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Use of Plural Pronouns in Joint Will Can Create Binding Obligation

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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

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.

[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.E.2d 445, 226 N.Y.S.2d 428 (1962) (quoting 1 PAGE ON WILLS 551 (rev. ed. W. Bowe & D. Parker 1960)). Normally executed by husband and wife, joint wills are used infrequently. *See* Recommendation of the Law Revision Commission to the 1977 Legislature Relating to Proving Contracts to Make Testamentary Dispositions, [1977] N.Y. LAW REV. COMM'N REP. 2, *reprinted in* [1977] N.Y. Laws 2248, 2249 (McKinney) [hereinafter cited as Recommendation on Testamentary Dispositions, *reprinted in* N.Y. Laws].

Although joint in character, such wills operate as the separate will of each subscriber and can dispose of property owned by them either jointly, severally, or in common. *See, e.g.*, Rubenstein v. Mueller, 19 N.Y.2d 228, 225 N.E.2d 540, 278 N.Y.S.2d 845 (1967); *In re* Will of Diez, 50 N.Y. 88 (1872); *In re* Brown's Will, 26 Misc. 2d 1011, 209 N.Y.S.2d 465 (Sur. Ct. Orleans County 1961). Mutual wills, on the other hand, are separate instruments with provisions that "are reciprocal, identical, or substantially similar." 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 553 (rev. ed. W. Bowe & D. Parker 1960)). *See* 9D P. ROHAN, NEW YORK CIVIL PRACTICE EPTL ¶ 13-2.1[7] (1978). The courts have not carefully distinguished between joint and mutual wills. *See, e.g., In re* Aquilino's Will, 53 Misc. 2d 811, 812, 280 N.Y.S.2d 85, 86 (Sur. Ct. Nassau County 1967). Similarly, the Surrogate's Court Procedure Act does not differentiate between joint and mutual wills for probate purposes. N.Y. SURR. CT. PROC. ACT § 2504 (McKinney 1967).

[359] *E.g.*, Tutunjian v. Vetzigian, 299 N.Y. 315, 87 N.E.2d 275 (1949); Hermann v. Ludwig, 229 N.Y. 544, 129 N.E. 908 (1920) (mem.); Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915). A contract may require the disposition of property by will. *See, e.g.*, Shakespeare v. Markham, 72 N.Y. 400 (1878); Stanton v. Miller, 58 N.Y. 192 (1874); Parsell v. Stryker, 41 N.Y. 480 (1869). Likewise, there is no doubt that a testamentary contract may be embodied in a joint will. *See* Rich v. Mottek, 11 N.Y.2d 90, 181 N.E.2d 445, 226 N.Y.S.2d 428 (1962); Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915). *See generally* 1 B. DAVIDS, THE NEW YORK LAW OF WILLS, §§ 412-423 (1923 & Supp. 1965).

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.[360] 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.[361] Re-

Tutunjian v. Vetzigian, 299 N.Y. 315, 87 N.E.2d 275 (1949); Hermann v. Ludwig, 229 N.Y. 544, 129 N.E. 908 (1920) (mem.); *accord,* ROHAN, *supra* note 358, ¶ 13-2.1[8].

[360] *E.g.,* Rubenstein v. Mueller, 19 N.Y.2d 228, 232, 225 N.E.2d 540, 542, 278 N.Y.S.2d 845, 848 (1967); *In re* Lowe's Estate, 24 App. Div. 2d 983, 984, 265 N.Y.S.2d 257, 260 (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); Swerdfeger v. Swerdfeger, 4 App. Div. 2d 535, 537, 167 N.Y.S.2d 775, 777 (3d Dep't 1957). The burden of proving a contract not to revoke a joint will is on the beneficiaries claiming under it. *See In re* Estate of Conay, 29 Misc. 2d 1090, 121 N.Y.S.2d 481 (Sur. Ct. N.Y. County 1953), *aff'd,* 284 App. Div. 950, 135 N.Y.S.2d 626 (1st Dep't 1954); Cooke v. Burlingham, 105 Misc. 675, 173 N.Y.S. 614 (Sup. Ct. Kings County), *aff'd,* 189 App. Div. 911, 178 N.Y.S. 885 (2d Dep't 1919). *See generally* ROHAN, *supra* note 358, ¶ 13-2.1[2]. The Court of Appeals, however, has been reluctant to apply the statute of frauds section of the Estates, Powers and Trusts Law, EPTL § 13-2.1 (a)(2) (1967), to such contracts. *See, e.g.,* Oursler v. Armstrong, 10 N.Y.2d 385, 389, 179 N.E.2d 489, 490, 223 N.Y.S.2d 477, 479 (1961). *But cf. In re* Will of DeLano, 41 App. Div. 2d 880, 343 N.Y.S.2d 15 (3d Dep't 1973) (mutual promises not to revoke not enforceable absent a writing).

Instead, when articulating the level of proof needed to support a claim that a testamentary contract was made, the courts usually hold that "clear and convincing" or "certain and definite" evidence must be shown either from the language of the will alone or the language supported by extrinsic evidence. *See, e.g.,* Wallace v. Wallace, 216 N.Y. 28, 39, 109 N.E. 872, 874 (1915); Edson v. Parsons, 155 N.Y. 555, 567, 50 N.E. 265, 268 (1898). While this standard generally is applied to both joint and mutual wills, one court has indicated that a joint will signed by husband and wife may serve as "sufficient" evidence of a contract. Oursler v. Armstrong, 10 N.Y.2d 385, 392, 179 N.E.2d 489, 492, 223 N.Y.S.2d 477, 481 (1961).

[361] *See, e.g.,* Rich v. Mottek, 11 N.Y.2d 90, 181 N.E.2d 445, 226 N.Y.S.2d 428 (1962); Tutunjian v. Vetzigian, 299 N.Y. 315, 87 N.E.2d 275 (1949); *In re* Estate of Wiggins, 45 App. Div. 2d 604, 360 N.Y.S.2d 129 (4th Dep't 1974), *aff'd mem.,* 39 N.Y.2d 791, 350 N.E.2d 618, 385 N.Y.S.2d 287 (1976). In Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915), a husband and wife used the words "we," "our" and "us" in their joint will to describe themselves and their estate. *Id.* at 72, 108 N.E. at 211. In addition, the following recitation appeared at the beginning and end of the will: "this *and this only* [is] our last mutual and joint will and testament." *Id.* (emphasis added). The *Rastetter* Court noted that, while neither factor alone proved a contract, the total effect evinced a binding obligation. *Id.* at 72-73, 108 N.E. at 211. Similar language was used by the testators and relied upon by the second department in finding a binding agreement. Hermann v. Ludwig, 186 App. Div. 287, 291, 303, 174 N.Y.S. 469, 471, 478 (2d Dep't 1919), *aff'd mem.,* 229 N.Y. 544, 129 N.E. 908 (1920).

In 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. *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. *Id.* Evaluating these circumstances, the *Tutunjian* Court reasoned that the couple had not "abandoned

cently, in *Glass v. Battista,*[362] 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.[363]

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 . . . ."[364] 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.

[362] 43 N.Y.2d 620, 374 N.E.2d 116, 403 N.Y.S.2d 204 (1978), *aff'g* 56 App. Div. 2d 806, 392 N.Y.S.2d 654 (1st Dep't 1977), *rev'g* N.Y.L.J., Oct. 21, 1976, at 6, col. 5 (Sup. Ct. N.Y. County).

[363] *Id.* at 625, 374 N.E.2d at 118, 403 N.Y.S.2d at 207.

[364] *Id.* at 623, 374 N.E.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.

Id.

accordance with the terms of their will.[365] In 1973, the husband executed a second will in which his children were expressly disinherited "for reasons well known to them."[366] 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.[367] 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."[368] 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.[369]

The Court of Appeals unanimously affirmed.[370] Writing for the Court, Judge Jasen observed that repudiation of the right to revoke is not viewed as a "casual matter."[371] 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

[365] *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.*

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).

[366] 43 N.Y.2d at 623, 374 N.E.2d at 117, 403 N.Y.S.2d at 206.

[367] N.Y.L.J., Oct. 21, 1976, at 6, col. 5.

[368] *Id.* at col. 6.

[369] 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.

[370] 43 N.Y.2d 620, 374 N.E.2d 116, 403 N.Y.S.2d 204.

[371] *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 Tatkow, 80 Misc. 2d 389, 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).

to be bound.[372] 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.[373] Furthermore, the Court viewed the testators' use of first person plural pronouns as an indication that their dispositions were mutually dependent.[374]

It is submitted that the *Glass* opinion reflects the laxity with which many courts apply the "clear and convincing" evidence standard[375] in determining whether a testamentary contract has been made.[376] Previously, the courts have required the use of plural pronouns in a joint will supplemented by other revealing language or

[372] 43 N.Y.2d at 624, 374 N.E.2d at 117, 403 N.Y.S.2d at 206. While express contractual language is not necessary to prove the existence of a testamentary contract in a joint will, the Court noted that "where [contractual] intent [is] left to conjecture" no agreement may be found. *Id.* According to the Court, however, extrinsic evidence may provide the necessary proof of a contractual obligation. *Id.; accord,* Rubenstein v. Mueller, 19 N.Y.2d 228, 232-33, 225 N.E.2d 540, 541, 278 N.Y.S.2d 845, 848 (1967); *see* note 361 *supra. See generally* notes 386-387 *infra.*

[373] 43 N.Y.2d at 625, 374 N.E.2d at 118, 403 N.Y.S.2d at 207.

[374] *Id.* The Court found it unnecessary to decide whether the testimony of the draftsman of the joint will should have been admitted at trial. *Id.* Thus, it remains uncertain whether the testimony of the draftsman is admissible as it constitutes direct evidence of the testators' intent. *Compare* Glass v. Battista, N.Y.L.J., Oct. 21, 1976, at 6, col. 5 (Sup. Ct. N.Y. County), *rev'd,* 56 App. Div. 2d 806, 392 N.Y.S.2d 654 (1st Dep't 1977), *aff'd,* 43 N.Y.2d 620, 374 N.E.2d 116, 403 N.Y.S.2d 204 (1978), *and In re* Estate of Frederick, 41 Misc. 2d 759, 246 N.Y.S.2d 320 (Sur. Ct. N.Y. County), *aff'd mem.,* 22 App. Div. 2d 760, 253 N.Y.S.2d 760 (1st Dep't 1964), *with* Glass v. Battista, 56 App. Div. 2d 806, 392 N.Y.S.2d 654 (1st Dep't 1977), *aff'd,* 43 N.Y.2d 620, 374 N.E.2d 116, 403 N.Y.S.2d 204 (1978), *and In re* Morrison's Will, 270 App. Div. 318, 60 N.Y.S.2d 18 (3d Dep't 1946). *See generally* J. WIGMORE, EVIDENCE §§ 2470-2472 (3d ed. 1940 & Supp. 1970); *see also In re* Smith's Will, 244 N.Y. 283, 172 N.E. 499 (1930).

[375] *See* note 361 *supra.*

[376] *See* Recommendation on Testamentary Dispositions, *supra* note 358, at 3, *reprinted in* N.Y. Laws at 2250. In determining whether a testamentary contract exists, one court has described the necessary standard of proof as "full and satisfactory." *In re* Rosenblath's Estate, 146 Misc. 424, 425, 263 N.Y.S.2d 303, 304 (Sur. Ct. Queens County 1933). Another court has expressed the standard as "clear and unambiguous." Rubenstein v. Mueller, 19 N.Y.2d 228, 232, 225 N.E.2d 540, 542, 278 N.Y.S.2d 845, 848 (1967). The standard also has been enunciated as "certain and definite." Edson v. Parsons, 155 N.Y. 555, 567, 50 N.E. 265, 275 (1898). As the Law Revision Commission noted, the use of plural pronouns in a will is not alone sufficient to meet the standard of clear and convincing evidence. Recommendation on Testamentary Dispositions, *supra* note 358, at 5, *reprinted in* N.Y. Laws at 2250. Even before *Glass,* however, some courts found an enforceable testamentary contract despite the ambiguity of the documents. For instance, in Rich v. Mottek, 11 N.Y.2d 90, 181 N.E.2d 445, 226 N.Y.S.2d 428 (1962), there were no provisions expressly preventing the surviving spouse from disposing of his property by will. *See* note 361 *supra.* Thus, the testators' intent to be bound was not unambiguously manifested. *See* 11 N.Y.2d at 97, 181 N.E.2d at 449, 226 N.Y.S.2d at 433 (Van Voorhis, J., dissenting); Rich v. Mottek, 14 App. Div. 2d 89, 217 N.Y.S.2d 409 (1st Dep't 1961), *rev'd,* 11 N.Y.2d 90, 181 N.E.2d 445, 226 N.Y.S.2d 428 (1962).

extrinsic evidence before finding that a contract was intended.[377] 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.[378] 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 will[379] appears to be based upon a belief that the surviving spouse would be unjustly enriched by receiving the benefits of a joint will without being required to adhere to its terms.[380] It is suggested, however, that diluting the level of proof will not necessarily produce equitable results and may increase the possibility that the true intention of the testators will be frustrated.[381]

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[377] *See* notes 360-361 *supra*.

[378] *See* 43 N.Y.2d at 625, 374 N.E.2d at 118, 403 N.Y.S.2d at 207.

[379] 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 909, 911, 252 N.Y.S.2d 587, 590 (Sur. Ct. Westchester County 1964). *Compare* Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915) *with* Edson v. Parsons, 155 N.Y. 555, 50 N.E. 265 (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 beneficiaries. There is a significant distinction between this intention and an intention to be irrevocably bound. *See In re* Estate of Blazer, N.Y.L.J., Nov. 22, 1976, at 15, col. 5 (Sur. Ct. Kings 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).

[380] 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. Vetzigian, 299 N.Y. 315, 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*.

[381] 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.[382] 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.[383] While preferable to the present state of the law,[384] the proposed amendment still is problematical 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[385] where a joint will is ambiguous as to whether a testa-

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tal estate tax effects will result since the surviving spouse does not acquire the entire interest in the estate. *See, e.g., In re* Estate of Ryan, 61 Misc. 2d 390, 305 N.Y.S.2d 698 (Sur. Ct. Nassau County 1969). *But see In re* Estate of Tatkow, 80 Misc. 2d 389, 363 N.Y.S.2d 720 (Sur. Ct. Kings County 1975) (dicta). *See generally* ROHAN, *supra* note 358, ¶ 13-2.1[14].

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.

[382] Recommendation 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*.

[383] 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.

[384] 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).

[385] A provision enabling the courts to find the existence of a contract in cases where

mentary contract was intended.[386] Such an addition could serve to militate against the possibility of inequitable results,[387] 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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extrinsic evidence clearly indicates an intention to be bound but does not meet the strict requirements of subdivision (a) or (b) of the proposed amendment, *see* note 383 *supra*, could be easily incorporated into the bill. A third subdivision to the proposed subsection (b) of section 13-2.1 of the Estates, Powers and Trusts Law would read as follows:

> or (3) extrinsic evidence manifesting a clear and unambiguous intention of the decedent to enter a contract.

[386] The proposed third subdivision, *see* note 385 *supra*, should be construed in a manner consistent with the parol evidence rule as applied to the construction of wills. *See* W. RICHARDSON, EVIDENCE § 630 (10th ed. J. Prince 1973). Thus, the provisions of this proposal would not be invoked unless the will, on its face, was ambiguous as to contractual intent. *See In re* Fabbri's Will, 2 N.Y.2d 236, 140 N.E.2d 269, 159 N.Y.S.2d 184 (1957). For example, the use of plural pronouns by husband and wife could create such an ambiguity, thus permitting the third subdivision to be applied to facts similar to those presented in *Glass*.

[387] While the proposal of the Law Revision Commission would require clear intrinsic expression of contractual intent, inequities may result from the exclusion of parol evidence. For instance, even if the testimony of the draftsman in *Glass*, *see* note 374 *supra*, were credible and clearly indicative of the testators' intention to enter a contract, the present version of the proposed amendment to the Estates, Powers and Trusts Law, *see* note 383 *supra*, nevertheless would operate to exclude it. Thus, the proposal as drafted would have frustrated the *Glass* testators' intention and produced inequitable results.