses reveals that one factor is the dominant, if not the only determinant of how a chancellor will exercise his discretion in denying or granting specific performance. That factor is whether the spouse had, or did not have, antenuptial notice of the pre-existing contract.

Two California cases illustrate the critical role of notice in equity cases. In *Sargent v. Corey* an oral adoption contract was proved wherein Littlefield agreed to surrender parental rights with respect to his three minor children in consideration of the Coreys' promise "that upon the death of the survivor of them the [children] 'should and would succeed' to the property then owned or thereafter acquired" by the Coreys. After his wife died, Corey remarried and fathered a daughter. He executed and deposited with a bank a deed of gift conveying certain real and personal property to his second wife and their daughter, which deed was delivered upon his death. In an action

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141. See, e.g., *Owens v. McNally*, 113 Cal. 444, 45 P. 710 (1896); *Ver Standig v. St. Louis Union Trust Co.*, 344 Mo. 880, 129 S.W.2d 905 (1939).
142. *Owens*, 113 Cal. at 450-51, 45 P. at 712.
144. For a discussion of notice in a different context, see supra text accompanying notes 119-34.
146. 34 Cal. App. 193, 166 P. 1021 (1917).
147. *Id.* at 194, 166 P. at 1022.
brought by the Littlefield children, the trial court found that the widow had no notice or knowledge of the contract until after her husband's death, and it denied enforcement of the contract. In affirming the decision on appeal, the court determined that *Owens v. McNally*¹⁴⁸ was controlling precedent which dictated that "such a contract will not be specifically enforced where the man marries after making it, *leaving his wife in ignorance thereof*, as marriage under such circumstances is sufficient to warrant the court in withholding equitable relief."¹⁴⁹

In *Sonnicksen v. Sonnicksen*¹⁵⁰ the spouses had entered into a written separation agreement which provided, in part,

that upon the death of the first of them that all of the property of either or both of them will go to the survivor, and upon the death of such survivor will go to the four children of these parties . . . and both of said parties agree to make a will which will carry out the above provision and which shall provide that . . . all of the property . . . upon the death of such survivor will go to the four children of these parties . . . .¹⁵¹

One day after his wife died, Sonnicksen entered into a written agreement with a woman who was to become his wife eighteen months later. In consideration of her providing him nursing care, he agreed that he would convey to her his home and the adjoining lot at the moment before his death. After he died, the widow tried to obtain the promised property in the probate proceedings and in a separate action. Both attempts failed, except that she was allowed a homestead.¹⁵² The four children then brought a quiet title suit and succeeded in the appellate court in obtaining full legal title to all of the property on estoppel grounds.¹⁵³ Commenting on the equities, the court said:

All the equities support the judgment of the trial court upon [the issue of title and right of possession]. There is no equity in the claim of the [widow]. She entered into a contract with [Sonnicksen] following the death of [his first wife] which was designed to aid [him] in a repudiation of the contract with his former wife and this was done . . . *with full knowledge of the former contract* and of the rights of the [children] to the property in litigation.¹⁵⁴

Surviving spouses who had no notice of pre-existing contracts

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¹⁴⁸. 113 Cal. 444, 45 P. 710 (1896).
¹⁵⁰. 45 Cal. App. 2d 46, 113 P.2d 495 (1941).
¹⁵¹. *id.* at 49, 113 P.2d at 497. The appellate court notes that conforming mutual wills apparently were not made by the parties. *Id.*, 113 P.2d at 498.
¹⁵³. *Id.*, at 49, 59, 113 P.2d at 497, 503.
¹⁵⁴. *Id.* at 56, 113 P.2d at 501 (emphasis added).
which may be deemed to call for future legacies have prevailed over beneficiaries in cases involving adoption, property settlement and services contracts. They have also prevailed in estate plan cases based on mutual wills or on a separate written contract.

A surviving spouse has prevailed even though she had notice of the pre-existing contract. In Boner's Administratrix v. Chesnut's Executor the court had to determine priority of rights based on a husband's antenuptial contract with his second wife and on mutual contractual wills of himself and his first wife. Each will left the testator's estate to the other spouse for life; the remainder, after numerous similar bequests, was to be divided between the heirs of both. The antenuptial contract provided that the second wife would receive only $25,000 from her husband's estate. The husband's last will acknowledged the widow's antenuptial contract rights, but it left the residue to a charity instead of to his and his first wife's heirs. Suggesting, but not deciding, that the widow would have been entitled to dower except for the antenuptial contract, the court found strong equities in her favor in spite of her actual knowledge of the mutual wills. Noting that the mutual will beneficiaries had "no moral or legal claim upon the testators," the court added that "[i]t would be most unjust and inequitable to say that collateral beneficiaries should take the entire estate of Mr. Chesnut and leave his widow with nothing..." The widow received the amount allowed by the antenuptial contract, but the will beneficiaries prevailed over the charity as to the residue.

The above cases dealt with actual notice. Courts generally have not faced the question of whether and under what circumstances constructive notice of a pre-existing contract may be imputed to a second spouse. In Wides v. Wides' Executor the court rejected an argument that a divorce decree gave notice of an incorporated settlement agreement. The court said that, as a recorded instrument, the decree gave no

155. See supra text following note 90.
157. See Wides v. Wides' Ex'r, 299 Ky. 103, 184 S.W.2d 579 (Ky. Ct. App. 1944).
161. 317 S.W.2d 867 (Ky. 1958).
162. Id. at 870.
163. 299 Ky. 103, 184 S.W.2d 579 (Ky. Ct. App. 1944).
notice to persons not parties to the litigation, and that the widow was not negligent in failing to investigate the judgment record.\textsuperscript{164} Wides and a paucity of cases on point may suggest that courts are averse to denying spousal rights where constructive notice is the only basis on which that may be done.

C. Lack of Notice and a Will Conforming to the Contract

The foregoing cases were in equity because a decedent’s last will did not conform to a contract’s requirements and because beneficiaries could not obtain the relief they wanted in probate proceedings or at law. If lack of notice is the key to spousal recovery in equity, a question arises as to the role of notice in circumstances in which equity’s intervention is neither sought nor available.

Suppose that a decedent’s last will is in conformity with a contract calling for future legacies either because no statute revokes it upon the spouse’s marriage\textsuperscript{165} or because it was executed after remarriage.\textsuperscript{166} In such a case, the beneficiaries have no need for relief in the nature of specific performance because the contract’s requirements for them have been met. Nor can specific performance be of any help to the surviving spouse. If the spouse has any rights, they are necessarily based on protective statutes\textsuperscript{167} and are to be claimed in probate proceedings.

If notice or lack of notice is only a criterion used to guide the chancellor in exercising his discretion, an anomaly in the law appears to emerge. In case of a will not conforming to a contract’s call for future legacies, beneficiaries’ full recovery in equity will depend upon whether the spouse did or did not have antenuptial notice of the contract. In case of a conforming will, equitable discretion does not come into play, and beneficiaries’ full recovery will depend solely upon the priorities accorded to spousal rights by the protective statutes. Typically, those statutes do not mention notice nor make the spouse’s right to the protections dependent upon lack of notice.\textsuperscript{168} Thus the spouse’s claims

\textsuperscript{164} Id. at 113, 184 S.W.2d at 584. \textit{But cf.} Price v. Craig, 164 Miss. 42, 143 So. 694 (1932) (antenuptial knowledge of the existence of a recorded contract may give constructive notice of its contents to the subsequent spouse).

\textsuperscript{165} See supra text accompanying notes 96-103.

\textsuperscript{166} Execution of a conforming will after remarriage prevents the new spouse from being able to claim as an “omitted spouse.” \textit{See In re} Estate of Beauchamp, 115 Ariz. 219, 564 P.2d 908 (Ariz. Ct. App. 1977). \textit{Beauchamp} is discussed supra in text accompanying notes 105-07. Failure to execute a new will after remarriage may constitute a breach of the contract. \textit{See}, e.g., \textit{Beauchamp}, 115 Ariz. at 221, 564 P.2d at 910.

\textsuperscript{167} See supra text accompanying notes 94-117.

\textsuperscript{168} The Uniform Probate Code contains several sections providing protection for a surviving
based on the statutes should be allowed regardless of notice; notice is immaterial.¹⁶⁹ Use of this reasoning to deny full statutory benefits to the spouse in non-conforming will cases in equity because he or she had notice is wholly unwarranted discrimination.

The Boner case¹⁷⁰ appears correct in awarding a Kentucky widow the benefit afforded by her antenuptial contract in spite of the fact that she had notice of the contractual wills of her husband and his first wife. The widow did not claim dower because the antenuptial contract called for a lesser amount. But for the contract, the court notes, she would have been entitled to dower.¹⁷¹ It thus may be implied from Boner that dower is to be allowed in spite of notice. Since the court earlier had decided that a widow was entitled to dower where there was no notice,¹⁷² the decisions make notice immaterial in Kentucky and are in accord with the Kentucky dower statute,¹⁷³ which does not make the dower right dependent upon lack of notice.

Only one case has been found in which a widow who had notice of a pre-existing contract calling for future legacies was denied any participation in her husband's estate. In Sonnicksen v. Sonnicksen,¹⁷⁴ decided on estoppel grounds, the court hinted that the widow had acted in concert with her husband in an attempt to defraud the third party beneficiaries of their contract rights. Although the result may be acceptable, the court's reasoning is somewhat unsatisfactory. A clear finding of fraud would have helped to justify the result.

It has earlier been observed that Kansas regards notice as wholly immaterial when a spouse claims rights in face of a contract which had immediately vested property rights in third party beneficiaries.¹⁷⁵ There, the beneficiaries prevailed. Notice is just as immaterial when a spouse claims rights in face of a contract calling for future legacies. Here, however, the spouse should prevail in all cases, regardless of notice, on the basis of priority of rights. Fortunately, up to this time judges have not worked an injustice on surviving spouses, as there ap-

¹⁶⁹ See supra text following note 118.
¹⁷⁰ See supra text accompanying notes 161-62.
¹⁷¹ 317 S.W.2d at 869.
¹⁷² See Wides v. Wides' Ex'r, 299 Ky. 103, 184 S.W.2d 579 (Ky. Ct. App. 1944).
¹⁷³ See KY. REV. STAT. ANN. § 392.020 (Michie 1984).
¹⁷⁴ 45 Cal. App. 2d 46, 113 P.2d 495 (1941) (discussed supra in text accompanying notes 150-54).
¹⁷⁵ See supra text accompanying notes 119-24.
pears to be no case where notice of a contract has been used as the sole basis for denying the priority of spousal rights. Future courts should be careful to recognize that the statutory rights protecting surviving spouses are not made dependent upon lack of notice of a future legacies contract.

VII. Public Policy

Although a number of courts have flirted with public policy in cases dealing with will contracts affecting spousal property, only one court appears to have held that a specific contract violated public policy, and that holding is an alternative one.

Bedal v. Johnson is a complex case which deals with a contract that provides not only for an adoption but also for making the adoptee the sole heir. In 1868 Alexander orally agreed with Johnson and his first wife that he would give up his daughter whom they would adopt and make their heir so that she would have all property they might leave at their deaths. In 1874 Alexander threatened to take the child away, since the adoption had not occurred. Thereupon the parties entered into a novation of the original agreement and in 1875 Johnson procured the enactment of a special act of the Legislative Assembly of Idaho which authorized the adoption and stated, in part, that the child “is hereby made the lawful and legitimate heir of said Orville P. and Rosanna C. Johnson, the same as if she were their natural child, and shall be treated as and have the same rights as an heir as if she were their natural child . . . .” After his first wife died, Johnson remarried and fathered a son; neither his second wife nor his son survived him. He married a third time and subsequently transferred most of his property to his third wife. His last will, which was offered for probate after the adopted daughter instituted an action based on the contract, left her fifty dollars and left the remaining estate to his widow and deceased son. The court says that the original agreement is invalid because contracts for the adoption of children were against public policy in 1868. The 1874 novation, originally invalid, became a binding contract upon the enactment of the 1875 special act. But the court also says:

176. 37 Idaho 359, 218 P. 641 (1923).
177. Id. at 370, 218 P. at 643.
178. Id. at 382, 218 P. at 648 (adoptions not authorized under common law).
179. See id. at 387, 218 P. at 650.
It should be remembered that we are discussing the contract not merely as one of adoption, but one providing for sole heirship. We shall not here go into the question as to whether the contract operates as a restraint of marriage, since we are of the opinion that inasmuch as the contract for sole heirship would deprive any children subsequently born of their natural rights of inheritance, and would likewise deprive the parents of their right to dispose of property by gift or devise to subsequently born or adopted children or to a spouse of either on a subsequent marriage, such a type of contract offends against the common instincts of natural loyalty, affection and duty and is therefore contrary to the public good and welfare.\(^{180}\)

The court’s final comment on public policy related to its decision that, because of the contract, Johnson could not legitimately disinherit his adopted daughter: “It contravenes no principle of public policy and invokes no unjust, harsh or inequitable rule against the [third wife] to so construe the contract as to give [the daughter] a child's share in the estate of both the Johnsons.”\(^{181}\) A number of courts have made statements about public policy in contract cases of this sort, but they have not based their decisions on that ground.

Several courts have addressed the question left open in the Johnson case: whether such a contract constitutes a restraint on remarriage. Uniformly, they suggest that the original parties to the contracts must have contemplated a possible remarriage, otherwise the contracts would operate as an impermissible restraint on marriage, and would be against public policy.\(^{182}\) One court has said that the law reflects a policy of disfavor upon the failure of a spouse to provide for the surviving spouse.\(^{183}\) Another court has said, on the other hand, that “[a] contract to make joint wills which may operate to deprive a second spouse of her statutory share is not contrary to the public policy of Illinois.”\(^{184}\) Mississippi has even taken the position that husband-wife estate plan contracts are to be encouraged.\(^{185}\)

\(^{180}\) Id. at 384, 218 P. at 648 (alternative holding); accord Gall v. Gall, 19 N.Y.S. 332 (N.Y. Sup. Ct. 1892); Patecky v. Friend, 220 Or. 612, 350 P.2d 170 (1960).

181. 37 Idaho at 388–89, 218 P. at 650.


Faced with a sole heirship contract in *In re Estate of Beauchamp*, the Arizona court thought that a settlement agreement calling for a will leaving all property the father owned at his death to the six children of the marriage did not violate public policy. That the father could freely alienate property during his lifetime distinguished the agreement from a contract, which would be against public policy, "where a person has irrevocably agreed to divest himself of all control of all his property of every nature whatever which he at the time possesses, and also of all he may subsequently acquire."  

It is not surprising that courts are reluctant to rely on public policy due to its ephemeral nature. As one court has observed:

> We are not unmindful of the fact that a Court should not lightly strike down a contract on the ground that it is contrary to what is called public policy. That is an uncertain, indefinite term, and when judges come to apply the doctrine they must take care that they do not trespass upon the right to make contracts as parties see proper, so long as they do not violate some principle or policy of law.

It seems clear on the other hand that a properly and well articulated public policy would serve as a far more legitimate basis on which to limit or restrict contracts that affect future spouses and children than do the somewhat artful and attenuated bases relied on in some of the decided cases.

The foregoing discussion has focused on two types of contracts which create different rights in third party beneficiaries and affect spousal property rights. One type vests immediate property rights in beneficiaries and in some cases purports to extend coverage to property acquired in the future. The other type promises the right to a future legacy of property owned at death. A legislature could change the nature or enlarge the scope of coverage of substantive spousal protections and fit the two types of contracts into a new scheme of protections in any way it believed socially desirable. It could even make the availability of a protection dependent upon lack of notice of a pre-existing contract.

Where the legislature does not act, however, the courts may con-

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187. *Id.* at 221, 564 P.2d at 910 (citing Baltimore Humane Impartial Soc'y v. Pierce, 100 Md. 520, 60 A. 277 (1905)).


189. See supra text accompanying notes 91-93.

190. See supra text accompanying notes 94-117.
tribute stability and reduce litigation by establishing as public policy "rules of construction" for determining the effects of the two types of contracts. In case there is no remarriage, a court should enforce both the future legacy and the immediate vesting contracts according to their terms, there being otherwise no supervening rights to require a different result.

The courts could construe future legacy contracts as contemplating remarriage and as giving the beneficiaries only a type of expectancy in that property bargained for in their behalf. Third party benefits would thus be subservient to the statutory protections available to surviving spouses, although the promisor could not exercise direct control over the benefits.\textsuperscript{191}

Two positions are desirable in regard to an immediate vesting contract. The contract should be construed to vest immediately in beneficiaries the interest bargained for in property the promisor owned at the time of the contract. Insofar as a contract purports to include an interest in property the promisor acquires or amasses in the future, the contract could be construed, again, as contemplating remarriage and as giving the beneficiaries only a type of expectancy. In case of remarriage, the third party benefits would be subservient to the statutory protections available to surviving spouses. If a court adopted these positions, it would in effect be recognizing that a decedent spouse had two "estates." The first estate would be comprised of all property owned by the decedent at the time of the second marriage. This estate would be fully subject to the contract and would become the property of the beneficiaries in accordance with the contract terms. The second estate would be comprised of property acquired by the spouse after marriage to the subsequent spouse. This estate would first be subject to the statutory protections accorded a surviving spouse and to issue of that marriage and otherwise subject to the contract for third party beneficiaries. Although such a policy would complicate estate matters for common law property jurisdictions, reference to community property law principles could be utilized to delineate the estates. The policy has the advantage of giving some recognition to the claims of all persons legitimately interested in a decedent spouse's estate.

\textsuperscript{191} See Bedal v. Johnson, 37 Idaho 359, 388-89, 218 P. 641, 650 (1923) (discussed \textit{supra} in text accompanying note 181).
VIII. Conclusion

Will contracts serve a number of useful functions, including spousal estate planning, settlement of property rights in case of divorce, facilitation of adoption and compensation for future services. These contracts may, however, give rise to a conflict between the rights of third party beneficiaries and the rights of a spouse acquired by a contracting party after a contract has been entered into. In fact, some contracts may have the effect of creating estate preferences for third party beneficiaries so that there is little or no estate available to the surviving spouse. In resolving the conflict, some courts have confused property, estates and contract law or relied upon less than pellucid reasoning.

In some cases the conflict has been avoided. Courts may rely on a presumption that joint or mutual wills do not presume a contract or that the introduced evidence of a contract does not meet the clear and convincing evidence standard. Courts may find that disputed property is not embraced by a contract or that a contract permits reasonable gifts of property.

A critical distinction perceived by some courts is whether a will contract merely promises future legacies to third party beneficiaries or immediately vests property rights in them. Statutes creating rights for surviving spouses may properly be interpreted as giving those rights priority over the rights of third party beneficiaries of a future legacies contract. The priority is reversed in cases where the contract immediately vests rights in beneficiaries. Although notice or lack of notice of a pre-existing will contract has been stated by courts to be critical in determining priority between the surviving spouse and the third party beneficiaries, notice or lack of it is, in fact, immaterial because the statutory spousal rights are not made dependent upon it.

Public policy has not generally been utilized by courts to resolve the conflict, although there are occasional dicta about it. Although recent enactments have enlarged the estate subject to the forced share rights of surviving spouses, legislatures still have an opportunity to formulate public policy to resolve the conflicts between third party beneficiaries and surviving spouses arising out of will contracts which bind the contractor’s assets. Until legislatures act, courts can contribute stability and reduce potential litigation in the area by adopting uniform rules of construction which effectuate the probable intentions expressed in will contracts.