Use of Plural Pronouns in Joint Will Can Create Binding Obligation

Fred P. Boy III
Use of plural pronouns in joint will can create binding obligation

New York courts have long recognized that a joint will[^358] can bind the signatories to dispose of their estates in a particular manner and preclude a subsequent revocation.[^359] Before an agreement

[^358]: A joint will has been defined as "a single testamentary instrument that embodies the testamentary plan of two or more persons and is separately executed by each of the testators using the instrument." Rich v. Mottek, 14 App. Div. 2d 89, 95, 217 N.Y.S.2d 409, 414 (1st Dep't 1961) (Valente, J., dissenting), rev'd, 11 N.Y.2d 90, 181 N.Y.S.2d 445, 226 N.Y.S.2d 428 (1962) (quoting 1 PAGE ON WILLS 551 (rev. ed. W. Bowe & D. Parker 1960)).

[^359]: 381 A.2d 330 (N.H. 1977), however, the New Hampshire Supreme Court found Seider jurisdiction unconstitutional, since its assertion does not require the defendant to have the requisite "minimum contacts" with the forum state. Moreover, although the second circuit upheld Seider, O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.), cert. denied, 47 U.S.L.W. 3386 (Dec. 5, 1978), it is interesting to note that a previous second circuit decision intimated that Seider was no longer viable. Intermeat, Inc. v. American Poultry, Inc., 575 F.2d 1017, 1022 (2d Cir. 1978). Further, the denial of certiorari in O'Connor prompted a strong dissent on the part of Justice Powell, in which Justice Blackmun joined. See 47 U.S.L.W. 3386 (Dec. 5, 1978) (Powell, J., dissenting), denying cert. to 579 F.2d 194 (2d Cir.). In light of these inconsistent views, it is hoped that the Supreme Court will soon address the Seider issue.

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When a party breaches a contract not to revoke a joint will by executing a second one after the death of his co-testator, the second will is admitted to probate as the last will and testament of the decedent. E.g., In re Higgins' Will, 264 N.Y. 226, 190 N.E. 417 (1934); cf. In re Miceli's Will, 1 Misc. 2d 375, 145 N.Y.S.2d 819 (Sur. Ct. Kings County 1955) (mutual wills). Third party beneficiaries claiming under the joint will, however, may seek specific performance of the testamentary contract in the supreme court or surrogate's court. E.g.,
not to revoke can be found to exist in a joint will, however, there must be clear and convincing evidence that the testators intended to be contractually bound.\textsuperscript{30} Thus, when a third party beneficiary seeks specific performance of a contract embodied in a joint will which lacks expressly binding provisions, courts will interpret the language in the will and evaluate the circumstances surrounding its execution to determine if a contract not to revoke was made.\textsuperscript{31} Re-


In \textit{Tutunjian v. Vetzigian}, 299 N.Y. 315, 87 N.E.2d 275 (1949), the Court indicated that, although the use of plural pronouns in the will suggested the existence of a contract, "any doubt . . . was removed" by an agreement entered into by the couple 13 years before the joint will was executed. \textit{Id.} at 320, 87 N.E.2d at 277. This agreement provided that the couple would not revoke their contemporaneously executed mutual wills. When the joint will was later executed, it contained provisions substantially similar to the mutual wills. \textit{Id.} Evaluating these circumstances, the \textit{Tutunjian} Court reasoned that the couple had not "abandoned
cently, in *Glass v. Battista*, the Court of Appeals found that a husband and wife’s use of plural pronouns in their joint will to describe their estate and themselves and the naming of their children as ultimate beneficiaries was sufficient evidence of an intent to create a contractual obligation so as to bind the surviving spouse to the terms of the will. In *Glass*, a couple executed a joint will in 1966 which provided, in part: “Third: We give to the survivor of us all our property . . . . Fourth: In the event we die simultaneously or under such circumstances that the evidence is not sufficient to determine the question of survivorship between us, or if either of us predeceases the other, then we jointly, mutually and individually give . . . all . . . our property . . . to our . . . children . . . .” Following the death of the wife in 1967, the husband received the wife’s entire estate in their earlier design of entering a contract.” *Id.* In Rich v. Mottek, 11 N.Y.2d 90, 181 N.E.2d 445, 226 N.Y.S.2d 428 (1962), there was no use of words such as “this and this only” to describe the will as there was in Rastetter; nor was there any prior agreement as in Tutunjian. The Rich Court nevertheless found support for the existence of a testamentary contract by the couple’s use of plural pronouns and by a clause in the will which recited that “our children are appointed heirs of the last decedent spouse.” *Id.* at 94, 181 N.E.2d at 447, 226 N.Y.S.2d at 431. In contrast, the court in *In re Lowe’s Estate*, 24 App. Div. 2d 983, 265 N.Y.S.2d 257 (2d Dep’t 1965), aff’d mem. sub nom. *In re Estate of Zeh*, 18 N.Y.2d 900, 223 N.E.2d 43, 276 N.Y.S.2d 635 (1966), held that a clause in the joint will which made the surviving spouse the “absolute owner” of their estate prevented the terms of the will from being binding on him. 24 App. Div. 2d at 984, 265 N.Y.S.2d at 259-60. In a more recent case, the presence of plural pronouns, buttressed by extrinsic evidence, was sufficient to support the claim that a testamentary contract was made. Rubenstein v. Mueller, 19 N.Y.2d 228, 225 N.E.2d 540, 278 N.Y.S.2d 845 (1967). A significant factor in Rubenstein was a prior joint will which contained a provision expressly permitting revocation of the will. The absence of a similar clause led the Court to infer that the parties intended to eliminate the possibility of revocation in the later will. *Id.* at 232-33, 225 N.E.2d at 543, 278 N.Y.S.2d at 848.

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33 *Id*. at 625, 374 N.Y.S.2d at 118, 403 N.Y.S.2d at 207.

34 *Id*. at 623, 374 N.Y.S.2d at 116-17, 403 N.Y.S.2d at 205. The complete text of the third and fourth paragraphs read as follows:

**THIRD:** We give to the survivor of us all our property, both real and personal, wherever situated, whether owned by us jointly or severally.

**FOURTH:** In the event we die simultaneously or under such circumstances that the evidence is not sufficient to determine the question of survivorship between us, or if either of us predeceases the other, then we jointly, mutually and individually give, devise and bequeath all of the rest, residue and remainder of our property, both real and personal and wheresoever situated, or to which we or either of us may be entitled at the time of our death, to our beloved children, CIARINO DeFILIPPO and TILLIE DeFILIPPO, who shall survive us, share and share alike, per stirpes and not per capita.

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*Id.*
accordance with the terms of their will. In 1973, the husband executed a second will in which his children were expressly disinherited “for reasons well known to them.” When the husband died and the second will was admitted to probate, the children sued the executors for specific performance of the testamentary disposition made in the joint will. In holding that a testamentary contract did not exist, the Supreme Court, New York County, found that the fourth article of the will was intended only as a “joint bequest should [the couple] die a simultaneous death or in a common disaster.” Reversing on the law and facts, the Appellate Division, First Department, found that the language of the joint will clearly indicated the testators’ intention to bind themselves.

The Court of Appeals unanimously affirmed. Writing for the Court, Judge Jasen observed that repudiation of the right to revoke is not viewed as a “casual matter.” Noting that by itself a joint will does not establish the existence of a testamentary contract, the Court reaffirmed the principle that the provisions of a superseded will can be enforced only if its terms reflect the testator’s intention

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36 Id. at 623, 374 N.E.2d at 117, 403 N.Y.S.2d at 205. After the death of his wife, the decedent opened two Totten Trusts in 1973, one for each of his daughters but later removed them as the named beneficiaries. Id.

37 It is well settled in New York that when a person enters a contract not to revoke a will, an inter vivos gift cannot be made to defeat the purpose of the will. See, e.g., Rich v. Mottek, 11 N.Y.2d 90, 93, 181 N.E.2d 445, 446-47, 226 N.Y.S.2d 428, 430 (1962). The survivor, however, may use the property to meet everyday needs. See, e.g., Schwartz v. Horn, 31 N.Y.2d 275, 280-81, 290 N.E.2d 816, 818, 338 N.Y.S.2d 613, 617 (1972); Rich v. Mottek, 11 N.Y.2d at 93, 181 N.E.2d at 446-47, 226 N.Y.S.2d at 430; Rastetter v. Hoenninger, 214 N.Y. 66, 74, 108 N.E. 210, 211 (1915).

38 Id. at 623, 374 N.E.2d at 117, 403 N.Y.S.2d at 206.


40 Id. at col. 6.

41 56 App. Div. 2d 806, 806, 392 N.Y.S.2d 654, 655 (1st Dep't 1977). The appellate division ordered specific performance of the terms of the joint will.

42 Id. at 620, 374 N.E.2d 116, 403 N.Y.S.2d 204.

43 Id. at 624, 374 N.E.2d at 117, 403 N.Y.S.2d at 206 (quoting Oursler v. Armstrong, 10 N.Y.2d 385, 389, 179 N.E.2d 489, 490, 223 N.Y.S.2d 477, 479 (1961)). Contracts not to revoke a will traditionally are disfavored in the law because a person should “be free, in all the contingencies of life, with all the possible mutations in [his] relations to others, or in the worthiness of the destined objects of [his] bounty, to make such other testamentary dispositions, as might seem wise, or in better accord with [his] sentiments.” Edson v. Parsons, 155 N.Y. 555, 571, 50 N.E. 265, 269 (1898). For example, the economic condition of the surviving spouse or of the third party beneficiaries may change, the surviving spouse may remarry, or the intended beneficiaries may die. These events may require the testator to change his will. See In re Estate of Tatkov, 80 Misc. 2d 359, 397, 363 N.Y.S.2d 720, 727 (Sur. Ct. Kings County 1975). Thus, the Court has observed that the requirement of adducing proof of intent to be bound should not be replaced by a presumption of a contract. Edson v. Parsons, 155 N.Y. 555, 568, 50 N.E. 265, 269 (1898).
Reasoning that a "natural inference flows from the relationship" between the testators and their children, the Glass Court concluded that the joint will in question was intended to be contractual. Furthermore, the Court viewed the testators’ use of first person plural pronouns as an indication that their dispositions were mutually dependent.

It is submitted that the Glass opinion reflects the laxity with which many courts apply the "clear and convincing" evidence standard in determining whether a testamentary contract has been made. Previously, the courts have required the use of plural pronouns in a joint will supplemented by other revealing language or
extrinsic evidence before finding that a contract was intended.77 In
Glass, however, the Court based its decision solely upon a "natural
inference" arising from the familial relationship coupled with the
testators' use of plural pronouns.78 Thus, by its decision in Glass, the Court appears to have further relaxed the standard of proof
required. The willingness of the courts to find the existence of a
testamentary contract in a joint will79 appears to be based upon a
belief that the surviving spouse would be unjustly enriched by re-
ceiving the benefits of a joint will without being required to adhere
to its terms.80 It is suggested, however, that diluting the level of
proof will not necessarily produce equitable results and may in-
crease the possibility that the true intention of the testators will be
frustrated.81

77 See notes 360-361 supra.
78 See 43 N.Y.2d at 625, 374 N.E.2d at 118, 403 N.Y.S.2d at 207.
79 The courts have indicated that execution of a joint will, as distinguished from a
mutual will, is more suggestive of the parties' intention to enter a contract. See, e.g., In re
Estate of Silverman, 43 Misc. 2d 908, 911, 252 N.Y.S.2d 587, 590 (Sur Ct. Westchester
v. Parsons, 155 N.Y. 555, 50 N.E. 266 (1898). Although a joint will indicates a discussion
between the testators relating to their property, it does not necessarily follow that each signed
the will in return for the expectation of receiving the other's estate. It is well settled that a
will is presumptively revocable. See Lally v. Cronen, 247 N.Y. 58, 62-63, 159 N.E. 723, 725
(1928) (citing Edson v. Parsons, 155 N.Y. 555, 568, 50 N.E. 265, 268 (1898)). In light of the
policy reasons supporting the revocability of wills, see note 371 supra, it is submitted that,
absent evidence to the contrary, a joint will signed by husband and wife must be deemed to
express only the couple's revocable intention to bequeath their estate to the named beneficiar-
ies. There is a significant distinction between this intention and an intention to be irrever-
County) (distinction must be made between present intention to be bound and present
intention to bequeath); Sparks, Problems in the Formation of Contracts to Devise or
Bequeath, 50 CORNELL L.Q. 60, 63-65 (1954).
80 43 N.Y.2d at 624, 374 N.E.2d at 117, 403 N.Y.S.2d at 206; see, e.g., Rich v. Mottek,
11 N.Y.2d 90, 94, 181 N.E.2d 445, 447, 226 N.Y.S.2d 428, 431 (1962); Tutunjian v. Vetzgian,
299 N.Y. 318, 319, 87 N.E.2d 275, 277 (1949). A case cited by both the Rich and Tutunjian
Courts in support of the principle that the surviving spouse would be unjustly enriched if
allowed to revoke the will is Mutual Life Ins. Co. v. Holloday, 13 Abb. N. Cas. 16 (1883). In
contrast to Rich and Tutunjian, however, the existence of a contract in Mutual Life was clear.
See id. at 19. Where the existence of a testamentary contract is questionable, however, it is
submitted that the resolution of the issue should not be influenced by the possibility of the
surviving spouse being unjustly enriched. See note 381 infra.
81 Finding the existence of a contract may result in several unintended consequences. If
a contract not to revoke is found to exist, the surviving spouse will be unable to dispose of
his property in accordance with his present needs. See, e.g., Rastetter v. Hoenninger, 214 N.Y.
66, 74, 108 N.E. 210, 211 (1915); Edson v. Parsons, 155 N.Y. 555, 571, 50 N.E. 265, 269 (1898).
The surviving spouse also will lose the right of election against the will. See, e.g., In re Estate
of Clark, 26 Misc. 2d 759, 761, 206 N.Y.S.2d 113, 115 (Sur Ct. N.Y. County 1960); cf.
Rubenstein v. Mueller, 19 N.Y.2d 228, 234, 225 N.E.2d 540, 544, 278 N.Y.S.2d 845, 849-50
(1967) (following remarriage, testator's second wife lost right of election). Further, detrimen-
In response to decisions similar to Glass, the Law Revision Commission has recommended an amendment to the Estates, Powers and Trusts Law. This amendment would require either an express statement in the will that a contract not to revoke is intended or a writing extrinsic to the will supporting the existence of a contract. While preferable to the present state of the law, the proposed amendment still is problematic because it would not allow the courts to compel specific performance in cases where an intention to be bound clearly is manifested under the circumstances although the evidence does not fall within the statutory requirements. Since, in many cases, extrinsic evidence might clearly demonstrate the existence of contractual intent, it is suggested that the proposed legislation be supplemented by an additional provision which would permit the use of extrinsic evidence to prove contractual intent where a joint will is ambiguous as to whether a testa-


In In re Aquilino's Will, 53 Misc. 2d 811, 280 N.Y.S.2d 85 (Sur. Ct. Nassau County 1967), the testators executed a joint will which was virtually identical to the will in Glass. The Surrogate interpreted the provisions in the will "to be [the testators'] joint bequest should they die in a common disaster and to be the voluntary will of the survivor unless superseded by a later valid will." Id. at 812-13, 280 N.Y.S.2d at 87. While the intention of the testators in Glass and Aquilino may have been given effect, it would appear to be equally likely that their intention was frustrated.

Recommmendation on Testamentary Dispositions, supra note 1, at 8, reprinted in N.Y. Laws at 2250-51. The Commission believes that, while the courts have professed adherence to the "clear and convincing" evidence standard, they have departed markedly from this approach in practice. Id. at 3, reprinted in N.Y. Laws at 2249; see notes 379-81 and accompanying text supra.

The recommendation of the Law Revision Commission has been introduced into the New York State Senate and Assembly. N.Y.S. 3451, N.Y.A. 4226, 200th Sess. (1977). The bill, as amended and passed by the Assembly, would add a new subparagraph (b) to section 13-2.1 of the Estates, Powers and Trusts Law to read as follows:

(b) A contract to make a joint will, or not to revoke a joint will, if executed after the effective date of this subdivision can be established only by (1) an express statement in the will that the instrument is a joint will and that the provisions thereof are intended to constitute a binding and irrevocable contract between the parties; or (2) a writing other than the last will and testament signed by the decedent proving the terms of the contract.

N.Y.A. 4226, 200th Sess. (1977). The bill is currently under consideration by the Senate Judiciary Committee.

The need for a stricter standard of proof was implicitly recognized by the Glass Court when it observed that clear and unambiguous language in the will would "obviate the need for surmise as to the testators' intent." 43 N.Y.2d at 625, 374 N.E.2d at 118, 403 N.Y.S.2d at 207 (emphasis added).

A provision enabling the courts to find the existence of a contract in cases where
mentary contract was intended. Such an addition could serve to militate against the possibility of inequitable results, while maintaining an exacting, clear and convincing standard.

Although the degree of proof necessary to establish the existence of a contract not to revoke a joint will should become more stringent, the Estates, Powers and Trusts Law should not be amended to establish an evidentiary standard so rigid as to preclude the finding of a contract where an intention to be bound is clear. Specific legislation which would enable the courts to admit extrinsic evidence where intent is ambiguous could preserve a strict standard of proof and yet do justice to the parties’ intent.

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