Nebraska Law Review

Volume 46 | Issue 4 Article 8

1967

Joint and Mutual Wills in Nebraska and the Marital Deduction

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JOINT AND MUTUAL WILLS IN NEBRASKA AND THE MARITAL DEDUCTION

I. INTRODUCTION

Many couples who have toiled all their lives for their worldly goods often wish to make a common disposition of their property. The usual situation is for a couple to leave the entire estate of the first to die to the surviving spouse either absolutely or in the form of a life estate on condition that the last to die leave it to designated third persons. This type of common disposition is often effectuated by the use of a joint,[1] mutual,[2] or reciprocal will.[3] A recent state supreme court decision[4] has changed Nebraska's position concerning the contractual aspect of such wills and the purpose of this article is: (1) to comment on Nebraska's present position regarding these wills in light of this case and (2) to discuss the problem of qualifying the interest that passes to the surviving spouse under the above mentioned wills for the marital deduction for federal estate tax purposes.

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[1] "A 'joint' will is best defined as a single testamentary instrument which contains the wills of two or more persons, is executed jointly by them, and disposes of property owned jointly, in common, or in severalty by them. . . . Clearly, a will, although joint in the sense that it incorporates in one instrument the testamentary dispositions of two or more testators, is in effect the separate will of each." Annot., 169 A.L.R. 9, 12 (1947) (footnotes omitted). However an instrument executed by two testators, where one is the owner of all the property, is not a joint will. The signature of the other testator is treated as surplusage. *In re* Hansen's Estate, 87 Neb. 567, 127 N.W. 879 (1910).

[2] " 'Mutual' wills have been defined as wills executed pursuant to an agreement between two or more persons to dispose of their property in a particular manner, each in consideration of the other. In other jurisdictions, wills are deemed 'mutual' where executed with a common intention on the part of the testators, irrespective of whether there is a contract between them. 'Mutual' wills have been defined as documents of a testamentary character, executed in pursuance of an agreement or arrangement between two or more persons to dispose of their property either to each other or to third persons in a particular mode or manner. So defined, a contract against revocation may or may not be present. It is, however, the contractual element which is involved in most litigation concerning either joint or mutual wills. 'Mutual' wills have also been called 'twin' wills." Annot., 169 A.L.R. 9, 13 (1947) (footnotes omitted).

[3] " 'Reciprocal' wills are those in which the testators name each other as beneficiaries under similar testamentary plans. They are sometimes called 'double' or 'counter' wills. . . . Wills may be strictly reciprocal, each testator leaving his or her entire estate to the survivor, or they may depart from strict reciprocity by including bequests to third persons, without losing their character as 'reciprocal' wills." *Id.* at 13.

[4] Kimmel v. Roberts, 179 Neb. 8, 136 N.W.2d 208 (1965).

II. PROVING THE ORAL CONTRACT AND THE STATUTE OF FRAUDS

In the case of *Kimmel v. Roberts*[5] the husband and wife executed separate reciprocal wills which were identical in content except for the change in the names of the parties and the use of the words husband and wife therein. The wills provided that upon the death of the first spouse his or her entire estate would go to the other, and further that upon the death of the survivor the estate would then go to the nieces and nephews of both, share and share alike. The husband died first and his will was probated leaving his entire estate to his wife. Subsequently the wife revoked her reciprocal will by executing a new one which altered the disposition of her previous will to the benefit of her nieces and nephews and to the detriment of the nieces and nephews of her deceased husband. Upon the death of the wife this action was brought by the nieces and nephews of the deceased husband maintaining that the reciprocal wills executed by the husband and wife were pursuant to a binding oral contract which became irrevocable upon the death of the husband. The nieces and nephews of the deceased wife defended on the ground that a valid enforcible contract had not been established and that the second will of the wife should control the disposition of the property. The trial court found the evidence insufficient to sustain an enforcible contract and on appeal held: that, "[a]lthough there is evidence of an oral agreement, the effect of which is to make the reciprocal wills irrevocable, there is no proof of part performance sufficient to remove the bar of the statute of frauds."[6]

This is the usual joint, mutual, or reciprocal will case in that the separate reciprocal wills mentioned above indicate that they were drawn pursuant to some type of arrangement or common understanding between the husband and wife. It is reasoned that certainly the deceased husband would not have executed his will in this manner if he knew that after his death his wife would execute a subsequent will in violation of the arrangement, and therefore the husband must have executed his will pursuant to a binding contract. The bargained for consideration being the mutual promises of the husband and wife to leave their property to each other.

However, the problem is that the wills do not state that the arrangement was intended as a binding contract, nor is the alleged agreement set out in a separate document as it ought to be. Therefore the alleged contract must first be shown to exist, and then it

[5] *Id.*

[6] Kimmel v. Roberts, 179 Neb. 8, 12, 136 N.W.2d 208, 211 (1965).

must be taken out of the Statute of Frauds as an interest in land will pass to the beneficiaries under the terms of the will.[7] In a suit to enforce the specific performance of an oral contract embraced within the Statute of Frauds, two distinct facts must be established: (1) the terms of the alleged parol contract and (2) the acts of part performance which removes the bar of the Statute of Frauds.[8]

The court in the *Kimmel* case cited the rule as it was stated in the case of *Overlander v. Ware*[9] as follows:

> In considering cases of this character, where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proven by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires. The thing done, constituting performance, must be such as is referrable solely to the contract sought to be enforced, and not such as might be referrable to some other and different contract —something that the claimant would not have done unless on account of the agreement and with the direct view to its performance —so that nonperformance by the other party would amount to fraud upon him.[10]

The rule then as regards part performance is that the thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and in order to meet this test the court has stated that the act of part performance must be accounted for only by the existence of the pleaded oral agreement.[11] The act of part performance in the *Kimmel* case is the husband devising his property to his wife and subsequently dying. Since devising the property to the wife is the usual thing done, the fact that he did so cannot be accountable solely to the contract sought to be enforced, and therefore does not meet the test of part performance. This is the line of reasoning in the *Kimmel* case

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[7] NEB. REV. STAT. § 36-103 (Reissue 1960) states: "No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same."

[8] NEB. REV. STAT. § 36-106 (Reissue 1960) states: "Nothing contained in sections 36-101 to 36-106 shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance."

[9] 102 Neb. 216, 166 N.W. 611 (1918).

[10] *Id.* at 217-18, 166 N.W. at 611-12.

[11] Eagan v. Hall, 159 Neb. 537, 68 N.W.2d 147 (1955).

as it states that "the giving of a husband's property to his wife by will is a matter of common occurrence in the relationship of husband and wife and it cannot be said that it refers to, results from, or is in pursuance of the oral contract here sought to be enforced."[12]

Since both part performance and proof of the contract are needed in order to make the agreement enforceable, disproving one makes it unnecessary to consider the other, and therefore the court reaches this decision without considering the sufficiency of the evidence to establish the oral contract. In the writer's opinion the court has reached the right conclusion in the case, but for the wrong reasons.

The real issue in the case is whether or not the wills were executed pursuant to a binding contract, and if this can be proven by clear, satisfactory, and unequivocal evidence, there is no reason not to enforce the contract after the first spouse dies. By deciding the *Kimmel* case as it did, the court unnecessarily restricts the doctrine of part performance as regards joint, mutual, and reciprocal wills. If, in the future, an analogous case comes before the court, and a contract is proven beyond the shadow of a doubt, the court will be unable to enforce the contract due to the fact that a husband devising his property to his wife can always be explained by the fact that it is the usual thing done and the test of part performance will not be met. The court overlooks the fact that it is just not the usual thing for a husband to will one half of his estate to the nieces and nephews of his wife.

It is important to keep in mind that either spouse may revoke the contract during the life of both if notice is given to the other.[13] The rationale for this is the ambulatory nature of a will, that a person until the time of his death should be able to dispose of his property as he wishes. "This policy should not be defeated by an inter vivos contract, when the only consideration is a promise, and value has not yet been transferred."[14] However, upon the death of the first spouse to die, the contract (not the will) becomes irrevocable and becomes enforcible in a court of equity.[15]

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[12] Kimmel v. Roberts, 179 Neb. 8, 11, 136 N.W.2d 208, 210 (1965).

[13] The language for this proposition is dicta; however, this is the position taken by almost all treatises on this subject. Jennings v. McKeen, 245 Iowa 1206, 65 N.W.2d 207, (1954) (dictum); Child v. Smith, 225 Iowa 1205, 1214, 282 N.W. 317, 321 (1938) (dictum); J. SCHOULER, WILLS, EXECUTORS AND ADMINISTRATORS § 270 (6th ed. 1923); G. THOMPSON, WILLS § 34 (2d ed. 1936).

[14] This explanation is offered in 61 HARV. L. REV. 675, 682 (1948).

[15] *See* B. SPARKS, CONTRACTS TO MAKE WILLS 50-161 (1956).

Therefore, the husband has fully performed his part of the bargain; he has willed his property to his wife, and it is now up to the wife to perform her part by leaving the entire estate to the nieces and nephews of both, share and share alike.

In reaching its conclusion in the *Kimmel* case, the court overruled two earlier cases *Brown v. Webster*[16] and *Mack v. Swanson.*[17] They stood for the proposition that joint, mutual, or reciprocal wills themselves tended to prove the existence of the oral contract and the Statute of Frauds was no bar. With the overruling of these two cases, Nebraska is now in line with the majority of jurisdictions holding that the mere presence of joint, mutual, or reciprocal wills does not raise any presumption that they were executed in pursuance of a binding contract.[18]

However, the rationale of the rule followed by the majority of jurisdictions is that the presence of the wills is merely evidentiary material to consider in attempting to establish the contract in the first place, and Nebraska's position is that the presence of the wills does not constitute part performance to bring the contract out of the Statute of Frauds, regardless of whether or not there is a contract. Under the majority rule, if an oral contract is established by the necessary evidence, the contract can be enforced (the part performance being the executions of the wills to bring the contract out of the Statute of Frauds) while under the Nebraska rationale, even if a contract is established beyond a shadow of a doubt it will be unenforceable due to the fact that the execution of the wills does not satisfy Nebraska's rule of part performance.

The real issue in the case is whether or not there was in fact an oral contract, and by deciding the *Kimmel* case as it did, the court unnecessarily restricts the equitable doctrine of part performance. Fraud can be more easily avoided by the strict requirement of clear, satisfactory, and unequivocal evidence which is required to prove the contract,[19] rather than by the strict inter-

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[16] 90 Neb. 591, 134 N.W. 185 (1912).

[17] Mack v. Swanson, 140 Neb. 295, 299 N.W. 543 (1941).

[18] *See* Rolls v. Allen, 204 Cal. 604, 269 P. 450 (1928) (held that the execution of joint reciprocal wills had no tendency to show a contractual obligation); Jacoby v. Jacoby, 342 Ill. App. 277, 96 N.E.2d 362 (1950); *In re* Gudewicz' Will, 72 N.Y.S.2d 838 (Sur. Ct. 1947). Wills drawn in identical language and containing reciprocal provisions indicate a common understanding but do not show a contract. Lynch v. Lichtenthaler, 85 Cal. App.2d 437, 193 P.2d 77 (1948); Paull v. Earlywine, 195 Okla. 486, 159 P.2d 556 (1945); Johansen v. Davenport Bank & Trust Co., 242 Iowa 172, 46 N.W.2d 48 (1951).

[19] The amount of proof necessary to prove the contract in other states has been expressed in a variety of ways and is supported by enumerable

pretation of the doctrine of part performance.[20]

III. THE MARITAL DEDUCTION

The marital deduction is a provision in the Internal Revenue Code which exempts up to one-half of the adjusted gross estate from federal estate tax on any interest in property passing from a decedent to his wife.[21] The interest passing to the wife must be in the nature of a fee simple absolute, that is to say it must not fail by reason of a lapse of time or the occurrence or non-occurrence of an event or contingency.[22] A common example of this is where the decedent wills a life estate to his wife, remainder to their children. The wife's interest will lapse on her death, and therefore does not qualify for the marital deduction. However, if the wife in the above example is given a life estate with a general power of appointment, it would qualify for the marital deduction as the code specifically exempts this particular type of interest.[23] The wife must have the power to appoint the entire interest to herself, to her estate, or to either, whether exercisable during her life or by will only.

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cases only a few of which will be cited here. *E.g.*, Moumal v. Walsh, 9 Alas. 656, 662 (1940) ("clear, satisfactory and convincing"); Rolls v. Allen, 204 Cal. 604, 608, 269 P. 450, 452 (1928) ("most indisputable"); Soho v. Wimbrough, 145 Md. 498, 510, 125 A. 767, 771 (1924) ("definite and certain, strong and convincing"); Opel v. Aurien, 352 Mo. 592, 600, 179 S.W.2d 1, 4 (1944) ("a very high degree of proof"); Cox v. Williamson, 124 Mont. 512, 525, 227 P.2d 614, 621 (1951) ("clear, cogent and convincing"); Stafford v. Reed, 363 Pa. 405, 410, 70 A.2d 345, 348 (1950) ("clear, precise and indubitable"). A few courts apparently require that a contract to make a will be proved beyond reasonable doubt, thus applying a standard similar to the one required for proof of guilt in criminal cases. *See* Matthews v. Blanos, 201 Ga. 549, 563, 40 S.E.2d 715, 726 (1946); Salmon v. McCrary, 197 Ga. 281, 285, 29 S.E.2d 58, 60 (1944); Brickley v. Leonard, 129 Me. 94, 97, 149 A. 833, 835 (1930); Bicknell v. Guenther, 65 Wash.2d 749, 399 P.2d 598 (1965).

[20] An interesting earlier case to be noted in this connection is Riley v. Riley, 150 Neb. 176, 33 N.W.2d 525 (1948). In discussing the rule of part performance (that the thing constituting part performance must be referable solely to the contract sought to be enforced and not to some other or different contract) the court stated that: "The fact that there may be adversary evidence indicating that the acts refer to some other contract or situation will not defeat the satisfaction of the rule. Where one seeking specific performance of an oral contract to convey real estate has satisfied by evidence the requirements of this rule and there is evidence of an adversary in conflict therewith the decision on this question becomes one of the preponderance with the preponderant burden on the one seeking performance." *Id.* at 183, 33 N.W.2d at 529.

[21] INT. REV. CODE of 1954, § 2056.

[22] INT. REV. CODE of 1954, § 2056(b)(1).

[23] INT. REV. CODE of 1954, § 2056(b)(5).

If a testator wants to leave his or her estate to the survivor on stipulation that the survivor leaves it to certain designated third persons, the testator by employing a joint and mutual will can do it in one of four ways. In the following examples it will be assumed that the husband will be the first to die, and it is his intention that the entire estate of his surviving wife to be left to their children, share and share alike.

He can leave his estate to his wife for life with remainders over to the children. In this way the husband can be absolutely sure that the children will get the estate eventually, however, the interest passing to the wife is a terminable one and does not qualify for the marital deduction.[24]

A second method the husband could follow would be to leave his estate to his wife in the form of a life estate with a general power of appointment. The interest passing to the wife would qualify for the marital deduction.[25] However, in this case, the wife could appoint to herself, and the husband is thus unable to control the ultimate disposition of the estate.

A third way would be the *Kimmel* case, to leave the entire estate to the wife, and on the death of the wife the entire estate will go to the designated third persons. The problem here is that the joint and mutual will passes an absolute fee simple to the wife, and she is free to revoke her will at any time, and thereby alter the disposition of the estate. As the interest passing to the wife is an absolute one, it qualifies for the marital deduction, but again the husband is unable to dictate the ultimate disposition of the estate.

The fourth way would be to execute a joint and mutual will as in the third example, and execute it pursuant to a binding contract as stated either in the wills themselves, or in a separate document. The consideration for the contract would be the mutual promises of husband and wife, each promise being the consideration for the other. After the husband dies, the wife has a contractual obligation to leave the entire estate to the children. If she breaches the contract either by making a new will thereby altering the disposition of the estate, or by making wrongful inter vivos transfers, the children will have an appropriate contract remedy.[26] In this way the husband can be sure that the children will eventually get the entire property, however the question of whether or not the

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[24] INT. REV. CODE of 1954, § 2056(b)(1).

[25] INT. REV. CODE of 1954, § 2056(b)(5).

[26] *See*, B. SPARKS, CONTRACTS TO MAKE WILLS, 50-161 (1956).

interest passing to the wife qualifies for the marital deduction is a difficult problem.

A. Husband and Wife Holding the Property As Joint Tenants

If the husband and wife execute reciprocal wills pursuant to a binding contract that the survivor is to leave it to third parties, and their property is held as joint tenants or tenants by the entirety, the interest passing to the survivor under the will is an absolute one thereby qualifying for the marital deduction.[27] The theory being that upon the death of the first to die, ownership inures to the survivor since they held as joint tenants, and therefore the survivor is absolute owner. Even though the survivor entered into a binding contract to leave the entire property to third persons prior to her receiving the property, still the title transferring process was the contract of joint tenancy and under its terms she becomes absolute owner in fee simple. It is the title transferring process that is important, and not the fact that the survivor entered into a binding contract to leave it to third parties even before receiving the full title.

Estate of Peterson v. Commissioner[28] was a Nebraska case which involved a husband and wife executing a joint and mutual will in which the estate of the first to die was left to the other and the survivor's estate was left to the children. The will stated in effect that the first to die gave their estate to the survivor absolutely and forever and "expressly subject to the privilege and right of the survivor to use all or any portion of said estate for his or her use and benefit in the event the survivor in his or her sole discretion may elect so to do."[29]

The court held that the widow held all property as life tenant under Nebraska law with the right to use it only for her support, comfort, and enjoyment,[30] or that the contractual terms of the

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27 United States v. Spicer, 332 F.2d 750 (10th Cir. 1964); Estate of Awtry v. Commissioner, 221 F.2d 749 (8th Cir. 1955); Schildmeier v. United States, 171 F. Supp. 328 (S.D. Ind. 1959); McLean v. United States, 224 F. Supp. 726 (E.D. Mich. 1963), *aff'd* 65-2 U.S. Tax Cas. ¶ 12,326 (6th Cir. 1965).

28 23 T.C. 1020 (1955).

29 *Id.* at 1021.

30 Annable v. Ricedorf, 140 Neb. 93, 299 N.W. 373 (1941). In this case testator devised to his wife as follows: "I give, devise and bequeath to my beloved wife Elizabeth Ricedorf, all my estate, real, personal and mixed wherever located, to her own use and benefit forever; and it is my desire and wish that after her death, that all the property remaining, shall be divided equally between my son Burr and my

joint and mutual will became irrevocable upon the death of the husband[31] and the children acquired a contract interest in the property which was enforcible in a court of equity.[32] Either way the interest passing to the wife would be a terminable one not qualifying for the marital deduction.

On the taxpayer's appeal to the court of appeals the decision was reversed pursuant to stipulation on the authority of that circuit's decision in *Awtry v. Commissioner*.[33] Since the husband and wife held most of their property as joint tenants, the surviving spouse did not obtain any interest in the property by virtue of the will, but acquired absolute title through the terms of the joint tenancy and therefore the interest passing to the wife qualified for the marital deduction.

Of course the *Brown* and *Mack* cases have now been overruled by the *Kimmel* case, and therefore, the existence of a joint and mutual will is not of itself conclusive evidence of a contract in Nebraska. Therefore if the *Peterson* case were decided today, the surviving spouse would not be contractually bound to leave the property to the children. However, it should be noted that under the court's interpretation of Nebraska law the surviving spouse received only a life estate with right to use it only for her support, comfort, and enjoyment. The will gave it to her absolutely and forever with the right of the survivor to use all or any portion of the estate for her benefit in her sole discretion, yet the tax court interpreted this as giving her only a life estate under Nebraska law.[34] The testator in Nebraska should be extremely careful in his

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daughter Belle." The court held that the widow was entitled to a life estate only with power to dispose of and use the principal thereof only so far as the same might reasonably be necessary for support, comfort, and enjoyment. *Id.* at 94, 95, 299 N.W. at 375.

31 Brown v. Webster, 90 Neb. 591, 134 N.W. 185 (1912).

32 Mack v. Swanson, 140 Neb. 295, 299 N.W. 543 (1941).

33 221 F.2d 749 (8th Cir. 1955). In this case husband and wife executed a joint and mutual will leaving their property to each other, remainder to go to their nieces and nephews. The tax court held that since the wife was under a contractual obligation to leave the property to third persons, it was a terminable interest. However the eighth circuit reversed stating that the property interest was an absolute one as it passed under the terms of the joint tenancy, and the fact that she entered into a contract to leave the property to third persons made no difference.

34 23 T.C. 1020 (1955). The court, *Id.* at 1024, cited NEB. REV. STAT. § 76-205 (Reissue 1958) which reads as follows: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent

selection of words for he may intend to give his spouse a life estate with a general power of appointment so as to qualify for the marital deduction, however it may be that he has only given a life estate with a power of consumption which does not qualify for the deduction.

B. HUSBAND AND WIFE HOLDING PROPERTY SEVERALLY

Estate of Vermilya v. Commissioner[35] was a tax court decision in which the husband and wife executed a joint and mutual will in which they devised their respective property to the survivor in fee simple absolute. The will also contained certain specific and general legacies that were to take effect after the death of both the husband and his wife. The specific legacies were certain real estate, stocks, and bonds which were to go to named individuals. The general legacies were to go to named individuals in specific proportions, the fund being the sale of all assets remaining in the estate after expenses and debts were paid. The only jointly held property amounted to 7,304.88 dollars, while the adjusted gross estate amounted to 87,013.38 dollars. The Commissioner disallowed the marital deduction for all property passing to the spouse except for the jointly held property, on the theory that either: (1) the will only granted a life estate under Minnesota law, or else (2) the interest was a terminable one as the survivor was subject to a contractual obligation to devise the property to third persons at his or her death.

The tax court held that under Minnesota law the survivor took a fee simple absolute, and it pointed out that there was a split of authority on the question of whether the existence of a joint and mutual will was conclusive proof that it was executed pursuant to a contract. Under Minnesota law the question was unsettled so the tax court assumed it was pursuant to a contract, and therefore the surviving wife was under a contractual obligation to leave the property as the will so stated. The court then held that the marital deduction was allowable with respect to the general legacies, but did not decide the question whether it was allowable as to the

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of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." The court concluded that the couple intended to provide for the ultimate disposition of the estate and cited the *Annable* case. Other Nebraska cases on the construction of life estates are as follows: Abbott v. Wagner, 108 Neb. 359, 188 N.W. 113 (1922); *In re* Estate of Darr, 114 Neb. 116, 206 N.W. 2 (1925); Perigo v. Perigo, 158 Neb. 733, 64 N.W.2d 789 (1954); Trute v. Skeede, 162 Neb. 266, 75 N.W.2d 672 (1956).

[35] 41 T.C. 226 (1963).

specific legacies since the value of the property, not specifically mentioned in the will, exceeded the maximum marital deduction.

There is a provision in the regulations of the Internal Revenue Code which states as follows: "The deduction may not be taken with respect to a property interest which passed to such spouse merely as trustee, or subject to a binding agreement by the spouse to dispose of the interest in favor of a third person."[36]

The tax court held that this provision applied to a contract to devise specific property, because only with specifically mentioned property could one say that the beneficiary had received an interest in property at the time the contract was made. As to general property, the court stated that it would not be disqualified for the deduction as a terminable interest, "merely because it would, if held until death of the second spouse, be subject to a contract to leave all property owned at death in a certain manner."[37]

IV. CONCLUSION

The Nebraska Supreme Court is unnecessarily strict in its interpretation of the doctrine of part performance. The *Kimmel* case should have been decided strictly on the issue of whether or not the contract could be proven by clear, satisfactory, and unequivocal evidence. If the contract is then proven by the required evidence, there is no reason not to enforce it on the theory that the husband has partly performed the contract by willing the property to his wife, and dying leaving the will unchanged. Nevertheless it is quite clear that if a joint, mutual, or reciprocal will is used in Nebraska it should definitely state whether or not it is executed pursuant to a binding contract.

If the will is so executed, and the property is held severally by husband and wife, it is not clear whether or not property specifically devised would qualify for the marital deduction. Further, it is difficult to understand why a testator would wish to bind the survivor as regards the ultimate disposition of the estate by the use of such wills, as this makes it difficult for the surviving spouse to cope with unforeseen economic difficulties. If the wife is inexperienced in financial affairs, perhaps the husband would like to insure that she receive a life income, however the use of a joint and mutual will to effectuate this is taking a chance, as the wife may die first and the husband would then be bound to the terms of the will.

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[36] Treas. Reg. § 20.2056(e)-2(a).

[37] Estate of Vermilya v. Commissioner, 41 T.C. 226, 232 (1963).

The confusion attending such wills, and the relatively small amount of authority on the question of the marital deduction, should classify the use of such wills as questionable devices for the careful estate planner. If they are to be used at all, they should be used for estates smaller than 60,000 dollars[38] so as to avoid any marital deduction problems, and for larger estates a trust with a pour over provision from a will would be a more flexible and less confusing means of disposition.

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[38] The amount of the exemption to be deducted from the value of the gross estate in determining the estate tax. INT. REV. CODE of 1954, § 2052.