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WILLS-PREFERENCE FOR VESTING UNDER JOINT AND MUTUAL WILL

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WILLS — PREFERENCE FOR VESTING UNDER JOINT AND MUTUAL WILL — Chadwick and his wife executed in 1928 a joint and mutual will containing an express agreement that it should not be changed except by the agreement of both parties. The will then devised and bequeathed "*unto the survivor of us . . . all of the property real or personal—of which we may die seized or possessed* . . . and the survivor of us in accepting under the will shall be bound to carry out the provisions hereinafter and heretofore set forth. To have and to hold such property and *and* estate unto the survivor of us, for and during the natural life of such survivor. *This bequest to include all property whether separate estate or* [*of*] *either of us or our community estate.*[1] After the death of such survivor it is our will and the following described property shall pass to and vest in the following persons, to wit: . . . ." Then followed devises of specifically described lands to named devisees and a residuary clause in favor of the three children. Chadwick died in 1929 and the widow probated the instrument as his will, and accepted under it. It was again probated as her will upon her death in 1944. One of the children, Ora Mae, who would have taken as a specific and residuary devisee, died childless in 1937, giving all her property by will to her husband Bristow for life, remainder to her sister. The question was whether the gifts to her in the joint and mutual will, insofar as they represented gifts by the widow, lapsed at her death, or had vested in her at the death of Chadwick and passed to Bristow under her will. *Held,* Ora Mae received a remainder interest which vested when the widow probated and accepted under the will, and passed under her own will. *Chadwick v. Bristow,* (Tex. Civ. App. 1947) 204 S.W. (2d) 65; affirmed, (Tex. 1948) 208 S.W. (2d) 288.[2]

In reaching this result the court assumed its answer without discussion by holding that the will was intended to pass title to all the property of both spouses at the death of the first. There is no suggestion in the opinion as to how the court thought the instrument could be given such unusual effect. Instead, the argument of the court turned on whether the language of the instrument created vested or contingent interests in the remainder devisees at the death of the husband. The language of the will, and the rule of construction in favor of early vesting, were used to support the result. But this begs the whole question. The problem is not whether the remainder devisees took *vested* interests at the death of the husband. That this is so is indicated by the fact that apparently there was substantial agreement that their remainder interests in the property of the husband had vested at that time. The problem was whether at this time they took *any* interest, vested or contingent, in the survivor's property.[3] Unless Texas

[1] Principal case at 66-67. Italics supplied.

[2] Both courts emphasize the contractual aspects of joint and mutual wills, and no fact nor acceptance of benefits by the survivor precludes revocation by him. Larrabee v. Porter, (Tex. Civ. App. 1914) 166 S.W. 395; Sherman v. Goodson's Heirs, (Tex. Civ. App. 1920) 219 S.W. 839. The dissenting judge argued that this factor was entirely irrelevant to the case inasmuch as there had been no attempted revocation here.

[3] The same fallacy is apparent in the alternative ground which the court advanced, that at the death of Chadwick the widow had been put to an election as to

recognizes a new type will which operates to create an estate in the testator's property before the death of the testator, the result of this case cannot be achieved by calling the instrument in question a will as to the survivor. It must have operated to make a testamentary disposition of Chadwick's property, and simultaneously as an inter vivos conveyance of some description as to the property of Mrs. Chadwick.[4] The question is whether such construction can be supported by the language of the instrument. The only words which point in this direction are those italicized in the fact statement above, which could easily have been intended by the parties simply as bequests of their respective property at their respective deaths. Certainly the result the court reaches should not be reached without a close analysis of the instrument. One of the many anomalies which it creates is pointed out by the dissenting judge. If Ora Mae had died leaving children this decision would cut off those children in favor of Ora Mae's husband, beneficiary under her will, in the face of the provision of the lapse statute that in such cases the gift shall go to the descendants of the legatee.[5]

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whether she would accept what the will gave her or keep her separate estate and her interest in the community. She could not have been put to any election which would affect the results of this case unless the intent of the parties at the execution of the instrument was that it should operate at the death of the first spouse to divest the survivor of his fee simple interest in the community and his own separate estate and leave him only a life estate. If this were not the true construction of the instrument her only election would be either to take under the will the life estate in the husband's property and accept with it the duty to allow her own property to pass under the will (which would not have vested any interest in her property in the remaindermen), or to renounce the gift to her in the will and take her community half interest unencumbered by the contract to devise.

[4] Such a result has been reached at least in one English case, Freeman v. Arscott, [1930] 2 Ch. Div. 190, in which a joint will was held to operate also as a declaration of trust as to the property of the survivor.

[5] Tex. Civ. Stat. (Vernon, 1941) Art. 8295. Cases reaching a result opposite to that of the principal case: In re Lage, (D.C. Iowa 1927) 19 F. (2d) 153; Keasey v. Engles, 259 Mich. 178, 242 N.W. 878 (1932). But see Moore v. Moore, (Tex. Civ. App. 1917) 198 S.W. 659; Wagnon v. Wagnon, (Tex. Civ. App. 1929) 16 S.W. (2d) 366.