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The Troubled Relationship of Will Contracts and Spousal Protection: Time for an Amicable Separation

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THE TROUBLED RELATIONSHIP OF WILL CONTRACTS AND SPOUSAL PROTECTION: TIME FOR AN AMICABLE SEPARATION

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I. INTRODUCTION

We live in a society with rapidly changing familial norms.[1] Statistics show that one out of every two marriages ends in divorce,[2] and even higher divorce rates are projected.[3] The number of people who remarry following a divorce also is increasing.[4]

Much has been written about the effect of the changing family patterns on estate planning.[5] In the era when having only one spouse and one set of children was the norm, it was fairly simple to develop a rational system for dividing the person's estate among spouse and children. In recent decades, however, the growing number of multiple marriages has helped set the stage for a conflict that often occurs between the children from one marriage and the spouse of another.

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1. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. 89-1923, REMARRIAGES AND SUBSEQUENT DIVORCES—UNITED STATES 12-13 (1989) [hereinafter REMARRIAGES AND SUBSEQUENT DIVORCES].

2. Larry L. Bumpass, *What's Happening to the Family? Interactions Between Demographic and Institutional Change*, 27 DEMOGRAPHY 483, 485 (1990).

3. Norval D. Glenn, *What Does Family Mean?*, AM. DEMOGRAPHICS, June 1992, at 30 (noting that "[i]f current divorce rates continue, about two out of three marriages that begin this year will not survive as long as both spouses live").

4. BARBARA F. WILSON, *in* REMARRIAGES AND SUBSEQUENT DIVORCES, *supra* note 1, at 1-3.

5. Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP., PROB. & TR. J. 683 (1992).

Virtually every state recognizes the validity of contracts to make wills.[6] Some mechanism also exists in each state for protecting a surviving spouse from intentional or unintentional total disinheritance.[7] A recurring problem arises when the rights of a promisee or a third-party beneficiary of a will contract come into conflict with the spousal right to receive a share of a decedent's estate.[8] Often, the spouse claiming protection is a second, or later, spouse, and the contract beneficiaries are children from a previous marriage.[9] Courts are divided sharply on who should prevail in such a conflict, and too often, the holdings appear to rest more on a

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6. *See* 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 10.1 (1960 & Supp. 1995) (collecting cases on the validity of will contracts).

7. ALA. CODE § 43-8-70 (1991); ALASKA STAT. §§ 13.11.070, .075 (1985); ARIZ. REV. STAT. ANN. § 14-2301 (1995); ARK. CODE ANN. § 28-39-401 (Michie 1987); CAL. PROB. CODE § 100 (West 1991); COLO. REV. STAT. §§ 15-11-201 to -202 (Supp. 1995); CONN. GEN. STAT. § 45a-436 (1993); DEL. CODE ANN. tit. 12, §§ 901 to -902 (Supp. 1994); FLA. STAT. ANN. §§ 732.201, .207 (West 1995); GA. CODE ANN. § 53-2-9 (1995); HAW. REV. STAT. § 560:2-201 (1994); IDAHO CODE §§ 15-2-201 to -203 (1979); ILL. ANN. STAT. ch. 755, para. 5/15-1 (Smith-Hurd 1992); IND. CODE ANN. § 29-1-3-1 (Burns 1989); IOWA CODE ANN. §§ 633.236, .238 (West 1992); KAN. STAT. ANN. §§ 59-602 to -6a202, -6a203 (Supp. 1993); KY. REV. STAT. ANN. §§ 392.020, .080 (Michie/Bobbs-Merrill 1984); LA. CIV. CODE. ANN. art. § 2336 (West 1995); ME. REV. STAT. ANN. tit. 18-A, §§ 2-201 to -202 (West 1981); MD. CODE ANN., EST. & TRUSTS § 3-203 (1991 & Supp. 1995); MASS. GEN. LAWS ANN. ch. 191, § 15 (West Supp. 1995); MICH. COMP. LAWS ANN. §§ 700.281, .282 (West 1995); MINN. STAT. ANN. §§ 524.2-201 to -202 (West 1995); MISS. CODE ANN. § 91-5-25 (1994); MO. ANN. STAT. § 474.160 (Vernon 1992); MONT. CODE ANN. §§ 72-2-221 to -222 (1994); NEB. REV. STAT. §§ 30-2313 to -2314 (1989); NEV. REV. STAT. ANN. § 123.250 (Michie 1993); N.H. REV. STAT. ANN. § 560:10 (1974); N.J. STAT. ANN. §§ 3B:8-1, -3 (West 1983); N.M. STAT. ANN. § 45-2-805 (Michie 1995); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981); N.C. GEN. STAT. §§ 30-1, -3 (1994); N.D. CENT. CODE §§ 30.1-05-01 to -02 (Supp. 1995); OHIO REV. CODE ANN. § 2106.01 (Anderson 1994); OKLA. STAT. ANN. tit. 84, § 44 (West 1990); OR. REV. STAT. § 114.105 (1990); 20 PA. CONS. STAT. ANN. § 2203 (Supp. 1995); R.I. GEN. LAWS § 33-25-4 (Supp. 1994); S.C. CODE ANN. §§ 62-2-201 to -202 (Law. Co-op. 1975 & Supp 1995); S.D. CODIFIED LAWS ANN. §§ 30-5A-1, -2 (1984); TENN. CODE ANN. § 31-4-101 (Supp. 1995); TEX. FAM. CODE ANN. § 5.22 (West 1993); UTAH CODE ANN. §§ 75-2-201 to -202 (1993); VT. STAT. ANN. tit. 14, §§ 401-403 (1989); VA. CODE ANN. §§ 64.1-16 to -16.1 (Michie 1995); WASH. REV. CODE ANN. § 26.16.250 (West 1995); W. VA. CODE §§ 42-3-1, -2 (Supp. 1995); WIS. STAT. ANN. §§ 861.02, .03 (West 1995); WYO. STAT. § 2-5-101 (1992).

For a discussion of the various types of spousal protection, *see infra* notes 88-127 and accompanying text. Georgia offers only minimal protection. *See infra* note 108.

8. *See generally* BERTEL M. SPARKS, CONTRACTS TO MAKE WILLS (1956); David C. Minneman, Annotation, *Surviving Spouse's Right to Marital Share as Affected by Valid Contract to Convey by Will*, 85 A.L.R. 4TH 418 (1993).

9. *See* Gregory v. Estate of Gregory, 866 S.W.2d 379, 380 (Ark. 1993). The fact that the non-parent spouse may have little or no contact with the children of the prior marriage may exacerbate the conflict. This is so because children separated from a parent during childhood are much less likely to see that parent in later years. *See* Bumpass, *supra* note 2, at 492.

desire to reach the "right" result based on the particular facts of a case than on careful analysis or consistent policy.[10]

The conflict suggests the possibility of applying a number of bodies of law: (1) contract law; (2) property law; (3) probate law, and (4) family law. Courts have used some or all of these in resolving this type of conflict. This Article explores the conflict in the context of the policies underlying recognition of validity of will contracts and protection of surviving spouses. The Article proposes a rationale for resolving this difficult and important issue. Before considering the soundness of the case law, it is useful to examine the history and use of will contracts and the structure and purposes of spousal protection.

II. Will Contracts

Blackstone, the English commentator, defined a will as " 'the legal declaration of a man's intentions, which he wills to be performed after his death.' "[11] In addition, wills are ambulatory, which means that a will is ineffective until the death of the testator and that a will can serve to dispose of property that the testator acquired after executing the will.[12]

A person has the power to make any desired disposition of property by making a will, so long as the legislature has not curtailed the disposition[13] and doing so does not violate public policy.[14] Courts have called the right to make a will a statutory privilege rather than a natural right.[15] Additionally, the United States Constitution does not protect the right to

10. It has been suggested that courts' unsatisfying reactions to the conflict are "not entirely reprehensible" in light of the imperfect structure of spousal protection. W.D. Macdonald, Fraud on the Widow's Share app. D at 370 (1960). For a discussion of the shortcomings of spousal protection mechanisms, see *infra* notes 231 and accompanying text.

11. 1 William Blackstone, Commentaries on the Laws of England § 662 (William C. Jones ed. 1916) (1766).

12. *See* Sparks, *supra* note 8, at 6 n.18.

13. One common example of legislative curtailment is protection of surviving spouses. *See infra* notes 88-127 and accompanying text.

14. *See, e.g.*, Wilber v. Asbury Park Nat'l Bank & Trust Co., 59 A.2d 570 (N.J. Ch. 1948) (refusing to enforce wasteful direction in will), *aff'd sub nom.* Wilber v. Owens, 65 A.2d 843 (N.J. 1949).

15. Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) (explaining that "[r]ights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance"). Because the state granted testamentary power, one court reasoned that it could also be statutorily curtailed, in that case by an elective share statute. *See* Shimp v. Huff, 556 A.2d 252, 257 (Md. 1989) (explaining that the right to transfer property at death is a privilege given by the state). *But see* Estate of Eisenberg v. Eisenberg, 280 N.W.2d 359, 361-62 (Wis. Ct. App.) (noting that Wisconsin views the right to make a will as an inherent right protected by the Wisconsin Constitution), *appeal dismissed*, 444 U.S. 976 (1979).

make a will.[16] The right is, nevertheless, one with an impressive historical recognition.[17]

A person can, however, limit his own power to make a will by agreeing to make a particular disposition and not to revoke it, or by promising to die intestate.[18] The validity of such agreements has long been recognized.[19] A person who enters into such an agreement not only binds himself to the promisee under the agreement, but also may be liable to third-party beneficiary suits under the agreement. These parties may sue to enforce the contract,[20] sue for damages based on breach of contract, or ask a court to grant an equitable remedy such as the imposition of a constructive trust.[21]

Like any other contract, a contract to make a will requires an offer, acceptance, and consideration.[22] Although contract law governs both the validity of the contract to make a will and the possible remedies for breach,[23] the promisor's power to make or revoke a will technically re-

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16. *Irving Trust*, 314 U.S. at 562.

17. *See* Lawrence M. Friedman, *The Law of Succession in Social Perspective*, *in* DEATH, TAXES AND FAMILY PROPERTY: ESSAYS AND AMERICAN ASSEMBLY REPORT 14-20 (Edward C. Halbach, Jr. ed. 1977); Orrin K. McMurray, *Liberty of Testation and Some Modern Limitations Thereon*, 14 U. ILL. L. REV. 96 (1919-20) (discussing various justifications for, and theories of, testamentary disposition).

18. *See generally* SPARKS, *supra* note 8 (containing an exhaustive study of the history and operation of will contracts). For an interesting discussion of the early development of will contracts, *see id.* at 1-21.

19. The earliest reported case recognizing the validity of a will contract appears to be Goilmere v. Battison, 23 Eng. Rep. 301 (1682); *see* SPARKS, *supra* note 8, at 1. In the United States, the earliest reported case seems to be Izard v. Middleton, 1 Desaus. 116 (S. Car. 1785) (recognizing the validity of will contracts, but declining relief to promisee because of insufficient proof). *See* SPARKS, *supra* note 8, at 11 & n. 32.

20. This remedy is similar to specific performance. The performance, however, would usually be the execution of a will conforming to the contract, and the court does not write a will for the deceased promisor. Instead, the court distributes the promisor's estate in accordance with the will that should have been written. *See* Wides v. Wides' Ex'r, 184 S.W.2d 579, 581 (Ky. 1944).

21. *See* Rubenstein v. Mueller, 225 N.E.2d 540, 543 (N.Y. 1967) (imposing a constructive trust on property in favor of will contract beneficiaries). In *Rubenstein*, the beneficiaries of a contractual joint will asked the court to impose a constructive trust on the property that passed under a subsequent will that did not conform to the contract. *Id.* The court probated the subsequent will, but then imposed a constructive trust. *Id.* at 542-43; *see also* Keats v. Cates, 241 N.E.2d 645, 651 (Ill. App. Ct. 1968) (allowing contract beneficiaries to enforce will contracts through an action at law for breach of contract, or through a suit in equity to impose a constructive trust on property).

22. *See* SPARKS, *supra* note 8, at 22. Some courts have held that a bilateral will contract does not become irrevocable until the first promisor dies, leaving a will that conforms to the contract, and the other promisor accepts the benefits of the will. *See Keats*, 241 N.E.2d at 651 (stating that a will contract becomes irrevocable once a party to the contract dies).

23. *See* MACDONALD, *supra* note 10, app. D at 366.

mains unimpaired.[24] Thus, the last will of a decedent will be probated regardless of whether it breaches a contract.[25] This is true because a contract to make a will affects the property subject to the contract rather than the promisor's power to make or revoke a will.[26] The takers under the decedent's last will, however, may receive nothing if a court determines that the contractual rights of others take precedence over the takers' rights.[27] The same is generally true when the rights of beneficiaries under a contract conflict with the rights of intestate heirs.[28]

Finally, courts have rejected the argument that one with no property gives no consideration for a will contract.[29] Rather, these courts have held that the mutual promise to execute a will for the disposition of property is sufficient consideration to support the contract.[30]

A. Purposes of Will Contracts

Contracts to make wills are often an estate planning device. To a lesser extent, they can serve as a tool for resolving family disputes or as a business device, but their primary purpose generally is to carry out an estate plan. Consider, for example, Carol and David, a happily married couple with no children. The couple's estate planning goal is to have the survivor of them enjoy the couple's combined wealth for his or her life. At the death of the survivor, Carol and David would like one half of their combined wealth to pass to Carol's heirs, and the other half to pass to David's heirs. The simplest, most effective way to ensure this disposition is for Carol and David to enter into a contract to create mutual wills.[31] Carol

24. *See* Estate of Chayka v. Santini, 176 N.W.2d 561, 564 (Wis. 1970) (holding that the will itself remains ambulatory); MACDONALD, *supra* note 10, app. D at 366 (noting the promisor's ability to revoke the will).

25. *See In re* Burke's Estate, 134 P. 11, 13 (Or. 1913) (recognizing "[i]t is no objection to the probate of a will that it violates such an agreement, or revokes a former will made in pursuance of it").

26. *See* SPARKS, *supra* note 8, at 7-8 (discussing the proposition that the property is bound by the contract, regardless of the revocation of the will). *But see* Walker v. Yarbrough, 76 So. 390, 392-93 (Ala. 1917) (allowing an earlier will to be probated, rather than probating a subsequent will).

27. *See* Rubenstein v. Mueller, 225 N.E. 2d 540, 543 (N.Y. 1967) (imposing a constructive trust on property received by the beneficiary of a subsequent will).

28. Note, *The Contractual Will and Some Consequences of its Breach*, 34 VA. L. REV. 590, 595 (1948) (discussing a second will's beneficiary rights and whether they conflict with a will contract).

29. *See* Black v. Edwards, 445 S.E.2d 107 (Va. 1994) (rejecting the contention that, because a party lacked property, there was no consideration for the will contract).

30. *Id.*

31. A will contract is not the only way for Carol and David to effect their plan. They also could place all of their assets in an inter vivos trust. The terms of the trust would provide for them and their survivor for life, followed by a disposition to the appropriate

will promise to give everything to David, if he survives. If David does not survive, she will give one half of her estate to her heirs and the other half to David's heirs. David's will mirrors Carol's will. The existence of the contract ensures that the surviving spouse does not alter this plan after the first spouse's death.

Will contracts can also be utilized as part of a business plan.[32] If, for example, a partnership lacks the liquidity to "cash out" one of the partners at death, the partners simply could agree to bequeath their partnership interests to each other.[33] This type of agreement differs from an estate planning will contract in several important respects. First, the contract usually affects only the promisor's business assets, and not the promisor's entire estate. Second, the likely goal of such a contract is to preserve the business rather than to make a gift. A will contract also may be an integral part of a divorce or separation agreement.[34] For example, a soon to be ex-spouse may promise to leave all or part of his or her estate to the children of the dissolving marriage.[35] A will contract also may be part of a personal services arrangement. That is, a promisor can agree to make a particular testamentary disposition in exchange for the promisee's performance of a service.[36]

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heirs. However, an inter vivos trust may be an imperfect planning tool for Carol and David. For example, if assets acquired after the trust is created are not added to the trust corpus, the plan will not be fully effective. In addition, the couple may not want the added expense and effort that comes from administering a trust.

32. *See* Buehrle v. Buehrle, 126 N.E. 539 (Ill. 1920) (discussing the ownership of the wholesale liquor business of the deceased); Fleming v. Fleming, 174 N.W. 946, 947-49 (Iowa 1919) (debating who gets interest in the life insurance business), *reh'g overruled*, 180 N.W. 206 (Iowa 1920), *modified*, 184 N.W. 296 (Iowa 1921).

33. *See* Buehrle, 126 N.E. at 539-40 (quoting the will agreement made between two partners). In *Buehrle*, the Supreme Court of Illinois considered the effect of a will contract between two brothers who were partners in a business. *Id.* The brothers agreed to leave all rights in the business to each other. *Id.* Upon the first brother's death, the *Buehrle* court held that the right of a surviving spouse to renounce a deceased spouse's will and take an intestate share prevailed over the contract right of the deceased spouse's brother. *Id.* at 541; *see also Fleming*, 174 N.W. at 953 (holding that the deceased's wife is entitled to her distribution share of her husband's estate, despite the will agreement made by the deceased and his three business partners).

34. *See* Estate of Beauchamp v. Eichenberger, 564 P.2d 908, 909 (Ariz. Ct. App. 1977) (involving a will contract incorporated into a divorce decree); *see also* Gerald Y. Sekiya, Note, *Separation Agreements to Make Mutual Wills for the Benefit of Third Parties*, 18 HASTINGS L.J. 423, 424 (1967) (discussing separation agreement will contracts).

35. *See Beauchamp*, 564 P.2d 908, 909 (1977).

36. *In re* Estate of Beeruk, 241 A.2d 755, 757, 759 (Pa. 1968) (holding that promisor's nephew was entitled to the entire estate under an oral will contract in exchange for services that the nephew rendered). In *Beeruk*, the Supreme Court of Pennsylvania considered a surviving spouse's right to take a share of her husband's estate against the right of a promisee under a will contract. *Id.* at 756-57. The promisee had agreed to care for the promisor in exchange for a promise to will to the promisee the bulk of the promisor's estate. *Id.* at

This type of will contract differs in nature from the estate planning will contract and the property settlement will contract, the latter of which is more of an attempt to divide joint property than to effectuate a *quid pro quo* bargain. Additionally, in a personal services will contract, the contract beneficiary's recovery might be by *quantum meruit*, rather than an entitlement to the entire estate.[37] However, judging by the reported cases, the personal services will contract rarely is used.

B. Types of Will Contracts

By definition, a contract is any "promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[38] The promise underlying a will contract can be one of four types or a combination of several types. First, a person can promise to execute a will making a particular disposition. Wills, however, are by nature revocable until the death of the testator.[39] Thus, such a promise would have little value without the second type of promise, which is a promise not to revoke an existing will. Together, these first two types of promises form the basis of most will contracts.[40]

Less often, a person may base a will contract on a promise not to make a will or on a promise to revoke a will. Such promises are valuable to a person's intestate heirs, who will take the person's property if he or she dies without a will. However, such contracts are extremely rare, largely due to the fact that a person's intestate heirs cannot be determined until death. Thus, a contracting party could not guarantee that he or she actually would receive property under the contract.

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757. The court held the widow's rights inferior to the promisee's rights because the promisee was a creditor. *Id.* at 759. *But see* Gall v. Gall, 19 N.Y.S. 332, 333-35 (Sup. Ct. 1892), *aff'd*, 34 N.E. 515 (N.Y. 1893). In *Gall*, the New York Supreme Court refused to enforce a will contract. *Id.* at 333. The alleged promisee, a nephew of the testator, argued that he had cared for the testator, given up his own business interests to further the business interests of the testator, and had changed his last name to that of the testator in exchange for the testator's promise to leave him the residue of his estate. *Id.* at 334. Although the court declined to enforce the contract because it was too uncertain, the court opined that even if there had been a valid enforceable contract, its exclusion of a future spouse or child would have made it void as against public policy. *Id.* at 335.

37. *See, e.g.*, Wides v. Wides' Ex'r, 184 S.W.2d 579, 581 (Ky. 1994) (internal citations omitted).

38. 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1 (rev. ed. 1936).

39. *See* SPARKS, *supra* note 8, at 6.

40. *See* Plemmons v. Pemberton, 139 S.W.2d 910, 916 (Mo. 1940) (en banc) (recognizing that "[t]he agreement to be enforcible [sic] must be to dispose of the property as therein provided, or not to revoke such wills; that the wills shall remain in force at the death of the testators").

Consider the following example which illustrates the relative weakness of the third and fourth type of promise. Andy and Ben are brothers. Andy promises not to make a will in exchange for a $25,000 payment from Ben. At the time Andy made the contract, Andy's sole intestate heir under the governing intestacy statute was Ben. Before Andy's death, however, he marries. He dies while married, and the intestacy statute gives his entire estate to his wife. Ben is without a remedy because Andy fulfilled his obligation under the contract—he did not make a will. The same result would occur if Andy had promised to revoke a will. It should be noted that a promise to revoke a will would not insure intestacy unless accompanied by a promise not to make a will.

Additionally, the parties to a will contract may agree to prohibit the promisor from engaging in any inter vivos transfer that would defeat the agreement.[41] Even if the parties do not expressly so agree, the court may read such a promise into the will contract.[42] Examples of inter vivos transfers that would defeat the will contract are the making of large gifts and the creation or funding of will substitutes, such as a joint tenancy with the right of survivorship.

C. Is There a Contract?

The threshold issue in any will contract case is whether a contract existed.[43] Because the existence of a contract often results in a serious impairment of the promisor's testamentary freedom,[44] courts frequently

41. *See* Nye v. Bradford, 193 S.W.2d 165, 167 (Tex. 1946). In *Nye*, the joint will of a husband and wife provided that the survivor could sell a particular piece of real property. *Id.* at 166. The wife, who survived the husband, conveyed the property to her daughter. *Id.* The court held that the terms of the joint will did not authorize the gift of the property and violated the contract underlying the joint will. *Id.* at 167.

42. *See* Estate of Chayka v. Santini, 176 N.W.2d 561, 564 (Wis. 1970) (holding that an inter vivos transfer violated an implied duty of good faith in a will contract). In *Chayka*, a husband and wife executed a joint will, which the court held was made pursuant to a contract. *Id.* at 562. After the husband's death, the woman remarried and transferred inter vivos to her second husband much of the property she received under the joint will. *Id.* The *Chayka* court held "that transfer by gifts *inter vivos* of a substantial portion of the property received under the joint will must be held to be violative of the agreement of the parties and as a matter of law not made in good faith." *Id.* at 563. In part, the court based this conclusion on the implied duty of good faith imposed on the parties to a contract. *Id.* at 564. *See also* Rich v. Mottek, 181 N.E.2d 445 (N.Y. 1962). In *Rich*, the New York Court of Appeals noted that the parties to a will contract can use the property subject to the agreement as they please " 'short of making a different testamentary disposition or a gift to defeat the purpose of the agreement.' " *Id.* at 446-47 (quoting Rastetter v. Hoenninger, 108 N.E. 210, 211 (N.Y. 1915)).

43. *See Rich*, 81 N.E.2d at 447-48 (analyzing an agreement's terms to determine whether a testamentary contract existed).

44. For a discussion of this issue, see *supra* notes 18-21 and accompanying text.

have required a higher level of proof to establish that a contract was actually formed.[45]

1. Standards and Methods for Proving Will Contracts

There are a wide variety of standards and methods for proving that will contracts exist.[46] Because one of the parties to the contract is usually dead when proof of the contract is offered, courts may require a higher level of proof than they ordinarily would require for other contracts.[47] The usual rule is that a party must prove by more than a preponderance of the evidence that a contract to make a will existed.[48] Often, a party must present clear and convincing evidence that such a contract existed.[49] This heightened standard is probably an attempt to prevent the enforcement of fraudulently alleged will contracts.

A recent Virginia case, *Black v. Edwards*,[50] illustrates several of the issues that arise in this regard. In *Black*, the court found the testimony of the scrivener sufficient to establish the existence of a contract.[51] The facts of the case illustrate a very common situation in which husband and wife execute reciprocal wills—each leaving the entire estate to the surviving spouse.[52] In this case, if there were no surviving spouse, the estate would be distributed among eight pre-designated relatives, four of the husband's and four of the wife's.[53] Shortly after the wife's death, the husband executed a new will, giving his entire estate to his relatives, while

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45. *See* Glass v. Battista, 374 N.E.2d 116, 117 (N.Y. 1978) (discussing the high level of proof required for courts to recognize will contracts); *In re* Lowe's Estate, 265 N.Y.S.2d 257, 260 (Sup. Ct. 1965) (requiring clear and convincing evidence that joint or mutual wills are irrevocable), *aff'd sub nom.* Matter of Zeh's Estate, 276 N.Y.S.2d 635 (N.Y. 1966); Oursler v. Armstrong, 179 N.E.2d 489, 490 (N.Y. 1961) (requiring clear evidence of promise not to revoke will); Junot v. Estate of Gilliam, 759 S.W.2d 654, 657 (Tenn. 1988) (holding that an oral contract not to revoke a will must be proved by clear and convincing evidence).

46. *See generally* Edward W. Bailey, *Contracts to Make Wills—Proof of Intent to Contract*, 40 TEX. L. REV. 941 (1962) (discussing various aspects of proving the existence of will contracts).

47. *See* Plemmons v. Pemberton, 139 S.W.2d 910, 918 (Mo. 1940) (en banc) (stating a rule that the "agreement be established by clear, definite, convincing, unequivocal and satisfactory testimony"); Bailey, *supra* note 46, at 952 (noting that a higher standard of proof often is required); SPARKS, *supra* note 8, at 25-26 (suggesting a higher standard is appropriate); *cf.* Ridders v. Ridders, 65 P.2d 1424, 1427 (Or. 1937) (holding "unambiguous, clear, and convincing evidence" is required to prove existence of a oral will contract).

48. SPARKS, *supra* note 8, at 24-25.

49. *Id.* at 24 n.6 (collecting cases).

50. 445 S.E.2d 107 (Va. 1994).

51. *Id.* at 109.

52. *Id.* at 108.

53. *Id.*

the wife's relatives received nothing.[54] After the husband's death, the wife's relatives, who were the beneficiaries under the earlier will, sought to receive a portion of the husband's estate.[55]

Reversing the trial court, the Virginia Supreme Court held that the testimony of the attorney who prepared the wills was sufficient to establish the existence of a contract between the husband and wife not to revoke their wills.[56] The court noted that parties may prove will contracts through the testimony of "competent witnesses" regarding statements of the testators or implications arising from circumstantial evidence, parties' relations, and what the document actually included.[57] The court stated further that, although a contract must be proven by "clear and satisfactory" evidence,[58] such evidence need not be direct.[59] Sometimes, statutes mandate similar requirements.[60]

Some states avoid the proof problem by requiring that parties put will contracts in writing.[61] Others require at least a written reference to a

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54. *Id.*

55. *Id.* At an *ore tenus* hearing, the court found in favor of the defendants (the husband's executor and the beneficiaries of the husband's will). *Id.* at 108-09.

56. *Id.* at 109. The attorney testified that he had explained to the couple that once they signed mutual and reciprocal wills, there would be a contract between them, and that neither could change the terms of the wills. *Id.* at 108. He further testified that he did not put the agreement in writing or include it as part of the testamentary documents because he thought that both clients " 'had a clear understanding of . . . how the ultimate beneficiaries would take the property.' " *Id.*; *see also* Junot v. Estate of Gilliam, 759 S.W.2d 654, 658 (Tenn. 1988) (noting that, although a draftsman may not express an opinion as to the testator's intention as to the meaning of a will, the draftsman may testify to the stated desire of testators that no contract exists); *In re* Estate of Beeruk, 241 A.2d 755, 758 (Pa. 1968) (relying on scrivener's testimony to prove existence of contract).

57. *Black*, 445 S.E.2d at 109 (quoting Williams v. Williams, 96 S.E. 749, 751 (Va. 1918)).

58. *Id.*

59. *Id.*; *see also* Chambers v. Appel, 64 N.E.2d 511, 516 (Ill. 1945) (noting that execution of a will that did not conform to an alleged earlier oral contract was a factor that bore on existence of such contract); Plemmons v. Pemberton, 139 S.W.2d 910, 916 (Mo. 1940) (en banc) (noting that direct evidence is not necessary to prove a contract).

60. *See* WIS. STAT. ANN. § 853.13 (West 1991). Section 853.13 provides in pertinent part that:

> (1) A contract not to revoke a will can be established only by: (a) provisions of the will itself sufficiently stating the contract; (b) an express reference in the will to such a contract and evidence proving the terms of the contract; or (c) if the will makes no reference to a contract, clear and convincing evidence apart from the will.
>
> (2) This section applies to a joint will . . . as well as to any other will; there is no presumption that the testators of a joint will have contracted not to revoke it.

Id.

61. *See* N.Y. EST. POWERS & TRUSTS LAW § 13-2.1(b) (Consol. 1987) (requiring written contract in the will itself to create a joint contractual will).

contract.[62] Even in states that do not require will contracts to be in writing, courts have given strong hints that express contractual language, either within the allegedly contractual will or as a separate document, is desirable.[63]

2. *The Unique Problem of Joint and Mutual or Reciprocal Wills*

A joint will is a single document that serves as a will for two people.[64] It may dispose of all the property of the two testators and is not limited to a disposition of jointly-held property.[65] Execution of a joint will may raise a presumption that the will was executed pursuant to an agreement whereby each party agreed that the survivor of the two would not revoke the will.[66] The presumption may be rebuttable[67] or irrebuttable.[68] In ju-

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62. *See* TENN. CODE ANN. § 32-3-107 (1984). Section 32-3-107 provides that:

(a) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate can be established only by:

(1) Provisions of a will stating material provisions of the contract;

(2) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or

(3) A writing signed by the decedent evidencing the contract.

(b) The execution of a joint will or mutual wills does not create a presumption of a contract to make a will, or to refrain from revoking a will.

Id.

The Uniform Probate Code is nearly identical to the Tennessee statute. *See* U.P.C. § 2-514 (1993). Thus, the U.P.C. provision governing contracts concerning succession does not address the rights of a promisor's surviving spouse.

63. Glass v. Battista, 374 N.E.2d 116, 118 (N.Y. 1978). New York subsequently legislated that in order to be contractual, a joint will must expressly state that it is intended to be contractual. *See* N.Y. EST. POWERS & TRUSTS LAW § 13-2.1(b) (Consol. 1987).

64. Bonczkowski v. Kucharski, 150 N.E.2d 144, 148 (1958); Annotation, *Joint, Mutual, and Reciprocal Wills*, 169 A.L.R. 9, 12 (1947).

65. *See In re* Estate of Knight, 533 N.E.2d 949, 951 (Ill. App. Ct. 1989) (acknowledging that "[a] joint and mutual will is meant to dispose of property owned in severalty, in common, or jointly by the testators").

66. *See* Keasey v. Engles, 242 N.W. 878, 879 (Mich. 1932) (assuming the existence of a contract where a joint will was entered into). *But see* TENN. CODE ANN. § 32-3-107(b) (1984) (stating that "[t]he execution of a joint will or mutual wills does not create a presumption of a contract to make a will, or to refrain from revoking a will").

67. *See* Estate of Chayka v. Santini, 176 N.W.2d 561, 563 (Wis. 1970) (stating that, although the terms of the will are important, it is the terms of the agreement that control). The *Chayka* court stated that a joint reciprocal will itself is prima facie evidence of a will contract, and its existence raises a rebuttable presumption that a will contract existed between the testators. *Id. But see* WIS. STAT. ANN. § 853.13 (West 1969) (altering *Chayka* holding).

68. *Knight*, 533 N.E.2d at 951. The *Knight* court reasoned that a joint will becomes irrevocable at the death of the first of the two testators. *Id.* Additionally, the court posited that the survivor is bound to dispose of the property in accordance with the terms of the will. *Id.* Thus, the court appeared to presume conclusively that a will contract existed between the testators. *Id.*; *see also Keasey*, 242 N.W. at 879 (assuming joint will executed pursuant to contract).

risdictions that do not rely on a presumption to prove the existence of a contract where there is a joint will, a number of factors may be relevant.[69] First, the court may look to the language of the joint will.[70] Judges have construed wills that employ plural pronouns as showing an intent to dispose of the collective property of the makers.[71] Additionally, the court may look to the language of the will making the gift to the survivor to decide whether an agreement existed. A joint will that gives property to the surviving testator "absolutely" may lead a court to conclude that the surviving testator was not bound to the plan of disposition in the joint will.[72] On the other hand, a will that gives a gift to others at the death of both testators[73] or disposes of all property under a common plan[74] may lead a court to find an enforceable contract.

Second, the relationship of the makers to each other and to the beneficiaries of the joint will may lead a court to conclude that a contract existed. Thus, when the makers are married and leave their property first to their survivor and then to their children, a court may infer that the makers intended a contract.[75] On the other hand, a court may conclude that a joint will made by two parties who share a close relationship is not contractual because it is natural for each to wish to leave her entire estate to the other and not to restrict the survivor's ultimate disposition of the estate.[76]

Third, even when two people execute separate wills rather than a joint will, a claim that the survivor agreed not to revoke his or her will after the

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69. Glass v. Battista, 374 N.E.2d at 116, 117 (N.Y. 1978).

70. *Id.*

71. *Id.* at 117-18; Rubenstein v. Mueller, 225 N.E.2d 540, 542, 543 (N.Y. 1967) (noting that the entire context of the will was plural); *see* Bailey, *supra* note 46, at 958-59 (noting the trend in Texas toward the conclusion that plural pronouns imply a joint will made pursuant to contract).

72. *In re* Lowe's Estate, 265 N.Y.S.2d 257, 259-60 (App. Div. 1965), *aff'd sub nom. In re* Estate of Zeh, 223 N.E.2d 43 (N.Y. 1966). *But see* Estate of Hoeppner v. Hoeppner, 145 N.W.2d 754, 757 (Wis. 1966) (affirming trial court's holding that a contract existed where joint will provided that survivor of the testators would be the "absolute owner" of the combined estates), *superseded by statute as stated in* McNutt v. First Wisconsin Nat'l Bank, 1991 Wisc. App. LEXIS 1031 (Ct. App. July 23, 1991).

73. *Rubenstein*, 225 N.E.2d at 542-43.

74. Wiemers v. Wiemers, 683 S.W.2d 355, 357 (Tex. 1984).

75. *Glass*, 374 N.E.2d at 118; Rich v. Mottek, 181 N.E.2d 445, 447 (N.Y. 1962) (noting language of will and surrounding circumstances relevant to proving joint will contractual, "particularly in the case of a joint will executed by husband and wife or by parents interested in providing for their children").

76. *See* Edson v. Parsons, 50 N.E. 265, 267 (N.Y. 1898) (noting close relationship of two sisters could negate inference that reciprocal wills were contractual); *see also* Ridders v. Ridders, 65 P.2d 1424, 1426-27 (Or. 1937) (holding wills of a brother and two sisters leaving property to each other were a "natural disposition of property" that did not, without more, prove the existence of will contract).

death of the first testator may arise where the wills are reciprocal.[77] Reciprocal wills contain provisions that "mirror" each other.[78]

Courts have engaged in much debate over whether reciprocal or "mutual" wills are evidence of a contract between the testators.[79] Most courts hold that the execution of reciprocal wills is not per se evidence of a will contract.[80] Courts, however, occasionally have held that little beyond the mere existence of reciprocal wills is required to prove a will contract.[81] Most courts regard the existence of mutual wills as some evidence that a will contract existed.[82] Also, the fact that testators who write mutual wills make gifts to the other's relatives may be evidence that the wills were made pursuant to an agreement.[83]

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77. *See* Junot v. Estate of Gilliam, 759 S.W.2d 654, 657 (Tenn. 1988) (stating that, although wills were "mutual and reciprocal," this was not sufficient evidence to prove existence of a contract).

78. *See id.* at 656.

79. *Id.* at 657 (holding execution of wills with reciprocal provisions not of itself clear and convincing evidence of contract not to revoke wills).

80. *See, e.g., id.* (stating that the existence of a reciprocal will is not absolute, conclusive proof of a will contract); Plemmons v. Pemberton, 139 S.W.2d 910, 915 (Mo. 1940) (en banc) (noting that reciprocity of will provisions is insufficient to prove a will contract and requiring "clear and definite contract" by proof of express agreement or unequivocal circumstances); *see* SPARKS, *supra* note 8, at 27 (stating the presence of joint wills does not indicate a presumption).

81. Chambers v. Porter, 183 N.W. 431, 434 (Iowa 1921); *see* Church of Christ Home for Aged, Inc. v. Nashville Trust Co., 202 S.W.2d 178 (Tenn. 1947). In considering a husband and wife's reciprocal wills, the *Church of Christ Home* court stated:

> Where, as in the instant case, the wills are identical in language, witnessed by the same persons, at the same time and place; and the contracting parties are husband and wife, it is well nigh conclusive that such wills were executed in accordance with their mutual contract to dispose of their property in this manner.

Id. at 180; *cf.* Ridders v. Ridders, 65 P.2d 1424, 1426 (Or. 1937) (regarding as insignificant evidence that the same attorney drew and executed the wills of a brother and two sisters at the same time).

82. *See, e.g.*, Patecky v. Friend, 350 P.2d 170, 175 (Or. 1960) (holding mutual wills do not establish that testators acted pursuant to contract, but are relevant to the issue of existence of contract); *cf. Plemmons*, 139 S.W.2d at 917-18 (noting reciprocity of provisions, fact that the same scrivener drew the wills, executions at same time before same witnesses, and the fact that each testator knew contents of other's will was sufficient evidence to establish an agreement); First Christian Church v. Moneypenny, 439 S.W.2d 620, 623 (Tenn. Ct. App. 1968) (affirming trial court's decision that execution of reciprocal wills by husband and wife, preparation of wills by same attorney, and execution of wills at the same time and place with the same witnesses was insufficient to prove will contract).

83. Schramm v. Burkhart, 2 P.2d 14, 16 (Or. 1931). In *Schramm*, a husband and wife executed reciprocal wills under which each gave the other all of the testator's property until the death of the survivor. *Id.* at 15. At that time, each will provided that one half of the property possessed by the testator at death was to pass to certain relatives of the testator. *Id.* From this, the court reasoned that "[t]he reciprocal provisions contained in [the wills] show that they must have been prepared and executed by the two spouses pursuant to an understanding and agreement entered into by them and for the purpose of making an

The execution of mutual wills is probably the result of an agreement on a particular estate plan at the time the makers executed the wills.[84] Execution of mutual wills, however, probably is not indicative that the parties intend to create a contract that would cause the wills to stay in force until the death of their survivor.[85] Most likely, the parties intend that no change will be made for some indeterminate time. If questioned, each party probably would state that he or she would not expect the other to revoke his or her will the next day. Additionally, each person probably would not intend that, were the other to die the next day, he or she would be contractually bound for the remainder of his or her life not to change their will.[86] In light of this, it is somewhat troubling that courts do not always require more than just a preponderance of the evidence in the case of mutual wills.[87]

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equal distribution between their respective heirs of their joint property." *Id.* at 16. *But see* Oursler v. Armstrong, 179 N.E.2d 489 (N.Y. 1961).

In *Oursler*, a husband and his second wife executed mutual wills. *Id.* at 490. Each left the residue to the survivor or, if the testator survived the other spouse, then equally to two children of the husband's first marriage and two joint children of the husband and his second wife. *Id.* When the husband died first, the second wife wrote a new will leaving everything to her two children. *Id.* The New York court found that no contract existed. *Id.*

84. Elmer v. Elmer, 260 N.W. 759, 761 (Mich. 1935) (affirming the trial court's finding that the husband and wife's execution of reciprocal wills, which left a piece of real property to the survivor and then to their son, established only that they agreed on the disposition of the property at the time they executed the wills). The court refused to overturn the trial court's conclusion that the evidence did not prove that the husband and wife agreed never to revoke their wills without the other's consent. *Id.*; *see also* Alvin E. Evans, *Concerted Wills—A Possible Device for Avoiding the Widow's Privilege of Renunciation*, 33 KY. L.J. 79, 80-81 (1945) (discussing reciprocal wills of married persons).

85. *See* Edson v. Parsons, 50 N.E. 265, 267 (N.Y. 1898) (noting that the trial court could infer justifiably that execution of mutual wills was merely an act in the testators' lives "without stronger significance than to illustrate how closely bound up they were in common habits of thought and of conduct"); SPARKS, *supra* note 8, at 27 & n.19 (supporting the proposition that evidence of the same state of mind of two people when executing mutual wills does not necessarily mean they formed a contract). *But see* Mack v. Swanson, 299 N.W. 543, 545 (Neb. 1941) (finding a contract based on circumstance and the mutuality of provisions in reciprocal wills).

86. *See* Wiemers v. Wiemers, 663 S.W.2d 25, 29-30 (Tex. Ct. App. 1983), *rev'd*, 683 S.W.2d 355 (Tex. 1984). The Texas Court of Appeals in *Wiemers* noted:

> In order to prevail the party asserting a binding contract must prove more than a mere agreement to make reciprocal wills. The agreement must involve the assumption of an obligation to dispose of the property as therein provided, or not to revoke such will, which is to remain in force at the death of the testators.

Id.

The Supreme Court of Texas disagreed with the Texas Court of Appeals' interpretation of the will in question and held that the language of the joint will evidenced a contract. *Wiemers*, 683 S.W.2d at 356-57.

87. *See* SPARKS, *supra* note 8, at 27 (acknowledging that "[w]hen two people execute . . . separate documents at approximately the same time and in identical or almost identical

III. Protecting The Surviving Spouse From Total Disinheritance

The idea that one should not be permitted to disinherit completely one's spouse has led to a variety of techniques for protecting surviving spouses. At common law, surviving spouses received some protection from disinheritance through the estates of dower and curtesy.[88]

In 1929, the New York legislature abolished dower and curtesy and enacted a provision that gave a surviving spouse a right to elect to take the share of the decedent's estate that he or she would have received had the decedent died intestate.[89] Viewing this new statute, the New York Court of Appeals noted the apparent inconsistency of the old law, which allowed a husband to leave his wife nothing upon his death, yet compelled him to provide for her during his life.[90] The change in the law no longer allowed such practices.[91] The Court of Appeals recognized that the new statute did not provide for consideration of individual cases, and, thus, stated that "[p]roper provision must be made for the widow where the statute is applicable."[92]

The New York statute was the first of many legislative attempts to increase protection for surviving spouses. Some have even suggested that the elective share acts as a deterrent in that it encourages testators to provide for a surviving spouse in order to avoid the unpleasantness of elective share proceedings.[93]

Protection of the surviving spouse has several possible theoretical bases. The theory supporting a conclusion that one spouse cannot totally deprive the other of a share of the estate because each spouse contributes to the other's estate is commonly known as the "partnership" theory of

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language there is a tendency to pass too easily to the conclusion that such action must have been the result of a contract").

88. *See* 3 Sir William Holdsworth, A History of English Law 185-97 (5th ed. 1966) (discussing curtesy and dower).

89. The Decedent Estate Law, c. 229, § 18, ¶ 1 (1929).

90. *In re* Greenberg's Estate, 185 N.E. 704-05 (N.Y. 1933).

91. *Id.*

92. *Id.* at 705.

93. John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 Real Prop. Prob. & Tr. J. 303, 313 (1987).

marriage.[94] It has become, without question, the "contemporary view of marriage."[95]

Under the partnership theory, a husband and wife are presumed "to pool their fortunes on an equal basis."[96] Property acquired by gift or inheritance and property owned prior to the marriage should be excluded.[97] Commentators also have suggested that the partnership theory brings economics in line with behavior.[98] The partnership theory is sometimes called the "contribution" theory because it recognizes that each spouse contributes to marital wealth in a variety of ways, both by earning wages and through activities that support wage earning.[99] Additionally, the partnership theory is seen as promoting gender equality because a couple's total resources are shared, and gender-linked roles become less important.[100]

Another theory underlying spousal protection is the "support" theory.[101] Simply put, the "spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor."[102] The term "support" is somewhat misleading in this context because the surviving spouse is entitled to receive the protection

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94. Recognition of the partnership theory in the United States began approximately 30 years ago. *See* COMM. ON CIVIL AND POLITICAL RIGHTS, REPORT TO THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN 18 (1963), *reprinted in* UNIF. MARITAL PROPERTY ACT prefatory note, 9A U.L.A. 97 (1987); *see* J. Thomas Oldham, *Should the Surviving Spouse's Forced Share be Retained?*, 38 CASE W. RES. L. REV. 223, 231-33 (1987) (questioning whether forced share system effectuates partnership theory goals).

95. Waggoner, *supra* note 5, at 716.

96. MARY A. GLENDON, THE TRANSFORMATION OF FAMILY LAW 131 (1989).

97. Waggoner, *supra* note 5, at 717.

98. *See id.*

99. *See* Langbein & Waggoner, *supra* note 93, at 308 (noting that the support burden includes such activities as maintaining the marital home and providing childcare).

Professors Langbein and Waggoner suggest that the liberalization of divorce law arguably supports abolition of the elective share. *Id.* at 313. They suggest that disinheritance comes as a result of an unhappy marriage, and that the unhappy spouse can prevent "unjustified" disinheritance by divorcing and obtaining a property settlement. *Id.* Although they note that "divorce is not a wholly satisfactory alternative to the forced share," they do not seem to consider that divorce is extremely unsettling and potentially emotionally devastating, when someone might prefer even an unhappy marriage to divorce. *Id.*

100. Rhode & Minow, *Reforming the Questions, Questioning the Reforms*, *in* DIVORCE REFORM AT THE CROSSROADS 191, 198-99 (S. Sugarman & H. Kay eds. 1990).

101. *See* Waggoner, *supra* note 5, at 742 (discussing the theory that spouses support each other throughout their lives and this duty should be recognized after the death of one's partner); Oldham, *supra* note 94, at 247-53 (suggesting that the forced share system needs reform to carry out its support objective).

102. *See* Waggoner, *supra* note 5, at 742.

whether in need of it or not.[103] The use of the word suggests a fulfillment of a *possible* support need.

Closely related to the support theory is the notion that protection of the surviving spouse from total disinheritance is based in part on a desire to meet the economic needs of those survivors.[104] Often, the surviving spouse is advanced in years.[105] As a result, the surviving spouse is often beyond the working years.[106] Thus, protection from economic disaster is an important impetus for spousal protection.

Some courts also note the state's interest in protecting the surviving spouse.[107] Thus, at its heart, spousal protection reflects a compromise. The legislature that enacts a form of spousal protection has chosen to curtail testamentary freedom to further another set of goals.[108]

A. Types of Spousal Protection

Most common-law states have chosen to protect the surviving spouse from total intentional disinheritance by providing for an elective share.[109] An elective share statute gives the surviving spouse the right to elect to receive some portion of the deceased spouse's estate, even if the deceased spouse has left a valid will disinheriting the surviving spouse.[110]

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103. *See* Oldham, *supra* note 94, at 247-48 (urging that support responsibility be limited to only those marriages that are long-lasting and involve raising children); Langbein & Waggoner, *supra* note 93, at 307-08 (noting that spousal need is not a prerequisite to receiving a share under most forced-share statutes).

104. *See* Waggoner, *supra* note 5, at 710 (noting that because of life expectancy and various other factors, women tend to be widows and on average live 15 years after their husbands' death).

105. *See id.*

106. *See id.*

107. *See* Hamilton v. Hamilton, 879 S.W.2d 416, 419 (Ark. 1994) (recognizing the balance that elective share provisions draw between a person's right to dispose of property upon death and state's interest in protecting the surviving spouse); Estate of Dahlmann v. Estate of Dahlmann, 668 S.W.2d 520, 521 (Ark. 1984) (citing a state statute that protects surviving spouse's interest).

108. *See* Hamilton, 879 S.W.2d at 419 (suggesting that it is appropriate to balance testamentary freedom against state interest in protecting surviving spouse). *But see* GA. CODE ANN. § 53-2-9 (Michie 1995) (allowing complete testamentary exclusion of surviving spouse). Although Georgia allows total spousal disinheritance, a surviving spouse may be able to obtain a year's support from the deceased spouse's estate. *Id.* § 53-5-2. The statute allowing the year's support, however, may be circumvented through the use of inter vivos transfers. *See* Peter H. Strott, Note, *Preventing Spousal Disinheritance in Georgia*, 19 GA. L. REV. 427, 439 (1985) (discussing avoidance of year's support statute).

109. *See* Waggoner, *supra* note 5, at 720.

110. *Id.*

The assets used in calculating the surviving spouse's share may or may not include assets outside the deceased spouse's probate estate.[111]

Critics of elective share statutes argue that the statutes fail to recognize effectively the partnership theory of marriage because the share to which a surviving spouse is entitled often is unrelated to the contribution the surviving spouse made to the marital wealth.[112] The recent revisions to the Uniform Probate Code redesigned the elective share in an attempt to address such concerns.[113]

In community property states,[114] a surviving spouse is entitled to one half of the community property at the death of a spouse.[115] Put another way, each spouse can dispose of one half of the community property at death.[116] Community property is property acquired during the marriage other than property acquired by gift or inheritance.[117]

Many states also protect the pretermitted spouse, i.e., the unintentionally disinherited spouse.[118] The policy underlying the protection of a pretermitted spouse is the notion that the law should protect a spouse

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111. Beginning in the 1960s, elective share jurisprudence increasingly evidenced an attempt to prevent a spouse from defeating the elective share by making nonprobate transfers. *See* MACDONALD, *supra* note 10, at 15-17. The 1969 version of the U.P.C. introduced the concept of the augmented estate, and many states followed suit. *See generally* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (discussing the causes and repercussions of the nonprobate revolution).

112. *See* Waggoner, *supra* note 5, at 720-23 (providing examples that illustrate the inconsistency of the partnership theory and elective share law); Oldham, *supra* note 94, at 229-33.

113. U.P.C. §§ 2-201 to 207 (1993); *see infra* notes 255-60. For an excellent discussion of the redesigned U.P.C. elective share authored by one of the driving forces behind the revisions, see Waggoner, *supra* note 5, at 715-48.

114. The eight community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. In addition, Wisconsin has enacted a version of the Uniform Marital Property Act, essentially making it a ninth community property state.

115. ARIZ. REV. STAT. ANN. § 14-3101 (1991); CAL. PROB. CODE § 100 (West 1991); IDAHO CODE § 15-2-501 (1983); LA. CIV. CODE ANN. art. 2336 (West 1985); NEV. REV. STAT. ANN. § 123.250 (Michie 1993); N.M. STAT. ANN. § 45-2-805 (Michie 1995); TEX. PROB. CODE ANN. § 58 (West 1993); WASH. REV. CODE ANN. § 11.02.070 (West 1987); WIS. STAT. ANN. § 861.01 (West 1991).

116. *See* WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 309-32 (2d ed. 1982) (discussing powers over community property at death).

117. ARIZ. REV. STAT. ANN. § 25-211 (1991); CAL. FAM. CODE §§ 760, 770 (West 1994); IDAHO CODE §§ 32-903, -906 (1983); LA. CIV. CODE ANN. art. 2338 (West 1985); NEV. REV. STAT. ANN. §§ 123.130, .220 (Michie 1993); N.M. STAT. ANN. §§ 40-3-8, -12 (Michie 1994); TEX. FAM. CODE ANN. § 5.01 (West 1993); WASH. REV. CODE ANN. §§ 26.16.010, .020, .030 (West 1986); WIS. STAT. ANN. § 766.31 (West 1993); 4A R. POWELL, REAL PROPERTY §§ 625.1, 625.2[1] (Rev. ed. Rohan 1982).

118. ARIZ. REV. STAT. ANN. § 14-2301 (1995); CAL. PROB. CODE § 6560 (West 1991).

who the testator did not consider a spouse at the time the testator wrote the will.[119] In that case, if the testator makes no provision in his will for a spouse, it is reasonable to conclude that the spouse who the testator married after making the will was unintentionally, rather than intentionally, disinherited. Additionally, if the testator made a will in contemplation of marriage, the alleged pretermitted spouse may bear the burden of proving that the disinheritance was unintentional.[120]

The Uniform Probate Code also protects spouses from unintentional disinheritance.[121] Section 2-301 provides that an omitted spouse is entitled to an intestate share of the portion of the deceased spouse's estate that is not devised to a child of the deceased spouse from a prior marriage or to a descendant of such a child.[122] The surviving omitted spouse can choose to take an intestate share under section 2-301 or an elective share under section 2-201.[123]

Finally, some have proposed spousal protection of the sort used in the United Kingdom—the family maintenance system.[124] Under a family maintenance system, a court has discretion to order payments from an estate to provide for a testator's wife, and perhaps also for surviving children.[125] The family maintenance system permits broad judicial discretion and increases the possibility of litigation, making it unlikely that the family maintenance system will replace either the elective share system or the community property system in the United States.[126]

Thus, the protection of a surviving spouse from total disinheritance is one of the most widely recognized principles of probate law in this country. Perhaps this strong protection of surviving spouses is also a result of the recognition in the United States that marriage is the most important family relationship.[127]

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119. *See* Estate of Ganier v. Estate of Ganier, 418 So. 2d 256, 261 (Fla. 1982) (stating that "[t]he primary purpose of the pretermitted spouse rule is to assure that the decedent spouse considered the surviving spouse *as a spouse* when making his or her will").

120. *See id.* (noting importance of " 'contemplation of marriage' " determination).

121. U.P.C. § 2-301 (1993).

122. *Id.*

123. *See* Waggoner, *supra* note 5, at 749. Professor Waggoner notes that pretermitted spouse statutes are rare, perhaps because "the elective share [is] thought to provide sufficient protection against a premarital will." *Id.* at 749 n.171.

124. *See* MACDONALD, *supra* note 10, at ix, 290-327 (advocating a family maintenance system); *cf.* Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1185-89 (1986) (critiquing the family maintenance system).

125. MACDONALD *supra* note 10, at 291.

126. *See* Langbein & Waggoner, *supra* note 93, at 314.

127. *See* GLENDON, *supra* note 96, at 238-40.

B. Waiver of Spousal Protection

A surviving spouse, of course, can waive the right to spousal protection through either a prenuptial or antenuptial agreement. The waiver agreement, however, must be a voluntary act by the spouse.[128] Although contract principles generally govern such waivers, the modern trend is to view such agreements with higher scrutiny than other types of contracts.[129]

A series of Massachusetts cases illustrates this trend. The Supreme Judicial Court of Massachusetts addressed spousal protection in *Wellington v. Rugg*.[130] The *Wellington* court held that the contesting spouse must show actual fraud to set aside an antenuptial agreement waiving spousal protection.[131] The same court later partially overruled *Wellington* in *Rosenberg v. Lipnick*.[132] When determining the validity of antenuptial agreements, the *Rosenberg* court suggested that courts consider:

> [W]hether (1) [the agreement] contains a fair and reasonable provision as measured at the time of its execution for the party contesting the agreement; (2) the contesting party was fully informed of the other party's worth prior to the agreement's execution, or had, or should have had, independent knowledge of the other party's worth; and (3) a waiver by the contesting party is set forth.[133]

The *Rosenberg* court further noted that courts should judge the reasonableness of a monetary provision for the contesting party according to factors such as each party's worth, age, intelligence, literacy, business acumen, and prior family obligations.[134] Other courts have espoused similar standards.[135] At least one court, however, has lowered the level of

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128. *See* Shimp v. Huff, 556 A.2d 252, 263 (Md. 1989) (holding spousal protection could not be waived by unilateral act of person other than the surviving spouse).

129. Martin v. Farber, 510 A.2d 608, 609 (Md. Ct. Spec. App.) (noting that the court should guard against unfair antenuptial agreements because parties are in confidential relationship), *cert. denied*, 517 A.2d 1120 (Md. 1986).

130. 136 N.E. 831 (Mass. 1922) (overruled in part by Rosenberg v. Lipnick, 389 N.E. 2d 385 (Mass. 1979)).

131. *Id.* at 833-34. *But see Rosenberg*, 389 N.E.2d at 388 (imposing a duty to disclose upon parties maintaining a confidential relationship).

132. *Rosenberg*, 389 N.E.2d at 388.

133. *Id.*

134. *Id.* at 389.

135. *See* Martin v. Farber, 510 A.2d 608, 609-10 (Md. Ct. Spec. App.) (holding antenuptial agreement not unconscionable, but imposing constructive trust on assets traceable to husband's earnings), *cert. denied*, 517 A.2d 1120 (Md. 1986); Estate of Crawford, 730 P.2d 675, 679 (Wash. 1986) (en banc) (invalidating prenuptial agreement as a result of "grossly inequitable distribution of property and the circumstances surrounding the execution of the agreement").

scrutiny used to determine the validity of agreements waiving property rights.[136]

In addition to waiver through a prenuptial or antenuptial agreement, a waiver of spousal protection also could be implied from execution of a will contract. Thus, if the spouse claiming protection was a party to the contract, the court may refuse to allow the spouse to repudiate a will executed pursuant to the contract.[137]

IV. Judicial Reaction To The Conflict

A. A Typical Case

The recent Arkansas Supreme Court decision in *Gregory v. Estate of Gregory*[138] illustrates a typical conflict between will contracts and spousal protection and how one court resolved the conflict. In *Gregory*, a husband and wife executed "An Agreement to Make Reciprocal Wills and Not to Revoke Same."[139] This agreement provided that after the death of the first spouse, the survivor could not revoke his or her will unless the survivor obtained the consent of all of the takers under the will.[140] Pursuant to the agreement, the Gregorys executed wills with mirror provisions.[141] Each will provided that the residue of the estate of the first spouse to die was to be held in trust for the surviving spouse and the couple's six children.[142] Upon the death of the surviving spouse, the wills added the residue of his or her estate to the trust.[143]

The wife predeceased the husband, and her property was placed in a trust pursuant to the terms of the will.[144] Mr. Gregory subsequently re-

136. Simeone v. Simeone, 581 A.2d 162 (Pa. 1990). In *Simeone*, the Supreme Court of Pennsylvania overruled *Estate of Geyer*, 533 A.2d 423 (Pa. 1987), an earlier decision relating to the validity of prenuptial agreements. *Id.* at 166. Beginning with the premise that prenuptial agreements are contracts, the *Simeone* court opined that the parties should be bound absent fraud, misrepresentation, or duress. *Id.* at 165.

137. *See* Church of Christ Home for Aged, Inc. v. Nashville Trust Co., 202 S.W.2d 178, 181 (Tenn. 1947).

138. 866 S.W.2d 379 (Ark. 1993).

139. *Id.* at 380.

140. *Id.* The agreement provided " 'upon the death of either party the survivor shall not revoke his or her will without the consent of all the beneficiaries, devisees, and legatees.' " *Id.*

141. *Id.*

142. *Id.* at 381.

143. *Id.* This trust was for the benefit of the children and would continue until the youngest child was 25 years old. *Id.* At that time, the remaining principal would be distributed to the beneficiaries. *Id.*

144. *Id.*

married.[145] With the consent of the takers under his will, he executed a codicil giving a life estate in his home to his second wife.[146]

When Mr. Gregory died, his will and codicil were admitted to probate.[147] His second wife filed to claim her dower and homestead interests and her statutory allowance of the estate against the will.[148] A conflict arose when the six children asserted entitlement to the husband's entire estate.[149] The probate court held that the children's rights to the property were superior to any rights of the second wife,[150] and denied all of the second wife's claims.[151]

After recognizing the efficacy of reciprocal wills as an estate planning device and noting the statutory right of a surviving spouse to take against a deceased spouse's will,[152] the Supreme Court of Arkansas examined the conflict between "the right of a couple to contract to make mutual wills that are irrevocable and that dispose of both estates to third-party beneficiaries, and the right of a surviving spouse to take an elective share."[153] The court noted that the majority view favored the third-party beneficiary.[154] Finally, the court reasoned that the contract rights encumbered Mr. Gregory's property and, therefore, the property was not subject to the second wife's claim.[155] Thus, the court affirmed the trial court's decision.[156]

In 1960 a commentator noted that, in roughly two-thirds of the cases involving the conflict between the beneficiaries of a will contract and a surviving spouse, courts had decided in favor of the promisee or third-party beneficiary.[157] He noted, though, a trend favoring the surviving spouse.[158] As *Gregory* illustrates, the trend has not continued.[159]

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145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 382.
151. *Id.*
152. *Id.* The court cited the Arkansas elective share statute, which provides in pertinent part: "When a married person dies testate as to all or any part of his or her estate, the surviving spouse shall have the right to take against the will if the surviving spouse has been married to the decedent continuously for a period in excess of one (1) year." ARK. CODE ANN. § 28-39-401 (Michie 1987).
153. *Gregory*, 866 S.W.2d at 382.
154. *Id.*
155. *Id.* at 383.
156. *Id.* at 384.
157. MACDONALD, *supra* note 10, app. D at 368.
158. *Id.*
159. *See Gregory*, 866 S.W.2d at 383-84 (holding children's rights superior to any rights of second wife).

The case law is a tangled mess of decisions, some favoring the contract beneficiary,[160] some favoring the surviving spouse.[161] The rationales underlying the decisions include contract law principles and property law principles. Some decisions attempt to apply rules, while others consider the equities of the particular case. Before examining how to resolve the conflict, it is useful to attempt to isolate the various determinative factors that courts have used in resolving cases in the past.

B. Considerations in Resolving the Conflict

1. The Creditor/Legatee Dilemma

The "typical" priority order for receiving part of a decedent's estate is: (1) creditor, (2) surviving spouse, and (3) legatee. In other words, the surviving spouse usually cannot claim property to which a creditor has a claim. Similarly, a legatee cannot take property until the claims of creditors and the surviving spouse have been satisfied. The starting point for analyzing the conflict between will contracts and spousal protection is to determine whether the beneficiary of a will contract is a creditor or a legatee.

If the promisee or third-party beneficiary is characterized as a legatee, the contract-based claim will be subject to the rights of a surviving spouse.[162] Some courts consider the act of making a conforming will the performance of the contract, and treat the promisee as a legatee.[163]

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160. *See* Estate of Stewart v. Van Noy, 444 P.2d 337, 340 (Cal. 1968) (holding that the widow was entitled only to half of the half of the decedent's estate that previously had been inherited from the deceased's brother and which was not subject to the will contract); Keats v. Cates, 241 N.E.2d 645, 651-53 (Ill. App. Ct. 1968) (holding the contract beneficiaries' rights superior to those of the second wife).

161. *See* Shimp v. Huff, 556 A.2d 252, 263 (Md. 1989) (holding the right of the surviving spouse to an elective share superior to the contract beneficiaries' rights).

162. Buehrle v. Buehrle, 126 N.E. 539, 540 (Ill. 1920) (rights of contract beneficiary derived wholly through will; surviving spouse prevailed); MACDONALD, *supra* note 10, app. D at 369; *cf., e.g.*, Ver Standig v. St. Louis Union Trust Co., 129 S.W.2d 905, 909 (Mo. 1939) (assuming contract subject to surviving spouse's claim because contract to devise not "in the same category as a debt against the estate").

163. *See In re* Nicholson's Will, 267 N.Y.S.2d 719, 724-25 (Sur. Ct. 1966). In *Nicholson*, the New York Surrogate's Court considered the characterization of the promisee of a will contract. *Id.* at 721-22. The husband and wife had entered into a will contract with the wife's father, agreeing to will the father their interests in a bond and mortgage if they both died before the mortgage was paid. *Id.* The wife died, and the husband remarried and died before the mortgage was paid. *Id.* at 723. The husband's second wife claimed an elective share. *Id.* The court distinguished between a contract to convey, which would make the promisee a creditor, and a promise to make a testamentary disposition, under which the promisee would be a legatee with an equitable right to enforce the obligation. *Id.* at 724. The court treated the making of the will as payment of the obligation owed. *Id.* at 725. Thus, the court treated the father as a legatee, and the surviving spouse's rights prevailed. *Id.* at 724-25.

Other courts, however, have treated the contract beneficiaries as creditors, often without any discussion of the creditor/legatee issue.[164] If the contract beneficiary is a creditor, payment of the claim may consume the entire estate, leaving no assets for spousal protection.[165]

In assessing the creditor/legatee distinction, the position of the contract beneficiary of an estate planning will contract seems somewhat different from the position of the contract beneficiary of a personal services will contract. Perhaps this is because the contract beneficiary of a personal services will contract seems more like a creditor because he or she has provided something of value in exchange for the promise of a testamentary gift. On the other hand, the contract beneficiary of an estate planning will contract seems more like the donee of a gratuitous transfer.

2. *The Context Question*

It is sometimes generalized that, in the divorce context, courts tend to hold for the surviving spouse while, in the estate planning context, they tend to hold for the contract beneficiary.[166] Sometimes, this is true even within the same jurisdiction.

The New York courts, for example, have created a strange anomaly.[167] In the estate planning setting, the New York courts hold that the rights of contract beneficiaries take precedence over the rights of a surviving spouse.[168] In the divorce context, however, New York courts allow the rights of a surviving spouse to prevail over the rights of beneficiaries of a prior spouse's agreement.[169] The New York Court of Appeals has at-

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164. *See, e.g.*, Estate of Beauchamp v. Eichenberger, 564 P.2d 908, 910 (Ariz. Ct. App. 1977) (finding the children's breach of contract claim took precedence over spousal protection); *In re* Estate of Beeruk, 241 A.2d 755, 759 (Pa. 1968) (finding that decedent's breach of contract placed the nephew in the status of a creditor of the decedent's estate).

165. *See Beeruk*, 241 A.2d at 759.

166. *See* Wides v. Wides' Ex'r 184 S.W.2d 579, 580, 584 (Ky. Ct. App. 1944) (divorce context; surviving spouse prevailed); Minneman, *supra* note 8, at 423. *But see Beauchamp*, 564 P.2d at 908, 910 (divorce context; contract beneficiaries prevailed); North v. North, 638 S.W.2d 711, 712 (Ky. Ct. App. 1982) (divorce context; surviving spouse lost).

167. *See* Rubenstein v. Mueller, 225 N.E.2d 540, 545 (N.Y. 1967) (Bergan, J., dissenting) (noting that different results should not occur depending upon the context in which a will is executed).

168. *Rubenstein*, 225 N.E.2d at 543. In *Rubenstein*, the husband and wife executed a joint will. After the wife died, the husband remarried. *Id.* at 541-42. When the husband died, the widow attempted to claim a portion of the husband's estate. *Id.* She argued that her situation was analogous to electing against the will, and the court so treated it. *Id.* at 544. The court held that the wife had no elective share rights because the husband had only a life estate and a power to invade the property. *Id.* Thus, the husband had no interest against which the elective share rights could operate. *Id.*

169. *In re* Lewis' Will, 123 N.Y.S.2d 859 (Sur. Ct. 1953). The *Lewis* court reasoned that the spouse's property remained his own property after the divorce agreement, and that the

tempted to justify this difference based on differing equitable considerations.[170] The courts apparently are willing to rely on the idea that the property subject to an estate planning contract is "collective" property of the parties to the contract, but that the property subject to a divorce or separation contract is the separate property of the parties to the contract.

Even if the distinction is reasonable with respect to property owned at the time the contract is executed, it is illogical with regard to property that one of the parties to the contract obtains after the death of the other contracting party.[171] In this scenario, it is difficult to see how such property could be considered "collective" property. Thus, the New York court rationale does not apply well to the short-term first marriage/long-term second marriage scenario. This may explain why other states do not draw this distinction.[172]

3. *Knowledge of the Contract as a Factor*

Some courts consider the surviving spouse's knowledge an important, if not determinative, factor in resolving the conflict between beneficiaries of a will contract and a surviving spouse.[173] Others have viewed knowledge of the contract, or lack thereof, as a factor to be weighed in determining the equities of the case.[174] In some cases, it is difficult to tell whether knowledge was the determinative factor, or merely an equitable consideration.[175]

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surviving spouse could elect a share in such property. *Id.* at 862-64. In other words, the New York courts hold that a party to a will contract incident to a divorce retains both legal and equitable title.

170. *Rubenstein*, 225 N.E.2d at 544. *But see id.* (Bergan, J., dissenting). The dissent would have found the surviving spouse entitled to an elective share in both the divorce and estate planning contexts because election is a personal right. *Id.* at 545. The dissent noted that the "superficial factual differences between [the *Hoyt*] case and this one do not affect the common principle which unifies them." *Id.*

171. *See id.* at 543. Although the *Rubenstein* court did not precisely address this issue, it suggested that the estates of the contracting parties had "merged." *Id.*

172. *See* Davis v. Davis, 237 P.2d 396, 400, 402-03 (Kan. 1951) (divorce contract; contract beneficiaries prevailed); Dillon v. Gray, 123 P. 878, 879 (Kan. 1912) (personal services contract; contract beneficiaries prevailed).

173. *See, e.g.*, Sonnicksen v. Sonnicksen, 113 P.2d 495, 498 (Cal. Dist. Ct. App. 1941) (noting second wife married husband with full knowledge of previous contract); Tod v. Fuller, 78 So. 2d 713, 713-14 (Fla. 1955) (affirming the lower court's holding that a surviving spouse was entitled to statutory dower interest when she had no knowledge of deceased spouse's will contract).

174. Wides v. Wides' Ex'r 184 S.W.2d 579, 584 (Ky. 1944) (reasoning that wife's lack of knowledge was a factor in weighing the equities).

175. *See* Keats v. Cates, 241 N.E.2d 645, 652 (Ill. App. Ct. 1968); MACDONALD, *supra* note 10, app. D at 376.

Use of knowledge as a factor in determining whether a will contract should bar spousal protection is unsettling for several reasons. First, it suggests that the spouse implicitly has waived the right to protection merely by marrying with knowledge of the contract. In all other contexts, however, waiver of spousal rights requires a much higher, more direct expression of intent.[176] Second, use of knowledge downplays the nature of marriage as an affectional union and transforms it into a result of economic calculus.[177]

If knowledge serves to bar spousal rights, then the premise supporting such reasoning must be that one with knowledge of a will contract who nevertheless chooses to marry the promisor does so based on the economic decision that he or she is willing to forego such protection.[178] This simply seems implausible. Furthermore, in light of the conflicting judicial treatments of this issue, it is unfair to suggest that a person could know that the existence of a contract would bar spousal rights. Third, if knowledge is a bar to spousal protection, arguably there is a restraint on marriage.[179] A contract causing a significant restraint on marriage would probably be unenforceable as against public policy.

4. The Effect of a Will Contract on the Property of the Promisor

Courts sometimes have brought property principles into resolution of the conflict by focusing on the nature of the parties' interests in the disputed property. Courts have used these property principles in a number of ways. A court may find, for example, that a surviving spouse is not entitled to a share of the property in dispute because the deceased spouse did not own the property. Some courts treat the deceased spouse as hav-

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176. *See, e.g.*, HOMER H. CLARK, JR., 1 THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 1.1-1.4 (2d ed. 1987) (discussing antenuptial agreements).

177. MACDONALD, *supra* note 10, app. D at 377. As one commentator has observed:

> [E]ven in second marriages may we not assume that the prospective wife regards her husband as much an object of affection as a walking annuity? If this be so, should she be penalized, in a case in which she was aware of her fiance's contract to make a will, merely because her emotions supplanted her business acumen?

Id. *But see* Larrabee v. Porter, 166 S.W. 395, 404 (Tex. Civ. App. 1914) (finding the marriage "void of sentiment").

178. One litigant argued that a wife takes a husband " 'as she finds him, for richer, for poorer; for better, for worse.' " *Wides*, 184 S.W.2d at 580 (quoting appellees' counsel). This argument could lead to the conclusion that a surviving spouse's protection is subject to all pre-existing obligations of the husband.

179. *Contra* MACDONALD, *supra* note 10, app. D at 377 n.43 (suggesting that spouse of second marriage could not make this argument).

ing owned only a life estate in the property with the power to invade principal.[180]

Similarly, some courts have suggested that a valid will contract leaves the promisor with legal title to the property in question for life, but divests the promisor of equitable title.[181] Such courts frequently conclude that a surviving spouse is entitled only to a share of property that the decedent equitably owned.[182]

Related to the question of inheritable interests, some courts have analogized the conflict to the situation in which a person agrees to convey a piece of property and subsequently marries.[183] Under these decisions, if the conveyance does not occur before the conveying spouse's death, the surviving spouse can claim no right to the property subject to the agreement to convey.[184] The underlying rationale is that the decedent's seisin is defeated before the marriage, and that the title is of insufficient quality to allow a subsequent spouse's right to attach.

Property law principles also may be relevant in determining the effect of a will contract on the promisor's property between the execution of the contract and the promisor's death.[185] Several courts have suggested that the treatment of the property under the contract may determine the contract's validity.[186] Specifically, a contract promising to divest oneself of

180. Rubenstein v. Mueller, 225 N.E.2d 540, 543 (N.Y. 1967) (survivor took life interest with power to use principal in aggregate estate); *see* Gregory v. Estate of Gregory, 866 S.W.2d 379, 383 (Ark. 1993) (following *Rubenstein's* reasoning).

181. *See* Davis v. Davis, 237 P.2d 396, 403 (Kan. 1951).

182. Thus, in Baker v. Syfritt, 125 N.W. 998, 999 (Iowa 1910), the Supreme Court of Iowa was asked to decide whether a surviving spouse's dower interest in real property should take precedence over the provisions of a joint will in which the deceased spouse and his former wife agreed to devise the residue of the estate property to the first wife's children from a former marriage. *Id.* at 999. The *Baker* court focused on the nature of the deceased spouse's interest in the property while alive, and concluded that the deceased spouse had possessed no inheritable interest to which a dower interest could attach. *Id.* at 1003. The court characterized the deceased spouse's interest as holding the legal title to the land in trust for the uses specified in the joint will. *Id.*; *see* Lewis v. Lewis, 178 P. 421, 422 (Kan. 1919) (holding that surviving spouse had no rights in property subject to joint will because deceased spouse possessed only legal title to the property while others held equitable title); *Rubenstein*, 225 N.E.2d at 540, 543-44 (holding surviving spouse had no right in property subject to joint will because deceased spouse had only a life estate and power to use principal).

183. *See* Burdine v. Burdine's Ex'r, 36 S.E. 992, 995 (Va. 1900).

184. *See id.*; North v. North, 638 S.W.2d 711, 712 (Ky. Ct. App. 1982) (holding property contracted to be sold but not conveyed not subject to dower).

185. Estate of Chayka v. Santini, 176 N.W.2d 561 (Wis. 1970). For a discussion of *Chayka*, see *supra* note 42.

186. *See, e.g.*, Estate of Beauchamp v. Eichenberger, 564 P.2d 908, 910 (Ariz. Ct. App. 1977) (holding that deceased spouse's freedom to alienate his property kept contract from being invalid as against public policy); Baltimore Humane Impartial Soc'y v. Pierce, 60 A. 277, 278-79 (Md. 1905) (holding that a contract, whereby any property acquired after the

all property, including after-acquired property, may be void as against public policy.[187] Retention of the power to dispose of assets during life, however, may keep the contract from violating public policy.[188]

One of the most difficult questions that arises is whether property acquired after the death of one spouse should be subject to the contract.[189] If there is a written contract separate from the wills, then the issue should be addressed therein. On the other hand, where the contract is implied from the terms of the wills, there is often nothing to guide the court in determining the parties' intent with respect to after-acquired property. Usually, the court will resort to the language employed in the wills to determine the extent that the contract applies to after-acquired property. Thus, the argument occasionally suggested is that a will contract only should apply to property the testators owned at the time of the first promisor's death.[190]

One commentator has suggested that a "two estate" concept would resolve the after-acquired property dilemma.[191] Assuming that there are situations in which a will contract vests an interest in the contract beneficiary at the time of the contract's execution, Professor Lilly suggests taking a "snapshot" at the time of any marriage that occurs after the contract is executed.[192] The property the promisor owned prior to the time of the marriage would be fully subject to the contract, and, therefore, unavailable to a surviving spouse, whereas the property acquired after the marriage would be protected in favor of the spouse.[193]

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date of the contract by one party to the contract becomes the property of the other party is unenforceable as against public policy).

187. *Baltimore Humane Soc'y*, 60 A. at 278-79.

188. *See Beauchamp*, 564 P.2d at 910.

189. *See* Wallace v. Turriff, 531 S.W.2d 692, 694-95 (Tex. Civ. App. 1975) (holding language "all of the property . . . that the survivor may die seized and possessed of" included after-acquired property).

190. *In re* Estate of Wiggins, 360 N.Y.S.2d 129, 134 (App. Div. 1974) (Cardamone, J., dissenting) (arguing that will contract should not be applied to after-acquired property), *aff'd*, 350 N.E.2d 618 (N.Y. 1976).

191. Orley R. Lilly, Jr., *Will Contracts: Contract Rights in Conflict with Spousal Rights*, 20 TULSA L.J. 197, 231 (1984).

192. *Id.* Presumably, the two-estate system would not be used in cases in which marriage occurred before the will contract was executed because the promisor cannot strip a spouse of inchoate spousal protection. *See* Keats v. Cates, 241 N.E.2d 645 (Ill. App. Ct. 1968) (holding third-party beneficiaries' rights as provided for in will contract superior to those of surviving spouse because deceased spouse was not yet married to surviving spouse at contract's execution); Buehrle v. Buehrle, 126 N.E. 539 (Ill. 1920) (holding surviving spouse's right to spousal protection superior to rights of promisee of will contract because deceased spouse was married to surviving spouse at the time contract was executed).

193. Lilly, *supra* note 191, at 231.

Some courts also have suggested that a surviving spouse may be entitled to spousal share rights in after-acquired property only if it is proven that the property did not derive from the collective property of the parties to the contract.[194] This test places an almost insurmountable burden on the surviving spouse.

One issue that courts and commentators have failed to address is how the derivation of property is determined. Professor Lilly suggests that "reference to community property law principles could be utilized to delineate the estates."[195] This notion is troubling with respect to non-community property states for several reasons. First, the courts in common-law states are unfamiliar with the community property concepts that divide assets. Second, the public at large in a community property state at least may have some concept of how property will be divided at death, and of how to treat property during life to achieve a desired disposition. There is no reason to suspect that laypersons in a common-law jurisdiction possess such knowledge.

For example, consider a surviving spouse's assertion that he is entitled to a spousal share of his wife's wages after the death of her first husband. Assume that the first husband had assets valued at $100,000 at the time of his death, and that his widow earned $100,000 in net wages after his death. Assume further that the value of the wife's assets at her death is $100,000. Should a court engage in first-in first-out (FIFO) accounting and assume that the first husband's property was expended to pay living expenses and that the wife's subsequent wages are still present for distribution? Conversely, should the court assume that the couple expended the wife's wages and that the remaining assets were received from the first husband? Perhaps the court should adopt a Solomon-like stance and treat the assets as half the first husband's and half the wife's?

If the second husband must prove that the remaining assets did not derive from the first husband's property, then he faces a difficult tracing problem. Additionally, he may face the assertion by some courts that the assets of the first spouse can be expended only for the items necessary for his or her support.

Appreciation that occurs after the death of the other party to the contract presents a similar problem. In this situation, a court must decide whether the contract binds the property as it exists at the promisor's

194. Gregory v. Estate of Gregory, 866 S.W.2d 379, 383 (Ark. 1993). The *Gregory* court did not reach the question whether a surviving spouse might claim spousal protection from property acquired after his second marriage because the surviving spouse failed to show the source of the property. *Id.*

195. Lilly, *supra* note 191, at 231.

death; that is, in its appreciated state.[196] In a similar vein, the court must consider property that passed to a surviving spouse in a nonprobate transfer. For example, should the will contract apply to property the surviving spouse obtained title to by surviving the other joint tenant, the deceased spouse?[197]

5. Reliance on Equity

Some courts unabashedly have stated that they decided who should prevail based on the equities of the situation.[198] Sometimes, this is based on the principle that courts will enforce will contracts only if equity compels enforcement.[199] Stated another way, the contract beneficiaries will not obtain specific enforcement of a will contract if the equities favor non-enforcement.[200] The equitable factors considered vary widely, and include conduct of the surviving spouse while married to the promisor,[201] and the surviving spouse's knowledge of the contract.[202] Although appealing as a device to reach a desired result, a flexible "equities-oriented" approach is no more appropriate in this context than to decide how much

196. *See In re* Wiggins, 360 N.Y.S.2d 129, 131 (App. Div. 1974) (holding that the contract covered appreciation), *aff'd*, 350 N.E.2d 618 (N.Y. 1976).

197. *See* Rubenstein v. Mueller, 225 N.E.2d 540, 543 (N.Y. 1967). The *Rubenstein* court treated the property as subject to the contract. *Id.*; *see also* Keats v. Cates, 241 N.E.2d 645, 651 (Ill. App. Ct. 1968) (holding will contract could apply to property that passed under joint tenancy from one promisor to the other if the parties to the contract so intended); Estate of Hoeppner v. Hoeppner, 145 N.W.2d 754, 758 (Wis. 1966) (holding will contract applied to property that passed from one promisor to the other under joint tenancy).

198. *See* Wides v. Wides' Ex'r, 184 S.W.2d 579, 582-83 (Ky. 1944). Professor MacDonald advocates balancing the equities between the surviving spouse and the promisee or third-party beneficiary. MACDONALD, *supra* note 10, app. D at 372. He suggests that the most important factors are the spouse's need and the consideration the promisee furnished. *Id.* Such an approach would be a nice analogue to the family maintenance system that Professor Macdonald advocates, but it too suffers from the deficiencies of that system, namely unbridled judicial discretion and the likelihood of a great deal of litigation. *See supra* notes 124-27 and accompanying text (discussing the family maintenance system).

199. Arland v. Arland, 230 P. 157, 158 (Wash. 1924); Patecky v. Friend, 350 P.2d 170, 175 (Or. 1960); *see also* Alexander on Wills § 97. Professor Alexander stated:

> Thus it might be inequitable to grant specific performance against the estate of a decedent who had agreed to will all of his property to another, the promisor having subsequently married and the wife having been in ignorance of the agreement. Equity will not enforce a contract where the result will be harsh or oppressive. And since the law presumes that wills are revoked by marriage or by marriage and the birth of issue, it may be said that all parties to a contract to make a will must have done so with the statute in view.

Id. (quoted in *Arland's Estate*, 230 P. at 159).

200. *Arland's Estate*, 230 P. at 158.

201. *Id.* (noting surviving spouse lived with promisor for six years and "cared for him during his old age").

202. *Id.* (noting surviving spouse had no knowledge of contract).

spousal protection a surviving spouse would receive under an elective share statute.

Consider, for example, the Kentucky case of *Wides v. Wides' Executor*.[203] In *Wides*, a man contracted to will his property to his wife and children as part of a divorce settlement.[204] The man subsequently remarried, and predeceased his second wife, leaving her a portion of his estate.[205] She elected, instead, to claim a statutory share.[206] In its first opinion in the case, the Kentucky Court of Appeals noted that the husband attempted to treat all fairly. Even though he breached the will contract by making a testamentary gift to his second wife, the court characterized the gift as "only a reasonable part of his estate."[207] The court refused to allow the contract to defeat the spousal protection.[208]

It is difficult to see why the "reasonableness" of the husband's behavior should have entered into the equation at all. The husband who leaves his entire estate to an impoverished, chronically ill sister to the exclusion of his rich and healthy widow most likely would be viewed as "reasonable," yet in such a case there is no question that the widow would be entitled to spousal protection. In short, under the elective share system, no consideration of the circumstances of the particular case is appropriate.[209] Although the surviving spouse of a long-term marriage seems to deserve protection more than the surviving spouse of a short-term marriage, a court must give the same elective share to each. Just because a will contract is involved does not alter the entitlement of the surviving spouse. It is disturbing, then, that those courts that "weigh the equities" when deciding whether to enforce the provisions of a will contract to the detriment of a surviving spouse appear to stress facts such as a comparison of the lengths of the first and second marriages, and the promisor's age upon remarriage.[210]

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203. Wides v. Wides' Ex'r, 184 S.W.2d 579 (Ky. 1944).

204. *Id.* at 579-80.

205. *Id.* at 580.

206. *Id.*

207. *Id.* at 584.

208. *Id. But cf.* North v. North, 638 S.W.2d 711 (Ky. Ct. App. 1982) (holding for contract beneficiaries in case that involved present contract to convey property).

209. Fleming v. Fleming, 180 N.W. 206, 208 (Iowa 1920) (noting that "[t]he right of a widow to her share of the estate, whether legal or equitable, owned by her husband at the time of his death, is impregnable; or it is not existent at all"), *reh'g overruled*, 180 N.W.2d 206 (1920), *modified*, 184 N.W. 296 (Iowa 1921).

210. *See* Dillon v. Gray, 123 P. 878, 878 (Kan. 1912) (noting promisor was 78 years old).

6. Consideration of Public Policy

Some courts expressly have considered the role of public policy in resolving the conflict.[211] Perhaps the public policy that underlies protecting a surviving spouse should be viewed as a limitation on one's right to enter into a will contract that fails to protect the surviving spouse.[212] Courts have used public policy arguments both to grant protection to surviving spouses and to deny them protection.[213]

7. The Pretermitted Spouse

Sometimes, the rights of a pretermitted spouse come into conflict with the rights of beneficiaries under will contracts.[214] In states that protect

211. *See, e.g.*, Via v. Putnam, 656 So. 2d 460, 461 (Fla. 1995) (holding public policy favored rights of surviving spouse over rights of beneficiaries of will contract); Keats v. Cates, 241 N.E.2d 645, 652-53 (Ill. App. Ct. 1968) (holding public policy favored rights of third-party beneficiaries of will contract over rights of surviving spouse).

212. The surviving spouse in Rubenstein v. Mueller, 225 N.E.2d 540, 542 (N.Y. 1967), advanced this argument unsuccessfully.

213. The Supreme Court of Illinois has used public policy both in granting and denying protection to a surviving spouse. The Illinois court has stated that the public policy expressed in the Illinois statute, which allows a surviving spouse to renounce a deceased spouse's will and to take an intestate share of the deceased spouse's estate, compels the conclusion that a deceased spouse could not deprive the surviving spouse of protection by entering into a will contract. Buehrle v. Buehrle, 126 N.E. 539, 540-41 (Ill. 1920); *see also* Wides v. Wides' Ex'r, 188 S.W.2d 471, 472-73 (Ky. 1945). Yet, the Illinois Supreme Court later stated 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." *Keats*, 241 N.E.2d at 652.

The Court of Appeals of Maryland relied on public policy in Shimp v. Huff, 556 A.2d 252 (Md. 1989). In *Shimp*, a husband and wife executed a joint will that expressly stated that they wished to dispose of their property in accordance with a common plan. *Id.* at 254. In deciding that the rights of the contract beneficiaries were subordinate to the rights of a surviving spouse, the court relied heavily upon public policy favoring spousal protection. *Id.* at 263.

In a view similar to that expressed in *Keats*, the Mississippi Supreme Court has held that a promisee under a personal services will contract could prevail over a surviving spouse, and that such a result comports with public policy because it encourages the care of the elderly. Price v. Craig, 143 So. 694, 696-97 (Miss. 1932). In *Price*, a husband and wife agreed to will their property to a woman who agreed to pay them $75.00 a month for as long as they lived. *Id.* at 695. After the wife's death, the husband remarried, and then died. *Id.* at 696. In rejecting the second wife's claim for statutory spousal protection, the court stressed that the second wife had notice of the contract, and that upon execution of the contract, the promisee became the equitable owner of the property. *Id.* at 697.

214. In Estate of Stewart v. Van Noy, 444 P.2d 337 (Cal. 1968) (en banc), the Supreme Court of California resolved a conflict between a post-testamentary spouse revocation statute and a pre-marriage will contract. *Id.* at 338. The California statute gave a pretermitted surviving spouse the right to an intestate share (one half) of the decedent's estate. CAL. PROB. CODE § 70 (West 1991). Section 70 provided:

> If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by

the unintentionally omitted spouse from disinheritance, the existence of a will contract causes some analytical difficulty. In a case not involving a will contract, it is reasonable to conclude that a testator who did not make a gift to a spouse, who the testator married after executing the will, unintentionally disinherited the spouse. If, however, a will contract exists that precludes a gift to the spouse, then it is at least equally reasonable to conclude that the disinheritance was intentional—the testator chose to comply with the terms of the contract.[215]

8. *Timing of the Contract*

Some cases have held the timing of the contract determinative. In these cases, courts have focused on whether the deceased spouse was married to the surviving spouse who claimed protection at the time the contract to make a will was executed. Generally, if the surviving spouse was married to the promisor when the contract was made, then the surviving spouse's claim will prevail over the contract beneficiary's claim.[216]

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marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received.

Id. (Law Revision Commission Comment provides the language of the old § 70). Section 70, which was repealed and later replaced by section 6560-62 of the California Probate Code, applied to estates of decedents who died before January 1, 1985, while §§ 6560-62 apply to estates of decedents who died on or after January 1, 1985.

In *Stewart*, the decedent's estate consisted of two, one-third interests in a piece of real property: one that he owned and one that he had inherited from his brother. *Estate of Stewart*, 444 P.2d at 338. The decedent had entered into a contract agreeing that when the last of the three owners of the real property died, the property would pass to the children of the property owners. *Id.* Thus, the children, who were third-party beneficiaries under the contract, claimed they were entitled to three-fourths of the estate while decedent's surviving spouse contended that she should receive one half. *Id.*

The *Stewart* court noted that the stepchildren could enforce the contract in a court of equity. *Id.* at 339. The court overruled the trial court, which had held that each side was entitled to one half, holding that the pretermitted spouse provision operated only with respect to the estate assets not subject to the contract, i.e., the one-third interest that the decedent had inherited from his brother. *Id.* at 339-40. Interestingly, the court did not mention that the third-party beneficiaries could have claimed the entire inherited interest as well because it, too, was subject to the contract. The third-party beneficiaries should have claimed that property at the time of the brother's death.

215. *Contra* Estate of Beauchamp v. Eichenberger, 564 P.2d 908, 909-10 (Ariz. Ct. App. 1977) (involving circumstances where a will contract existed and the court concluded that disinheritance was unintentional).

216. *See* Buehrle v. Buehrle, 126 N.E. 539 (Ill. 1920). *But see* Crofut v. Layton, 35 A. 783, 785 (Conn. 1896). In *Crofut*, a father and son agreed to leave to each other their interests in a family business. *Id.* at 783. Even though the son was married at the time he executed the contract, the court held that the wife, who survived the son, was not entitled to a portion of the property subject to the contract because her husband did not own the property at the time of his death. *Id.* at 785.

9. Interpretation of the Contract

Some courts have construed the contract in a way that prevents any conflict from arising.[217] Thus, some courts have recognized expressly that the promisor cannot promise to dispose of all property owned at death, rather, only the net property owned at death.[218] On the other hand, a number of courts have decided in favor of the promisee or third-party beneficiary of a will contract based on the idea that the property of the deceased spouse did not actually belong to the deceased spouse and, therefore, could not be used to protect a surviving spouse.[219]

It is also possible to interpret a will contract as applicable only to the net estate.[220] For example, a court analyzing a contract promising to give one's entire estate could interpret that contract as conferring whatever remains after payment of spousal protection.[221]

V. The Solution

Consider, for example, the following hypothetical. Joe and Heidi marry when each is eighteen. Several months after the wedding, they each execute a holographic will. Each will leaves all of the testator's property outright to the other spouse, or to Greenstuff, an international environmental organization, if the other spouse does not survive the testator. At the date of execution, each owns property worth $5,000. Tragi-

217. *See In re* Nicholson's Will, 267 N.Y.S.2d 719 (Sur. Ct. 1966) (recognizing that a promisor can promise only the net property owned at death).

218. *Id.* In *Nicholson*, the surrogate's court considered whether a mortgage, which was the subject of a contract to bequeath, should bear a pro rata portion of the widow's elective share. In holding that it should, the court noted that the promise to bequeath:

> [W]as subject to diminution, disappearance, or vitiation by the length of time the testator might live in relation to the scheduled amortization, by the possibility of pre-payment, permissible by its terms, by the possibility of its passing into the hands of a receiver, trustee in bankruptcy, or judgment creditor, by the possibility of its being subject to the claims of an after-born child or an after-acquired wife, and by the failure to stipulate against apportionment of estate taxes.

Id. at 726; *see also In re* Erstein's Estate, 129 N.Y.S.2d 316, 319 (Sur. Ct. 1954) (net of, *inter alia*, widow's forced share); Owens v. McNally, 45 P. 710, 713 (Cal. 1896); *cf.* Wides v. Wides' Ex'r, 184 S.W.2d 579, 584 (Ky. 1944) (holding that a second wife is still entitled to a portion of her husband's estate, even though he was contractually bound to leave his entire estate to his first wife and children).

219. Lewis v. Lewis, 178 P. 421 (Kan. 1919).

220. Patecky v. Friend, 350 P.2d 170, 177 (Or. 1960) (stating that when a husband and wife make a will contract, the possibility of the surviving spouse remarrying is within their contemplation and can become part of contract).

221. *See* Gall v. Gall, 19 N.Y.S. 332, 335 (App. Div. 1892), *aff'd*, 34 N.E. 515 (N.Y. 1893). In dictum, the *Gall* court said that a will contract purporting to apply to the testator's entire estate would have to be limited by implication to provide protection for a subsequent wife. *Id.* If not so limited, the *Gall* court reasoned that the agreement would be void as against public policy. *Id.*

cally, Heidi is killed the day after executing the will. Joe probates Heidi's will and receives all of her property.

One year later, Joe meets Miriam, whom he marries several months later. Their marriage produces three children. Joe executes several wills during his marriage to Miriam. The first leaves everything to Miriam, and subsequent wills leave everything to Miriam and the children. None of these later wills makes any gift to Greenstuff.

After fifty years of happy marriage, Joe dies. At the time of his death, he owns property worth $500,000. When Miriam attempts to probate Joe's last will, Greenstuff objects, arguing that the will breaches the contract between Joe and Heidi. Greenstuff seeks to receive Joe's entire estate in probate court. Miriam and the children claim the entire estate and, in the alternative, Miriam claims her spousal protection rights.[222]

First, the court will have to decide whether there was a contract between Joe and Heidi. If the court finds the parties had a contract, it must decide what property the contract covered.[223] Finally, the court must decide whether Miriam is entitled to any of the property subject to the contract—whether the contract is subject to a surviving spouse's right to a portion of the estate.

It is apparent that the haphazard use of property, contract, probate, and family law principles leads to inconsistent and unjust results. The cases seemingly turn more on which side could muster more compelling facts, rather than on any well-thought-out rationale or on any sound public policy. Such fact-specific inquiries, while attractive in some respects, are inappropriate in every other instance involving spousal protection, and are inappropriate with respect to the conflict between will contracts and spousal protection.

Before examining how the law should resolve the conflict, it is important to consider two ancillary matters. First, parties can avoid the conflict, in most cases, with careful planning. Second, an attorney involved in any way with the conflict must consider the particularly thorny professional responsibility concerns that the conflict raises, both from a planning and litigation perspective.

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222. For a discussion of the various types of spousal protection, see *supra* notes 78-113 and accompanying text.

223. *See* SPARKS, *supra* note 8, at 16-17 (recognizing that "[t]hroughout its development the law as to the revocability of the will made pursuant to contract and the status of the property from the making of the contract until the death of the promisor has been in a constant state of confusion").

A. Avoiding the Problem Through Planning

Obviously, the best way to deal with the conflict is to avoid it. If a will contract makes clear that it does not affect property that would be subject to the spousal share of a subsequent spouse, then no conflict will exist. Similarly, if a party to a will contract enters into an agreement with a subsequent spouse who waives all rights to elect against the will of the party to the contract, then the conflict will never arise.

In the case of joint and mutual wills, the parties always should state whether they desire a binding agreement or not. For example, if the parties intend a contract, then the higher evidentiary requirement could frustrate that intent in the absence of a clear expression of intent. Yet, if the parties do not intend a contract, then a presumption that the reciprocal provisions are evidence of a contract could cause a result that neither party desires.[224]

More important, and more difficult to solve through planning, is the situation in which a party enters into a will contract that has consequences not contemplated at its inception.[225] The only solution to this problem would be to modify the contract while both parties are alive, or to seek a waiver from any spouse whose rights the contract might affect. Finally, it is likely that avoidance of the conflict through planning will occur only when adequate legal counsel is available. For that portion of the population who either do not seek or do not receive high-quality advice, the conflict must be resolved if and when it arises.

B. Professional Responsibility Concerns

Estate planning attorneys often find themselves in situations in which they are asked to represent clients with potentially conflicting interests.[226] Although an attorney who represents both spouses in a divorce or separa-

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224. *Id.* at 30 (explaining "[t]he rule requiring clear and convincing evidence to prove a contract to devise or bequeath coupled with the laxity of the courts in the application of the rule in joint and mutual will cases creates such uncertainty as to require that special care be exercised in the drafting of instruments of this type").

225. *See* Simeone v. Simeone, 581 A.2d 162, 166 (Pa. 1990). In the context of evaluating a prenuptial agreement, the Supreme Court of Pennsylvania noted that changes of circumstance can make a desirable bargain become unattractive over the life of a long-term contract. *Id.* But, the court opined, contracting parties assume such risks. *Id.*

226. *See generally Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct, Report of the Commission on Significant New Developments in Probate and Trust Law Practice*, 22 REAL PROP. PROB. & TR. J. 1, 10-23 (1987) [hereinafter *Professional Responsibility Developments*]; Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 212 (1982) (discussing simultaneous representation in same transaction or proceeding); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L.

tion proceeding clearly is representing conflicting interests,[227] the conflict is often less clear in the estate planning setting. Simply drafting wills for a husband and wife may put an attorney in a difficult position under the Model Rules of Professional Conduct.[228] For example, when one of the spouses later requests a change in his or her will, the attorney must decide whether to inform the other spouse.[229] Similarly, an attorney who

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REV. 1244, 1247 (1981) (stating that a conflict of interest question "has provided bench and bar with one of the toughest problems in legal ethics").

The relevant Model Rules of Professional Conduct are Rules 1.7, 1.9, and 1.16. Rule 1.7 states:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1994). Rule 1.9 states in part:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation . . .
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: . . . use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known. . . .

Id. Rule 1.9(a), (c)(1) (1994). Rule 1.16 states in part: "[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(1) (1994).

227. Charles P. Kindregan, *Conflict of Interest and the Lawyer in Civil Practice*, 10 VAL. U. L. REV. 423, 438 (1976) (stating that, in a divorce proceeding, a single lawyer should be precluded from advising both the husband and the wife).

228. *See generally Report of the Special Study Committee on Professional Responsibility of the Section of Real Property, Probate and Trust Law of the American Bar Association, Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife*, 28 REAL PROP. PROB. & TR. J. 765 (1994).

229. The ABA Model Rules of Professional Conduct provide in part: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)," which deals with criminal acts and disputes between lawyer and client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1994); *see Professional Responsibility Developments*, *supra* note 226, at 13 (recog-

drafts wills initially for both spouses but is later asked to obtain spousal protection for the surviving spouse is put into a conflict situation.[230]

The fact that the attorney represents an interest that conflicts with the interest of a former, rather than current, client does not alleviate the problem.[231] A dilemma may arise in such situations because the attorney improperly may use confidential information obtained while representing the former client.[232]

The situation in which the spouses' wills may have been executed pursuant to a will contract presents several additional difficult issues for the estate planning attorney. First, may an attorney write wills for two people who wish him to do so pursuant to a will contract? Second, may an attorney change a will when it may have been executed pursuant to a will contract with another client of the attorney? Third, what role may an attorney, who drafted mutual wills, take in litigation asserting or denying that a contract existed? Here the complication is that a party may call the lawyer to testify regarding the existence of a contract.[233] Under the Model Rules, an attorney must take special caution in such a situation.[234] One commentator has suggested that the rule most clearly applies to a situation in which the attorney is called upon to testify about a substantive matter in the dispute.[235]

The rationales underlying the prohibition against representing conflicting interests include the possibility of confidentiality difficulties, problems with zealous representation, and the appearance of impropriety.[236] When the attorney also considers the potential benefits of multiple representa-

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nizing that "[i]f the changes are major and clearly affect the other spouse's estate plan, the attorney is caught between conflicting duties of loyalty toward the two clients").

230. *See Professional Responsibility Developments*, *supra* note 226, at 12 (suggesting that forced election in community property jurisdictions and elective share in non-community states by their very nature represent a conflict between spouses).

231. *See* Kindregan, *supra* note 227, at 444.

232. *Id.*

233. Black v. Edwards, 445 S.E.2d 107, 108-09 (Va. 1994). In *Black*, the couple's attorney testified to the existence of a will contract. *See id.*; *see also* Kindregan, *supra* note 227, at 429-31 (discussing the role of lawyer as witness).

234. *See* Lennox v. Anderson, 1 N.W.2d 912, 916 (Neb.) (providing that the testimony of attorney regarding existence of oral contract is inadmissible as privileged), *modified*, 3 N.W.2d 645 (Neb. 1942); *see* Hale McCown, *Ethical Problems in Probate Matters*, 39 NEB. L. REV. 343, 346-48 (1960) (noting that, because of the attorney-client privilege, attorneys may be precluded from testifying as to existence of an oral contract to make a will).

235. Kindregan, *supra* note 227, at 430 (discussing Disciplinary Rules and Ethical Considerations of the Code of Professional Responsibility).

236. *See id.* at 346 (listing these as common themes in professional conflict of interest situations).

tion (for example, an overall fee reduction) he or she is faced with possibly inharmonious goals.[237]

Yet another difficult problem comes when the situation that is the subject of this Article arises. It is difficult to predict when the present happy common plan will turn into the unhappy future litigation. An attorney may be able to resolve the conflict problem by obtaining appropriate client consent.[238] In many situations, however, the only solution will be to decline the representation or withdraw because sound professional judgment will forbid representation.[239]

C. The Solution When the Conflict Arises

If the conflict between spousal protection and a will contract arises, then a simple solution presents itself. There should be a complete separation of the two issues. In other words, the determination of the validity of a will contract should have nothing to do with the decision whether to grant spousal protection. Rather, if there is a valid will contract, then it should be enforced. Further, if the surviving spouse would have been entitled to spousal protection from the assets subject to the contract, then the contract beneficiary should take subject to the spousal protection rights of the surviving spouse. To conclude otherwise inappropriately and illogically dilutes the spousal protection right.

The rights of any taker under a will are subject to the vagaries of the testator's lifetime depletion of assets and to limits imposed by regulation of the testamentary power.[240] The beneficiary of a gratuitous promise to make a gift by will should be subject to the same vagaries. The trend in America has been to protect the surviving spouse more than other relatives. As one commentator has stated, "the position of the surviving spouse has steadily improved everywhere at the expense of the decedent's blood relatives."[241] In light of this trend, it seems odd that so many courts have allowed surviving spouses to be stripped of protection as a result of an earlier will contract.

An interesting parallel exists between the question whether a spouse can defeat future elective share rights by making an inter vivos transfer

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237. Moore, *supra* note 226, at 214.

238. *See* Dennis M. O'Dea, *The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability, and Disqualification*, 48 GEO. WASH. L. REV. 693, 725-39 (1980) (discussing methods for obtaining consent to conflicts).

239. *See* MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.7 (1994) (stating the general rule, and listing the exceptions).

240. *In re* Nicholson's Will, 267 N.Y.S.2d 719, 726 (Sur. Ct. 1966) (legatee takes subject to infirmities of will).

241. GLENDON, *supra* note 96, at 238.

and whether a spouse can defeat future elective share rights by making a will contract. One court has suggested that a surviving spouse of a deceased spouse who entered into a will contract before marriage is not entitled to spousal protection because the situation is similar to one in which the deceased spouse made an inter vivos transfer to obtain the same result.[242] In the era when the elective share attached only to probate assets, inter vivos transfers easily could diminish the elective share.[243] The recent reforms in spousal protection would, however, often give a surviving spouse rights in the property of at least some nonprobate transfers. Whether the surviving spouse should receive protection from assets in which the deceased spouse held only a partial interest should depend on what type of interest the deceased spouse retained.

The cases involving inter vivos transfers typically arise when a surviving spouse has attempted to invalidate an otherwise valid inter vivos transfer by arguing that it defeated the elective share. Before state legislatures enacted statutes addressing the availability of nonprobate assets to the elective share, courts reacted to such claims in a variety of ways. Some courts simply denied the surviving spouse relief. Others entertained the possibility of invalidating the inter vivos transfer, usually focusing on one of two tests. The first test was the "intent" test.[244] This test asks whether the deceased spouse made the inter vivos transfer with the intent to diminish the surviving spouse's elective share rights. The second test was the "control" test.[245] This test examined the degree of control the deceased spouse had retained over the property that was the subject of the nonprobate transfer.

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242. Lewis v. Lewis, 178 P. 421, 422-23 (Kan. 1919) (employing this rationale, and upholding the will as not against public policy).

243. *See* Newman v. Dore, 9 N.E.2d 966, 966-67 (N.Y. 1937). In *Newman*, the New York Court of Appeals held that whether an inter vivos transfer defeated a surviving spouse's right depended on whether the transfer was real or illusory. *Id.* at 969. In its holding, the *Newman* court noted that the share to which a surviving spouse is entitled:

> [I]s only an expectant interest dependent upon the contingency that the property to which the interest attaches becomes part of a decedent's estate. The contingency does not occur, and the expectant property right does not ripen into a property right in possession, if the owner sells or gives away the property.

Id. at 967.

244. *See* MACDONALD, *supra* note 10, at 98-119 (evaluating the "intent" test, and surveying the variations of the test in different jurisdictions).

245. *See id.* at 67-97 (explaining the control rationale and its effect on illusory transfers). Professor Macdonald also notes a third line of cases that apply a "reality" test. *Id.* at 120-44. This reality test could be classified as an offshoot of the "control" test because it focuses on who controls or has interests in the transferred assets during the life of the deceased spouse. *See Newman*, 9 N.E.2d at 969 (explaining that the ultimate test is whether the transfer is real or illusory).

Since its introduction, there has been much legislative reform of elective share law.[246] The main thrust of this reform has been to make it difficult or impossible to destroy future elective share rights by making inter vivos nonprobate transfers.[247]

Similarly, some have suggested that a contract must be subject to the possibility that the amount received by a third-party beneficiary would be reduced by a surviving spouse's share, or consequently, the contract itself would be a restraint on marriage.[248] Presumably, a serious restraint on marriage would be void as against public policy.[249]

Of course, some commentators have suggested that changes in society may have rendered spousal protection unnecessary.[250] The premise behind this suggestion seems to be that spousal protection was designed to protect widows, and that the improved position of women in society makes spousal protection no longer necessary. Even assuming that this premise is true, resolving the conflict in favor of contract beneficiaries, and thus eroding spousal protection, is not the answer. There is no reason why a decreased need for spousal protection should override a seemingly clear legislative pronouncement when a will contract is involved, but not in other circumstances. Rather, if the law of spousal protection needs reworking, or perhaps abolition, then such changes should apply to spousal protection in every situation.

Courts appear to give more protection to first spouses than to second or later spouses when a conflict arises.[251] This is true even when knowl-

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246. *See* Langbein & Waggoner, *supra* note 93, at 311 (observing that, since *Newman v. Dore*, there has been significant legislative reform).

247. *See id.* (noting that the newer statutes adopt the approach).

248. Gall v. Gall, 19 N.Y.S. 332 (Sup. Ct. 1892), *aff'd*, 34 N.E. 515 (N.Y. 1893). In dictum, the *Gall* court stated "[t]he parties . . . could never have contemplated a restriction upon the decedent's right to marry or to provide for his children in case such marriage was fruitful." *Id.* at 335. In *Patecky v. Friend*, the Oregon Supreme Court stated that:

> Marriage being a natural and desirable relationship in the eyes of the law, it may be said that the possibility of remarriage of either [of the parties to the will contract] was within their contemplation when the contract was made and became a part thereof. At least, it may not be assumed that they intended an agreement in restraint of marriage.

350 P.2d 170, 177 (Or. 1960); *see also* Minneman, *supra* note 8, at 423, 429.

249. Shimp v. Huff, 556 A.2d 252, 263 (Md. 1989) (noting contracts that restrain marriage are void as against public policy).

250. *See* Oldham, *supra* note 94, at 233-54 (criticizing the forced share system, and suggesting possible changes to reform the system); Sheldon J. Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681, 682 (1966) (discussing soundness of non-community property type spousal protection).

251. *Compare* Buehrle v. Buehrle, 126 N.E. 539 (Ill. 1920) *with* Keats v. Cates, 241 N.E.2d 645 (Ill. App. Ct. 1968). In *Buehrle*, the parties to the contract were the testator and his brother. *Id.* at 539. The court found the surviving spouse's rights superior, allowing her to renounce the will and take her intestate share. *Id.* at 540. In *Keats*, the

edge of the contract by the surviving spouse is not a determinative factor.[252] If such results are based on the idea that the equities favor the spouse who was married to the testator for the longer period of time, then they are wholly inconsistent with the overwhelmingly legislated rule that a surviving spouse is entitled to protection regardless of length of marriage. Additionally, it is not always true that the first marriage is of longer duration than a subsequent marriage.

One difficult problem in resolving the conflict is the sense that the equities favor the contract beneficiaries in the case of a short-duration marriage and the surviving spouse in the case of a long-term marriage.[253] Thus, decisions like those of the New York Court of Appeals, favoring the contract beneficiaries of a contractual will executed during a marriage of almost fifty years over the elective share rights of the promisor's surviving second spouse to whom the promisor was married for only fifteen months do not shock the conscience.[254] Most courts, however, do not draw distinctions based on length of marriage when resolving the conflict. Hence, one hopes that in the interest of analytical consistency, perhaps the New York court would favor the contract beneficiaries even in the case of a short-duration first marriage followed by a long-duration second marriage with a will contract made during the first marriage. This difficulty helps to illustrate the soundness of the Uniform Probate Code's redesigned elective share.[255]

Under the U.P.C., the percentage of the augmented estate[256] to which a surviving spouse is entitled varies with the length of the marriage.[257] The percentages suggested in section 2-202 range from zero in the case of a marriage of less than one year to fifty for a marriage lasting fifteen

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parties to the contract were the testator and his first wife. *Keats*, 241 N.E.2d at 649. The court found the second wife's rights inferior, allowing the contract beneficiaries to take the estate. *Id.* at 653.

252. *Keats*, 241 N.E.2d at 652.

253. For an example of an extremely short-term marriage, see Neiderhiser Estate, 2 Pa. D. & C.3d 302 (1977) (widow entitled to letters of administration after husband died during wedding ceremony).

254. *See* Rubenstein v. Mueller, 225 N.E.2d 540, 543 (N.Y. 1967).

255. *See* UNIF. PROB. CODE §§ 2-201 to -207 (1993). These sections were revised in 1993 to emphasize partnership theory and reform the elective share system. *Id.*; *see* Waggoner, *supra* note 5, at 715-24; Langbein & Waggoner, *supra* note 93, at 303. Professors Langbein and Waggoner suggest that even the reform wave that followed decisions like *Newman v. Dore* did not alleviate major problems in elective share laws, especially the inequity relating to duration of marriage. *Id.* at 310-12.

256. UNIF. PROB. CODE §§ 2-203, 2-205 (1993). The revised U.P.C. goes so far as to create a combined augmented estate. *Id.* § 2-203. Section 2-203 calculates the elective share as a portion of the decedent's and surviving spouse's combined augmented estates. *Id.*

257. *Id.* § 2-202(a) (charting the entitlements).

years or more.[258] In addition, section 2-202(b) permits a legislature to add a supplemental elective share amount so that any surviving spouse would receive a minimum dollar amount regardless of the length of the marriage.[259] The comment to section 2-202 makes clear that the increasing percentage component implements the partnership theory of marriage while the supplemental amount implements the support theory of the elective share.[260]

This is not to suggest, however, that it is inappropriate to allow spousal protection to prevail over rights under a will contract in a jurisdiction that offers full spousal protection to the surviving spouse of a short-term marriage. Like many jurisdictions that have chosen to eliminate misconduct as a disqualifying factor in spousal protection cases,[261] most states do not consider length of marriage in assessing a surviving spouse's entitlement to protection.

In addition, the use of property law principles represents nothing more than a game of smoke and mirrors. A contract to make a will does not deprive the promisor of lifetime rights in his property in any meaningful way. The idea that title vests immediately in the promisee or third-party beneficiary is equally ephemeral. The contract beneficiary has no meaningful property interest until the promisor dies. This combination of the promisor losing nothing while alive and the beneficiary enjoying the property only at the promisor's death compels the conclusion that the attempt to treat a contract to make a will as anything other than a testamentary act is pure legal fiction.[262]

Thus, in almost every case, the rights of a surviving spouse to protection should prevail over the rights of a promisee or third-party beneficiary of a will contract. There is, however, one fairly limited situation in which the surviving spouse should not be permitted to claim spousal protection to the detriment of the will contract's beneficiary, and one issue

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258. *Id.*

259. *Id.* § 2-202(b); *see also* Langbein & Waggoner, *supra* note 93, at 319-20 (suggesting that $50,000 would provide a person in his or her mid-70s with enough funds to subsist).

260. UNIF. PROB. CODE § 2-202 cmt.; *see also* Langbein & Waggoner, *supra* note 93, at 314-17 (discussing accrual-type forced share).

261. *See* Hall v. Jeffers, 795 S.W.2d 135, 138 (Tenn. Ct. App. 1990) (noting misconduct not a bar to distributive share); *see also* Oldham, *supra* note 94, at 243 (suggesting surviving spouse's behavior during marriage should not be considered in determining post-death support).

262. *See* Estate of Stewart v. Van Noy, 444 P.2d 337, 342 (Cal. 1968) (en banc) (McComb, J., dissenting) (stating that "[r]egardless of the separate nature of a contract and a will, a contract to make disposition of property by will for all practical purposes amounts to a testamentary disposition"); Church of Christ Home for Aged, Inc. v. Nashville Trust Co., 202 S.W.2d 178, 181 (Tenn. 1947) (noting will and contract are "completely dependent upon each other").

concerning the amount to which the surviving spouse is entitled. The one situation where the surviving spouse should not be permitted to claim spousal protection to the detriment of the beneficiaries of a will contract is fairly limited. When the surviving spouse claiming the protection is a promisor of the will contract, he or she should not be permitted to frustrate the purpose of the contract by electing against the other promisor's will.[263]

To allow the contract beneficiaries to prevail in such circumstances does not harm the integrity of spousal protection. Rather, it recognizes that a contract to make a particular disposition of property is tantamount to an agreement waiving any contradictory rights that the promisor may have had in the property.

Regarding the surviving spouse's amount of entitlement, an interesting situation arises when the promisor dies intestate. In such cases, the surviving spouse should be limited to receiving what he or she would have received by electing against a will drafted to comport with the terms of the contract. The spouse should not receive the intestate share. This embodies the logical solution because the spouse of a promisor who breaches a contract to make a will should not be placed in a better position than the spouse of a promisor who performs under the contract. This recognizes the idea that a contract to make a will is primarily testamentary—it is an agreement to make a testamentary disposition to someone other than the spouse. It also represents a recognition of the fact that making a will to exclude the surviving spouse and entering into a contract to exclude the surviving spouse are parallel courses of action.

Further, intestacy statutes constitute legislative attempts at executing the presumed dispositive intentions of a person who dies without a valid will.[264] Studies have shown overwhelmingly that a testator leaving a surviving spouse will likely give the entire estate to the surviving spouse.[265]

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263. The Supreme Court of Iowa was faced with this situation in Luthy v. Seaburn, 46 N.W.2d 44 (Iowa 1951). In *Luthy*, the surviving spouse, who was also the other party to a contract to execute mutual wills, attempted to elect against his dead spouse's will. *Id.* at 45. The court refused to allow the surviving spouse to rescind the contract by electing against the will. *Id.* at 48; *see also Nashville Trust Co.*, 202 S.W.2d at 183 (noting wife's dissent from will was breach of agreement); Seat v. Seat, 113 S.W.2d 751, 754 (Tenn. 1938) (refusing to allow wife to repudiate contract by dissenting from deceased husband's will).

264. *See* Waggoner, *supra* note 5, at 703-04. Professor Waggoner suggests that although a mixture of considerations should drive formulation of intestacy statutes, decedent's imputed intent is an "obvious and perhaps predominant consideration." *Id.*

265. *See* Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1307-08 (1969) (citing statistics that show testates tend to leave everything to their spouses, even when both spouse and issue survive); John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 283, 311-17 (1975) (concluding from data obtained in Washington

A legislature looking at such studies probably would conclude that most people would bestow their entire estate to a surviving spouse. Thus, the fact that most intestacy statutes favor a surviving spouse over other surviving relatives probably represents more a result of recognition of a typical pattern of disposition than a desire to protect the spouse.

A similar argument can be made with respect to a surviving spouse who claims protection as a pretermitted spouse. Again, the surviving spouse should be limited to the protection that he or she would have received had the deceased spouse written a will conforming to the contract because the premise underlying the pretermitted spouse statutes is that the decedent unintentionally omitted the spouse. The existence of the will contract, however, suggests that the deceased spouse was contractually obligated to intentionally omit the surviving spouse.[266] Because a jurisdiction designs spousal protection to address intentional disinheritance, the surviving spouse should receive only that amount.

Further, the focus of some courts on whether the surviving spouse knew of the contract's existence to determine whether the surviving spouse should receive a portion of the promisor's estate is not only illogical, but also undesirable as a matter of public policy. A court should not deem a spouse to have waived the right to spousal protection at death merely because he or she knows that a will contract exists. To so suggest might even be viewed as a restraint on marriage because it implies that the spouse had the power to avoid the effect of the contract by not marrying. Rather, a court should find the surviving spouse to have waived the right to spousal protection only if he or she voluntarily relinquishes such right in accordance with the law of the relevant jurisdiction regarding agreements affecting marital rights.

VI. Conclusion

In sum, a testator should not be permitted to contract to do that which he cannot otherwise do—completely disinherit his spouse.[267] Every jurisdiction in the United States has decided that protection of the surviving

State that, like other jurisdictions, a very high percentage of decedents transferred their entire estates to their surviving spouses).

266. *See* Estate of Beauchamp v. Eichenberger, 564 P.2d 908, 910 (Ariz. Ct. App. 1977) (holding second wife was pretermitted spouse even though husband was contractually bound to leave entire estate to children, and concluding that children should prevail).

267. *See In re* Estate of Mullin, 443 P.2d 331, 338 (Kan. 1968). The *Mullin* court held that a person could neither deprive a surviving spouse of protection by writing a will disinheriting the surviving spouse nor by contracting to write such a will. *Id.* at 338.

spouse is a worthy aim.[268] If a court allows the contract beneficiary's rights to prevail over the surviving spouse's rights, then a spouse in that jurisdiction has access to an extremely useful tool for defeating the spousal share.[269] Such circumvention of the principle of spousal protection should not be tolerated.

268. *See supra* note 108. As previously noted, Georgia's protection of surviving spouses is extremely limited.

269. Fleming v. Fleming, 180 N.W. 206 (Iowa), *reh'g overruled*, 180 N.W. 206 (Iowa 1920), *modified*, 184 N.W. 296 (Iowa 1921). In holding that the surviving spouse's rights prevailed, the *Fleming* court noted that the governing statute left no room for such an ingenious attempt to defeat spousal rights. *Id.* at 208. It also noted that spousal rights are impregnable or not existent. *Id.*