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WILLS—CONTRACT TO DEVISE—RIGHTS OF SUBSEQUENT SPOUSE WITH NOTICE OF PRIOR CONTRACT AT TIME OF MARRIAGE—Decedent and his first wife executed reciprocal wills pursuant to a contract appearing on the face of the instruments. Each gave the other a life estate, with remainders

to substantially identical beneficiaries. After his first wife's death, decedent remarried and in an antenuptial contract agreed to bequeath a sum of money to his second wife in lieu of all her claims against his estate. The second wife had actual notice of the prior agreement at the time of their marriage. Decedent then executed a new will which expressly revoked all prior wills, confirmed the terms of the antenuptial contract, and made further dispositions inconsistent with the first will. After his death the beneficiaries of the first will sought to impress decedent's estate with a trust in their favor. The trial court allowed their claim, but directed that the lien on the estate should be inferior to the antenuptial contract rights of the widow. On appeal, *held*, affirmed. The agreement embodied in the reciprocal will cannot be enforced against the widow's rights, even if she had actual notice of that agreement at the time of her marriage. *Boner's Admx. v. Chesnut's Exr.*, (Ky. 1958) 317 S.W. (2d) 867.

Several jurisdictions regard property subject to a contract to devise as immune from the claims of a surviving spouse who married the promisor after the contract was executed.¹ These courts assert that the promisee or beneficiary of the contract acquires an equitable interest in the property when the contract is executed, and that the interest of a surviving spouse cannot attach to property in which the promisor had bare legal title during coverture.² In other jurisdictions, a surviving spouse may assert a primary claim even though the property concerned is ostensibly subject to a contract to devise.³ Utilizing the discretionary nature of the equitable relief to which the contract beneficiaries *ordinarily* resort,⁴ the courts have applied a confusing array of equitable principles as bases for refusing to enforce the agreement to the detriment of the surviving spouse. Typical are the assertions that the widow's rights are indefeasible except by her

¹ *Price v. Craig*, 164 Miss. 42, 143 S. 694 (1932); *Smith v. Smith*, 340 Ill. 34, 172 N.E. 32 (1930); *Baker v. Syfritt*, 147 Iowa 49, 125 N.W. 998 (1910); *Burdine v. Burdine's Exr.*, 98 Va. 515, 36 S.E. 992 (1900).

² *In re Davis' Estate*, 171 Kan. 605, 237 P. (2d) 396 (1951); *Harris v. Harris*, 130 W. Va. 100, 43 S.E. (2d) 225 (1947). However, the promisor retains the power to make an *inter vivos* disposition of his property in good faith during his life, since the parties impliedly agree that only the property held by him at his death is subject to the contract. *Bell v. Pierschbacher*, 245 Iowa 436, 62 N.W. (2d) 784 (1954). See *Sample v. Butler University*, 211 Ind. 122, 4 N.E. (2d) 545 (1937); 108 A.L.R. 867 (1937). In the principal case, the widow's interest was treated as essentially testamentary, although her interest was based on a contract executed by the promisor during his lifetime.

³ *Owens v. McNally*, 113 Cal. 444, 45 P. 710 (1896); *Wides v. Wides' Exr.*, 299 Ky. 103, 184 S.W. (2d) 579 (1944); *Ver Standig v. St. Louis Union Trust Co.*, 344 Mo. 880, 129 S.W. (2d) 905 (1939); *In re Arland's Estate*, 131 Wash. 297, 230 P. 157 (1924); *Mayfield v. Cook*, 201 Ala. 187, 77 S. 713 (1918); *Gall v. Gall*, 64 Hun (N.Y.) 600, 19 N.Y.S. 332 (1892). See *Van Dwyne v. Vreeland*, 12 N.J. Eq. (1 Beasley) 142 (1858).

⁴ The fact that the contract was embodied in the wills does not change the nature of the remedy. As a will, the instrument is ambulatory and subject to revocation. When revoked, the promisee must resort to the contract embodied in the instruments, 4 *PAGE, LAW OF WILLS*, 3d ed., §1709 (1941). As to the precise nature of the remedy, see *id.*, §1736.

voluntary act,⁵ that the widow's position is the same as that of a purchaser for value without notice,⁶ or that equity will not enforce a contract if the necessary result is to harm after-acquired rights of third parties.⁷ All these positions overlook the basic question of how the widow ever acquires rights in property subject to a contract to devise at the time of her marriage. The most satisfactory explanation, adopted by several courts, is based on the principle that restraints on marriage are void as against public policy. If the parties to the contract intend to subordinate interests which might arise from a subsequent marriage, the contract would be an unenforceable restraint upon marriage. Since they undoubtedly intended their agreement to be effective, however, it must be assumed that they contemplated that a subsequent marriage would give the surviving spouse of the promisor legal rights in the property otherwise subject to the contract.⁸ But lack of notice of the prior agreement at the time of marriage is commonly asserted to be essential if the spouse is to be permitted to claim an interest superior to that of the contract beneficiaries.⁹ Rejection of this requirement by the principal case seems to be based on sound logic. The intent of the contracting parties is determined by policy considerations which view with disfavor any attempt to impair the rights of a surviving spouse. No change in this policy occurs when the spouse incidentally acquires knowledge of the contract before marriage. The event of marriage is the basis for creation of the interest of the surviving spouse. In the absence of fraud,¹⁰ the simple occurrence of this event should suffice to subject the property to the interest of the surviving spouse, at least where the entire estate of the promisor is concerned in the contract to devise.¹¹ The contract is ordinarily construed as encompassing only the property remain-

⁵ *Wides v. Wides' Exr.*, note 3 *supra*.

⁶ *In re Arland's Estate*, note 3 *supra*.

⁷ *Ibid*.

⁸ *Owens v. McNally*, note 3 *supra*; *Mayfield v. Cook*, note 3 *supra*; *Wides v. Wides' Exr.*, note 3 *supra*; *Gall v. Gall*, note 3 *supra*; *Van Duyne v. Vreeland*, note 3 *supra*. The contract remains enforceable to the extent marital rights are not impaired. See *Ver Standig v. St. Louis Union Trust Co.*, note 3 *supra*.

⁹ *Owens v. McNally*, note 3 *supra*; *Mayfield v. Cook*, note 3 *supra*. See 4 PAGE, WILLS, 3d ed., §1730 (1941). But see *Wides v. Wides' Exr.*, 300 Ky. 344, 188 S.W. (2d) 471 (1945), where the trial court's exclusion of evidence bearing on actual notice was upheld on appeal. Strangely, this decision was not cited in the principal case. For a discussion of the effect of the second *Wides* decision, see Sparks, "Enforcement of Contracts To Devise or Bequeath After the Death of the Promisor," 39 MINN. L. REV. 1, n. 197 (1954).

¹⁰ See *Sonnicksen v. Sonnicksen*, 45 Cal. App. (2d) 46, 113 P. (2d) 495 (1941).

¹¹ Decisions attributing a superior interest to the widow over specific legacies [*In re Hoyt's Estate*, 174 Misc. 512, 21 N.Y.S. (2d) 107 (1940)] or specific devises [*Ver Standig v. St. Louis Union Trust Co.*, note 3 *supra*] made pursuant to a contract to devise are without justification, if there remains adequate property in the estate to satisfy her claims apart from property subject to the contract. See Sparks, "Contract To Devise or Bequeath as an Estate Planning Device," 20 Mo. L. REV. 1 at 11 (1955).

ing in the promisor's net estate at the time of his death.¹² It does not seem unreasonable to conclude that a subsequent marriage is a contingency contemplated by the parties which works a change in the promisor's assets during his lifetime. Actual notice has no effect in changing a result based on dictates of public policy requiring protection for the surviving spouse.¹⁸

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¹² See note 1 supra.

¹⁸ That the claim of the surviving spouse in the principal case was based on an antenuptial contract does not alter the basic issues. The sum promised the widow was given in lieu of the marital interest to be claimed upon her spouse's death, which is the same interest the courts have sought to protect in other cases. The fact that the spouse's interest under the contract was less than her statutory rights may have been influential in causing the court to hold that actual notice was irrelevant.