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Contracts not to Revoke Joint or Mutual Wills: Indiana's Inconsistent Standard for Determining Testator Intent

Frank A. Lattal

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Recommended Citation

Frank A. Lattal, *Contracts not to Revoke Joint or Mutual Wills: Indiana's Inconsistent Standard for Determining Testator Intent*, 17 Val. U. L. Rev. 811 (1983).

Available at: <https://scholar.valpo.edu/vulr/vol17/iss4/10>

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CONTRACTS NOT TO REVOKE JOINT OR MUTUAL WILLS: INDIANA'S INCONSISTENT STANDARD FOR DETERMINING TESTATOR INTENT

A common situation confronting the estate planner is one where a husband and wife execute their wills at the same time. It is not uncommon for these parties to desire, when executing their wills, to dispose of all of their property whether owned jointly or in severalty according to a common plan. This plan usually provides for the surviving spouse to receive an interest in all or most of the property owned by the deceased spouse and also provides for the disposition of the remaining interest in that property.¹ The use of joint or mutual wills² is a method often used by estate planners when coordinating the disposition of marital estates in situations such as these.³

The use of joint or mutual wills is not an uncriticized practice.⁴ Further, many state courts are perplexed when confronted with

1. These interests are commonly in the form of a fee simple or life estate. See generally SPARKS, *CONTRACTS TO MAKE WILLS* 105-109 (1956), which discusses the nature of the relationship between the promisor and promisee in a contractual will [hereinafter cited as SPARKS].

2. The courts and commentators are not uniform in defining "joint" or "mutual" wills. For the purpose of this note the following generally accepted definitions will be used.

A joint will is a single testamentary instrument which provides for the testamentary plan of two or more testators. It must be executed concurrently by the testators and may dispose of property owned jointly or in severalty. Although the term joint will uses the singular form of the noun, two testamentary schemes are actually created. The joint will must be fully and independently probated upon the death of each testator. 1 BOWE-PARKER: *PAGE ON WILLS* § 11.1 (1960).

Mutual wills are the separate wills of two or more testators which are reciprocal, identical or substantially similar in their provisions or which on their face, when considered together, show that the instruments are one integrated plan of disposition. Reciprocal provisions are those provisions in separate wills which are identical except that the testator and beneficiary are reversed. *Id.*

Sometimes a joint will is referred to as "joint and mutual" will. Professor Page states: "It is improper to speak of an instrument as being a 'joint and mutual' will, for it can only be one or the other and not both." Further, while some courts and commentators refer to any separate wills executed at the same time as "mutual," Professor Page states that only wills with reciprocal provisions should be called "mutual." *Id.*

3. See Note, *Joint or Mutual Wills*, 61 HARV. L. REV. 675 (1947) [hereinafter cited as *Joint or Mutual Wills*].

4. Several writers have discouraged the use of joint or mutual wills. See Blank, *Problem Areas in Will Drafting Under New York Law*, 56 ST. JOHN'S L. REV. 459, 483 (1982) ("Clearly, however, joint and reciprocal wills create more trouble than they are worth, and unless the practitioner has a compelling reason for using such wills, he should not do so."); Cook, *The Contractual Will: Invitation to Litigation and*

these instruments and express conflicting views as to the nature of the obligation these instruments create and their irrevocability.⁵ These conflicting views and the general criticism directed at the use of joint or mutual wills leads to questions of whether these testamentary instruments are legitimate and effective probate tools.⁶ Despite strong criticism, attorneys have and will continue to draft joint or mutual wills for their clients.⁷

Excess Taxation, 48 TEXAS L. REV. 909, 911 (1970) ("There may be . . . no satisfactory solution to the problem of inflexibility other than to avoid the use of contractual wills altogether."); see generally *Note, Wills: Problems Presented by the Use of Conjoint Wills*, 25 OKLA. L. REV. 454 (1972); see *Joint or Mutual Wills*, *supra* note 3, at 675.

Further, the use of joint wills has been criticized when the use of mutual wills could accomplish the same goals. See 1 BOWE-PARKER: PAGE ON WILLS § 11.1 (1960) ("The use of a joint will is not advised, for there is a greater likelihood that pitfalls of execution and draftsmanship will arise."); see Falender, *Decedent's Estates and Trusts, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 1 (1981).

5. See *Joint or Mutual Wills*, *supra* note 3, at 675. See, e.g., *Frazier v. Patterson*, 243 Ill. 80, 90 N.E. 216 (1909) where the court stated:

If two persons make wills, each devising his property to the other, there is no necessary inference that the wills were the result of any mutual or reciprocal agreement or understanding. Such wills might be executed without either party knowing that the other had executed his will; but, where the parties execute their wills by the same instrument, it is not possible that such course could be adopted without some previous understanding or agreement between them.

Id. at 86, 90 N.E. at 218. But see *Meake v. Duwe*, 117 Kan. 207, ___, 230 P. 1065, 1070 (1924), which criticized *Frazier*, and said, "[t]his assertion lay beyond the boundary of the courts information. Such a thing [a joint will without a contract] is not only possible, but occurred in the case now under decision. . . ." See also *Eagleton, Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing*, 15 CORNELL L.Q. 358, 362 (1929) [hereinafter cited as *Eagleton*].

6. See *Blank, Problem Areas in Will Drafting Under New York Law*, 56 ST. JOHN'S L. REV. 459, 480 (1982); *Cook, The Contractual Will: Invitation to Litigation and Excess Taxation*, 48 TEXAS L. REV. 909, 910-16 (1970) [hereinafter cited as *Cook*]; *Mock, Wills: Problems Presented by the Use of Conjoint Wills*, 25 OKLA. L. REV. 454 (1972).

7. Several leading commentators have expressed their views on the frequency with which estate planners have utilized joint or mutual wills subject to contracts not to revoke. Professor Bailey states:

The great increase during the last few decades of the number of cases involving contracts, or alleged contracts, to make wills, or to devise or bequeath property has been the subject of comment by writers and judges. The increase has been particularly noticeable during the last twenty years. The reasons are probably to be found in the generally increased interest in estate planning which has resulted from an accelerated accumulation of wealth and the impact of estate and inheritance taxes. This accounts for the fact that a very large number of cases involving contracts, or alleged contracts, to make wills are arrangements between

One of the most troublesome areas for the courts is determining testator intent when it is alleged that a joint or mutual will was executed pursuant to a contract or contract not to revoke,⁸ but no express written contract was executed along with the will.⁹ A determination that a will is subject to an oral or implied contract¹⁰ binds the testators to a certain testamentary plan.¹¹ Such a determination is a fertile ground for controversy due to the contrasting nature of the law of wills and the law of contracts.¹² While it is well established

husband and wife which look to the execution of a joint and reciprocal will or separate mutual wills.

Bailey, *Contracts to Make Wills—Proof of Intent to Contract*, 40 TEX. L. REV. 941 (1962); see also Young, *The Doctrinal Relationships of Concerted Wills and Contract*, 29 TEX. L. REV. 439 (1951):

Some of the sharpest pressures at work in the judicial process are those bearing on the treatment of concerted wills. The number of such wills—either joint, or mutual . . . which are presented to the courts each year is rapidly increasing. This is not because of any question of their validity. . . . Rather it is the chance of capitalizing on some special, super-testamentary quality of concerted wills that mainly stimulates litigation about them.

Id.

8. There may be a literal difference between a "contract to will" and a "contract not to revoke a will." For the purposes of this note the effect is the same. If a testator or testators enter into a contract to devise certain property in a particular manner and one testator fails to fulfill that contract by devising property in a different way, that testator has breached the contract. If two testators enter into a contract not to revoke a joint will or mutual wills, and one testator revokes the subject will, that testator has breached the contract. See generally 1 BOWE-PARKER: PAGE ON WILLS § 11.1 (1960). References to either contracts to will or contracts not to revoke are viewed as essentially the same in this note.

In Indiana, the courts appear to treat contracts to will and contracts not to revoke a will similarly. See *Estate of Maloney v. Carsten*, ___ Ind. App. ___, 406 N.E.2d 1263 (1978), a "contract not to revoke" a joint will case which cites as controlling *Cramer v. Echelbarger*, 142 Ind. App. 374, 234 N.E.2d 864 (1968), a "contract to will" case.

9. See *infra* notes 105-73 and accompanying text.

10. In a majority of states, the contract which binds testators to the testamentary scheme of the will subject to such contract can be a written, oral, or implied contract. In Indiana a contract to devise can be oral, written or implied. See *Lawrence v. Ashba*, 115 Ind. App. 485, 490, 59 N.E.2d 568, 570 (1945).

11. See Cook, *supra* note 6, at 910 for a general discussion of the inflexibility of a testamentary plan subject to a contract not to revoke. See generally Bailey, *Contracts to Make Wills—Proof of Intent to Contract*, 40 TEX. L. REV. 941 (1962) [hereinafter cited as *Bailey*]; Young, *The Doctrinal Relationships of Concerted Wills and Contract*, 29 TEX. L. REV. 439 (1951) [hereinafter cited as *Young*]. See also *infra* notes 15-17 and accompanying text.

12. Mowrer, *Joint and Mutual Wills—Effect of Contract Not to Revoke*, 41 MO. L. REV. 127, 128 (1976) [hereinafter cited as *Mowrer*].

that testators may validly agree to dispose of their estates in a particular manner through contract,¹³ the practice is subject to close scrutiny.¹⁴ A basic feature of a will is that the testator is free at any time to revoke or change the provisions in the will.¹⁵ This ambulatory characteristic contradicts the basic purpose of a contract which is to bind both sides to certain terms from a certain time forward.¹⁶ Contractual and testamentary principles collide when a joint or mutual will subject to a contract not to revoke is revoked by the surviving testator.¹⁷

Indiana law provides that one seeking to establish a contract not to revoke a joint or mutual will must prove irrevocability by "clear and convincing" evidence.¹⁸ The rationale for this strict standard lies in the consequences of a contract not to revoke a will.¹⁹ However, recent Indiana Appellate decisions show that the clear and convincing standard is not applied with the same consistency to similar claims of contractual joint or mutual wills.²⁰ Recent decisions show that in various circumstances the court will display inconsistent degrees of sympathy towards third-party beneficiaries who claim they have been defrauded.²¹ These inconsistent decisions create an environment for potential excess litigation because the court, at times, displays its willingness to find an implied or oral contract based on inconclusive evidence.²² At other times the court appears unbending and will not find a contract based on evidence which would have sufficed in the cases where the court was liberal in applying the clear and convincing standard.²³ In addition, the

13. *Id.* See also *Lawrence v. Ashba*, 115 Ind. App. 485, 490 59 N.E.2d 568, 570 (1945).

14. See *Teason v. Niles*, 368 Mich. 474, 118 N.W.2d 475 (1962). Although this case involved an oral contract to devise land in exchange for services rendered, the court generally examined the caution necessary in establishing a contract to will.

15. See *Mowrer*, *supra* note 11, at 128. See also *Lawrence v. Ashba*, 115 Ind. App. 485, 490, 59 N.E.2d 568, 570 (1945); *Manrow v. Deveney*, 109 Ind. App. 264, 266, 33 N.E.2d 371, 372 (1941).

16. See *Mowrer*, *supra* note 11, at 128. A general definition of a contract is located in the RESTATEMENT (SECOND) OF CONTRACTS: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

17. See *Mowrer*, *supra* note 12, at 128.

18. *Lawrence v. Ashba*, 115 Ind. App. 485, 489, 59 N.E.2d 568, 570 (1945).

19. See *infra*, notes 39-51 and accompanying text.

20. See *infra*, notes 105-73 and accompanying text.

21. *Id.*

22. See *infra*, notes 105-39 and accompanying text.

23. See *infra*, notes 140-73 and accompanying text.

courts have unsuccessfully tried to distinguish those cases where contracts have been found from those cases where contracts have been denied.²⁴ Considering the court's inconsistency, an attorney may be doing his client a disservice by not pursuing a claim of a contract in any joint or mutual will controversy which is the least bit ambiguous as to what the testator's intentions were at execution.

This note will focus on the inconsistent manner in which Indiana courts have applied the clear and convincing standard to claims of oral and implied contracts to devise as they pertain to joint or mutual wills. The analysis will serve as support for the suggestion that the courts make clear the burden of proving testator intent to contract; or Indiana abandon the clear and convincing standard and join an increasing number of states in adopting a statutory rule which allows only written evidence to establish a contract to devise.²⁵ This position is based on the premise that testators who really desire to enter into a binding contract not to revoke their testamentary dispositions will do so with a contract which is clear, definite and specific. A writing, evidencing the contract, may be the only sure way to prove the testators agreed not to revoke their wills.

BASIC CONSIDERATIONS OF A CONTRACT TO DEVISE

A brief discussion of joint and mutual wills in general, and of how other jurisdictions deal with contracts not to revoke them, will help highlight the problem Indiana courts encounter in determining the existence of an oral or implied contract to devise. Joint and mutual wills prove troublesome to many courts. A contractual joint or mutual will severely limits the surviving testator's ability to use estate property. This limitation on use would not be a factor if the testators intended to execute a joint or mutual will but did not intend the will or wills to be subject to a contract. Thus, the court must be sure the testators intended their testamentary dispositions to be irrevocable and subject to a contract at execution.

Establishing a Contract Not to Revoke

Because there are no legal consequences unique to a joint or mutual will absent a contract not to revoke,²⁶ the main question in-

24. *Id.*

25. *See infra*, note 72.

26. *See J. DUKEMINIER & S.M. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, FUTURE INTERESTS AND ESTATE PLANNING* 365 (1972). *See also Joint or Mutual Wills*, *supra* note 3, at 677.

volved when confronted with one of these instruments is whether it was executed pursuant to such a contract. When a claimant alleges a will is subject to a contract, unequivocal proof of that contract is essential.²⁷ A court must determine, in accordance with the intention of the parties, whether a certain set of operative facts resulted in the loss by the testators of the privilege to revoke the will.²⁸ Once the existence of the contract is settled, other pertinent matters involving the will or wills can be resolved.²⁹

In some situations it is not difficult to prove the existence of a contract not to revoke. A separate written contract may declare the accompanying will or wills irrevocable.³⁰ A will may make direct

27. J. DUKEMINIER, S.M. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, FUTURE INTERESTS, AND ESTATE PLANNING 365 (1972); *Joint and Mutual Wills*, *supra* note 3, at 677.

28. *Id.* Two views have emerged from courts addressing contracts to devise. Some courts give preference to contractual principles and hold that not only is the contract enforceable but it also usurps any ambulatory characteristic of the will associated with that contract. In this case the will is deemed irrevocable upon the death of one testator. See *Frazier v. Patterson*, 243 Ill. 80, 84-86, 90 N.E. 216, 218 (1909).

The more widely accepted view is that a will is revocable at any time even if the will is subject to a contract not to revoke. *Meake v. Duwe*, 117 Kan. 207, 230 P. 1065 (1924). The contract cannot destroy the ambulatory characteristic of the will *per se*. However, if a will which was executed pursuant to a contract not to revoke is revoked, the damaged party will have a remedy in specific performance or equity. In this situation, the court will not be forced to probate a will it knows the testator did not intend as his last will and testament, but the court will also be able to provide a remedy to a wronged party.

29. The determination that a contract not to revoke binds the testators to the testamentary scheme in a will may have effect on other issues related to the claim. Once the existence of a contract has been established and the court determines that there has been breach of that contract, it may proceed with a remedy. The co-testator who has been wronged by the breach has a remedy at law or in equity. Very few cases arise for a remedy at law. 1 BOWE-PARKER: PAGE ON WILLS § 10.27 (1960). See also *Joint or Mutual Wills*, *supra* note 3, at 683 n.53.

Relief is also available for defrauded third-party beneficiaries. Courts will impose a constructive trust on the promisor's estate, heirs and devisees. *Id.* For a discussion of the various remedies and implications arising from a contract not to revoke, see *Mowrer*, *supra* note 11, at 129-32. See generally *Eagleton*, *supra* note 5, at 363.

Other implications arising from a contract not to revoke a joint or mutual will include effects on the surviving testator's use of estate property and effect on the use of the marital deduction. For an excellent review of the effects of a contractual will, see C. GROMLEY, J. HILLER, D. HOEPPNER, INDIANA ESTATE PLANNING TECHNIQUES § 11E0.3 (1962).

In *Maloney v. Carsten*, ___ Ind. App. ___, 381 N.E.2d 1263 (1978), the court discussed the implications a contract not to revoke would have on after-acquired property, jointly-held property, and lapse statutes. These considerations are all beyond the scope of this note.

30. See Note, *Contracts Not to Revoke Joint or Mutual Wills*, 15 WM. & MARY L. REV. 144, 145 (1973) [hereinafter cited as *Contracts Not to Revoke*].

reference in its provisions to a separate contract not to revoke between the testators.³¹ The will or wills themselves may expressly provide that in consideration of reciprocal provisions both testators agree not to alter or change any disposition without the consent of the other.³² In these three situations the intent of the testators to enter into a contract not to revoke at the time of execution is clear. Without mutual consent to the contrary, the dispositions in the will are forever binding.³³ There is no need for judicial interpretation.

A contract becomes less discernable when a joint or mutual will is executed without reference to, or along with, an express written contract.³⁴ Still, many claims are based on the allegation of an oral or implied contract binding the testators to their original testamentary plan.³⁵ A typical claim involves third-party beneficiaries named in an original joint or mutual will versus beneficiaries named in a subsequent will.³⁶ The second will was executed by the surviving testator of the original joint or mutual will, but provides for a different distribution of the same property than was set out in the original will. Further, the second will operates to revoke the original joint or mutual will. When the surviving testator dies, the second will is probated.³⁷ The beneficiaries of the original will realize

31. *Id.*

32. See, e.g., *Shimp v. Shimp*, ____ Md. App. ____, 412 A.2d 1228 (1980), where the testators expressly provided in the will itself their intention to enter into a binding contract. The relevant text provided:

We, the Testators, do hereby declare that it is our purpose to dispose of our property in accordance with a common plan. The reciprocal and other gifts made herein are in fulfillment of this purpose and in consideration of each of us waiving the right, during our joint lives, to alter, amend or revoke this Will in whole or in part, by Codicil or otherwise, without notice to the other, or under any circumstances after the death of the first of us to die. Unless mutually agreed upon, this Last Will and Testament is an irrevocable act and may not be changed.

Id. at ____, 412 A.2d at 1229. See also *Sample v. Butler Univ.*, 211 Ind. 122, 4 N.E.2d 545, *reh'g denied*, 211 Ind. 122, 5 N.E.2d 888 (1936).

33. *Contracts Not to Revoke*, *supra* note 29, at 145.

34. In *Glass v. Battista*, 43 N.Y.2d 620, 374 N.E.2d 116 (1978), the court said: "The law does not view the renunciation of the right to alter or revoke a will as a casual matter . . . and in keeping with this principle we have declined to find joint or mutual wills contractually binding where such intent was left to conjecture." *Id.* at ____, 347 N.E.2d at 117.

35. See *infra*, notes 4-16 and accompanying text.

36. See *infra*, notes 117-36 and accompanying text.

37. The clear weight of authority views a joint or mutual will subject to a contract not to revoke on the same footing as any other will in terms of its revocability. All wills are revocable and a revoked will even if subject to a contract not to revoke should be denied probate. 1 BOWE-PARKER: PAGE ON WILLS § 11.10 (1960). The rights of the defrauded third-party beneficiaries and co-testator, if applicable, will be saved

they have been treated differently under the second will. The original beneficiaries bring an action against the beneficiaries of the second will or the estate of the surviving testator on the grounds that the original will was executed pursuant to a contract not to revoke. The claim alleges that the surviving testator was estopped from executing a second will after the death of the original co-testator. In this situation most courts will look at all available evidence to try to ascertain whether the original testators manifested an intent to enter into a contract not to revoke the original will. The court's major goal is to give full effect to the intention of the testators without adding what the testators did not themselves intend.³⁸

When confronted with a claim of a contract not to revoke, a court must consider important competing interests.³⁹ Strong policy considerations exist against any restraint on property. The intent to deprive oneself of the right to freely dispose of property must be clear.⁴⁰ The far-reaching consequences of contracting away ambulatory testamentary rights demands an unequivocal showing of intent.⁴¹ The surviving spouse of a married couple when bound by a contract not to revoke can be left helpless to intervening changes of circumstances.⁴² A remarriage, the death of intended beneficiaries, an increase or decrease in the size of the estate, mere change of heart or similar unforeseen events may render provisions of a prior will inappropriate, unfair or meaningless.⁴³ Many times, the deceased spouse, had that spouse survived, would have acquiesced to appropriate or necessary changes in the testamentary scheme of a joint or mutual will even if subject to a contract.⁴⁴ When a court holds that a contract binds the surviving testator to an existing joint or mutual will, these important considerations may be left unprotected.

through equity. See Partridge, *The Revocability of Mutual or Reciprocal Wills*, 77 U. PA. L. REV. 357, 360 (1929); but see Goddard, *Mutual Wills*, 17 MICH. L. REV. 677, 687 (1919).

38. See *supra*, note 34. See also *Moore v. Harvey*, ____ Ind. App. ____, ____, 406 N.E.2d 354, 358 (1980).

39. In interpreting joint or mutual wills "it is essential . . . that we distinguish between the concept of wills and the concept of contracts." *Maloney v. Carsten*, ____ Ind. App. ____, ____, 381 N.E.2d 1263, 1267 (1978). See *infra* notes 40-52 and accompanying text.

40. *Moore v. Harvey*, ____ Ind. App. ____, ____, 406 N.E.2d 354, 358 (1980).

41. *Id.*

42. See *Lamberg v. Callahan*, 455 F.2d 1213, 1218 (2d Cir. 1972).

43. *Id.*

44. *Id.*

The interests of the deceased testator are equally important. The court should not destroy the peace-of-mind a testator gains through knowing his loved ones are provided for in case of his death. If the decedent and surviving testator at the time of execution intended the dispositions to be forever binding, such an agreement must be enforced. Many couples agree to give only a life estate in property to the surviving spouse with ultimate fee ownership to named third-party beneficiaries. These testators rely on the validity of a contract not to revoke. The change of heart or circumstances of the surviving testator, no matter how compelling, should not affect the enforcement of a valid contract. Further, an unequivocal showing of intent to enter into a contract is necessary to safeguard against fraudulent claims against a deceased's estate.⁴⁵ Once a testator dies, his opportunity to answer any claim against his estate is terminated.⁴⁶

The effects of a contract to devise are equally compelling so that a court must make certain the actual intent of the testator was to enter a contract. If the contractual will provides certain benefits for third parties, the rights created in these third persons are held to be enforceable by the third parties.⁴⁷ Thus, when testators agree to bind themselves into a contractual will and provide for certain third-party beneficiaries in that will, they have lost certain flexibility in their ability to plan their estate.⁴⁸ Before one of the contracting testators dies, it may be argued that at least that portion of the will under contract, which provides for a third party, cannot be revoked without the consent of that third party.⁴⁹

At the death of one of the testators of a contractual joint or mutual will, the ability of the survivor to use the estate property is restricted.⁵⁰ Courts display concern over the chance that the survivor will use up or transfer estate property *inter vivos*, and usually will try to assert some control over the testator's use of his own property.⁵¹ Before a court will exert such control, there must be a clear showing that the subject property is bound by a contract that both testators intended to enter.

45. SPARKS, *supra* note 1, at 26.

46. *Id.*

47. C. GROMLEY, J. HILLER, D. HOEPPNER, *WORKBOOK FOR INDIANA ESTATE PLANNERS*, § 11E0.3 (1962).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* See *Sample v. Butler Univ.*, 211 Ind. 122, 4 N.E.2d 545, 5 N.E.2d 888 (1936).

A minority of courts hold that mere execution of a joint or mutual will creates a presumption that the parties intended the will to be subject to a contract not to revoke.⁵² These courts hold the inference of contract to be especially strong when a husband and wife execute a joint or mutual will with reciprocal provisions and name third-party beneficiaries in whom both testators share a common interest.⁵³ Courts which follow the "presumption" position are criticized for losing sight of the distinction between an "understanding" and an actual contract.⁵⁴ Further, the "presumption" courts do not realize that closely related testators may reach informal accords with no intention of forming a binding contract.⁵⁵ The mere execution of a joint or mutual will does not clearly indicate the requisites for a binding contract.⁵⁶ Thus, the clear weight of authority provides no presumption of contract from the execution of a joint or mutual will alone.⁵⁷

52. The leading case asserting the presumption position concerning joint wills is *Frazier v. Patterson*, 243 Ill. 80, 90 N.E.2d 216 (1909).

53. See *In re Estate of Chayka*, 40 Wis. 2d 715, ___, 162 N.W.2d 632, 634 (1968). It should be noted that some courts hold the presumption of contract stronger from the execution of a joint will as opposed to the execution of mutual wills. "[A] contract to make mutual and reciprocal wills may be conclusively presumed or inferred from provisions of the wills themselves, *especially* if there is a jointly executed will." (emphasis added) *Id.* The rationale here is that executing one instrument infers a mutual agreement or understanding. But see SPARKS, *supra* note 1, at 29 which is critical of this presumption.

54. See *Contracts Not to Revoke*, *supra* note 29, at 144.

55. *Joint or Mutual Wills*, *supra* note 3, at 677.

56. Although the parties "agreed" to the dispositions set forth in the will, it is tenuous to hold such an understanding as the basis for an implied contract. The mere presence of a joint will or mutual wills with reciprocal provisions discloses only that the testators talked over their desires for testamentary distributions, and arrived at some understanding. However, wills executed by relatives due to love and affection infer mutual trust, loyalty and concern for one another more than contractual intent. Professor Sparks states: "such discussion and such understandings between persons of close affinities, especially between husbands and wives, are not unusual and the fact that they have taken place is no indication that there has been any thought of a binding contract." SPARKS, *supra* note 1, at 26-28. More logical in the case of close relatives is that similarity or reciprocity in wills results from similar tastes and affections caused by years of being together. Spontaneous executions of this type may be unaccompanied by any thought of forever binding the other testator to the will provisions. 1 BOWE-PARKER: PAGE ON WILLS § 11.1 554 (1960). Situations and desires change. A loving spouse may choose to leave the ultimate disposition to the judgment of the surviving spouse rather than to prevent that survivor in later years from making necessary or emergency changes in the estate plan. *Lamberg v. Callahan*, 455 F.2d 1213 (2d Cir. 1972).

57. All of the following cases assert that the mere execution of joint or mutual wills will not be sufficient to establish an implied contract: *Parker v. Richards*,

A majority of courts recognize the far-reaching consequences of a contract not to revoke a will. These courts recognize that claims of an implied contract against a decedent's estate is an area open for abuse.⁵⁸ In an effort to provide for all interests involved, these courts demand a substantial showing of intent to enter into a contract.⁵⁹ A majority of courts state that evidence to substantiate an implied contract or oral contract must be "clear and convincing, certain and unequivocal."⁶⁰

____ Or. App. ____, 602 P.2d 1154 (1979); Shook v. Bell, ____ Wyo. ____, 599 P.2d 1320 (1979); Moats v. Pumphrey, ____ Md. App. ____, 363 A.2d 589 (1976); *In re Wiggins*, 39 N.Y.2d 791, 385 N.Y.S.2d 287, 350 N.E.2d 618 (1976); Twombly v. Twombly, ____ Okl. ____, 489 P.2d 475 (1971); Ellexson v. Ellexson, ____ Tex. Cir. App. ____, 475 S.W.2d 515 (1971); Wagner v. Moor, 257 Mo. 482, 165 S.W.2d (1914).

The better reasoned view is that mere execution of a joint or mutual will is not substantial evidence of any underlying contract. ATKINSON, HANDBOOK ON THE LAW OF WILLS 44 (2d ed. 1943). The clear weight of authority provides that no assumption of a contract exists from simply the execution of a concerted will. The fact that two testators, closely related and emotionally involved, execute a will or wills with reciprocal provisions does no more than evidence a present agreement for the distribution of property. If the distribution was to be made the day of execution, the dispositive scheme provided for in the will would be how the testators wanted their property to be provided at the time. This is no indication that the parties intended that scheme to be forever binding. Without other evidence of the intent of the parties to bind themselves forever to the terms, an implied contract cannot stand. SPARKS, *supra* note 1, at 27.

58. See SPARKS, *supra* note 1, at 25-26.

59. *Id.* at 26-30.

60. See, e.g., *Estate of Somogyi v. Marosites*, 389 So. 2d 244, 246 (Fla. Dist. Ct. App. 1980) (The agreement "must be established by clear and convincing evidence."); *Northern Trust Co. v. Tarre*, 83 Ill. App. 3d 684, ____, 404 N.E.2d 882, 887 (1980) ("The burden is upon the party who asserts a contract to establish it by clear, convincing and satisfactory evidence."); *Estate of Ryder v. McCloskey*, 219 N.W.2d 552 (Iowa, 1974); *Estate of Wade v. DeTar*, 202 Kan. 380, ____, 449 P.2d 488, 494 (1969) (contract must be "clear in its terms" and established by "clear and convincing evidence"); *Shimp v. Shimp*, 387 Md. 372, ____, 412 A.2d 1228, 1233 (1979); ("The proof must be clear and explicit leaving no room for reasonable doubt."); *Eicholtz v. Grunewald*, 313 Mich. 666, ____, 21 N.W.2d 914 (1946); *Neff v. Poboisk*, 281 Minn. 475, ____, 161 N.W.2d 823, 824 (1968) (evidence must be "clear, positive and convincing"); *Wimp v. Collett*, 414 S.W.2d 65, 69 (Mo. 1967) (evidence must be "clear, cogent and convincing"); *Estate of Weidner*, 628 P.2d 285, 286 (Mont. 1981) ("The burden is on the party asserting the existence of the contract and it must be shown by clear, convincing and satisfactory evidence."); *Johnson v. Wilson*, 276 Or. 69, ____, 554 P.2d 157, ____, (1976) ("[Proof] by clear and convincing evidence means that the trust of the facts asserted is highly probable."); *Lancelloti v. Lancellotti*, ____ R.I. ____, ____, 377 A.2d 1315, ____ (1977); *Pruitt v. Moss*, 271 S.C. 305, ____, 247 S.E.2d 324, 326 (1978) ("... clear and convincing proof" is necessary to support a finding of contract); *Magids v. American Title Ins. Co.*, 473 S.W.2d 460 (Tex. 1971) ("Oral contracts" are only sustained when established by clear, satisfactory and convincing evidence.).

Despite the good-faith effort by the courts to require a clear showing of contractual intent, in practice the amount and kinds of evidence which will convince the court of the existence of an implied contract varies from jurisdiction to jurisdiction,⁶¹ and also between courts in the same jurisdiction.⁶² Because each set of circumstances

61. For an example of the different results various states' courts can arrive at based on similar claims and similar evidence, *compare* *Simmons v. Davis*, 240 Ga. 282, 240 S.E.2d 33 (1977) with *Estate of Kester*, ____ Pa. ____, 383 A.2d 914 (1978). In *Simmons*, a husband and wife executed a joint will which provided that the survivor would receive all the property in fee simple, and then divided up between the testator's brothers and sisters. There was no written contract executed along with the will nor any mention in the will of a contract or promise not to revoke. The Georgia Supreme Court held the will was subject to a contract. The court based its decision on an earlier Georgia decision which held that a contract can be more readily implied from the execution of a joint will. *Id.* at ____, 240 S.E.2d at 34, citing *Clements v. Jones*, 166 Ga. 738, 144 S.E. 319 (1978). The court further stated that the provisions of the will which left property in fee to the survivor and upon the survivor's death to the testator's brothers and sisters was evidence of a "clear and definite" contract. *Simmons*, 240 Ga. at ____, 240 S.E.2d at 34.

In *Kester*, a husband and wife also executed a joint will which provided for the survivor to receive all property in fee "subject to the contingency" that the survivor leave the entire estate to their son. After the husband died, the wife executed a new will devising much of the estate property to sources other than the son. The son brought an action claiming the original will was subject to a contract and the new execution of another will was in derogation of that contract. Despite provisions in the will itself which stated:

In the event, however, that we shall both die as the result of a common accident or disease, we shall be deemed to have both died at the same time (even though there be a reasonable interval of time between our respective deaths), and in this event, or in the event either one of us survives the other, it is our wish and mutual understanding that we give, devise and bequeath our entire estate as follows . . .

Id. The Pennsylvania Supreme Court held there was no contract. The court stated:

When it is claimed that someone has contractually limited his testamentary freedom, our standard of proof is a demanding one. In the case of a joint will in which extrinsic evidence is relied upon to prove the existence of a contract, we have held that the proof must be "clear and convincing." Likewise, in cases not involving joint wills, but involving the issue of whether there existed a contract to make a will or not to revoke a will, the rule has been that evidence of the existence of a contract must be clear and convincing.

Id. at ____, 383 A.2d at 918; *see also* *Nakoneczny Estate*, 456 Pa. 327, 319 A.2d 893 (1974); *Vanjentic Estate*, 453 Pa. 1, 306 A.2d 300 (1973); *Fahringer v. Strine*, 420 Pa. 48, 216 A.2d 82 (1966).

62. For an example of how courts in the same jurisdiction can arrive at inconsistent results based on similar facts and evidence, *compare* *Rubenstein v. Mueller*, 19 N.Y.2d 228, 278 N.Y.S.2d 845, 225 N.E.2d 540 (1967), with *Matter of Zeh*, 18 N.Y.2d 900, 276 N.Y.S.2d 635, 223 N.E.2d 43 (1966). In *Mueller*, a joint will provided in part:

SECOND: The first deceased hereby bequeaths and devises all real

is unique, the method of shifting through available evidence, evaluating it and applying the clear and convincing standard to it, creates an *ad hoc* procedure.⁶³ Inherent in any *ad hoc* procedure is the chance for inconsistency.⁶⁴ Nowhere is the inconsistency more visible than in joint or mutual will cases, where the court must apply an ambiguous evidentiary standard to countless different sets of facts.⁶⁵ One case simply does not serve as a guide for the next.⁶⁶ When one case cannot be used to predict the outcome of the next or when two seemingly similar cases result in different holdings, the effectiveness of the judicial process comes under attack. This in turn generates excess litigation.⁶⁷

and personal property of whatever kind and wherever situated to the survivor of us outright.

THIRD: Upon the death of the second one of us to die, or in the event of our simultaneous deaths or deaths resulting from a common disaster, then the estate of said second decedent, or both of us as the case may be, is hereby bequeathed, devised and disposed of as follows: . . .

FOURTH: All the rest, residue and remainder of the estate or estates . . . we hereby give, devise and bequeath equally between Ruth Hanzlicsek and Wilma Rubenstein aforesaid.

J. DUKMINIER, S. JOHANSEN, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS AND ESTATES 387-88 n.1 (2d ed. 1978) [hereinafter Dukminier & Johansen]. The court emphasized the use of plural pronouns in the third and fourth clause and the fact that the will made a gift over on the death of the survivor. Based on this evidence, the court found a contract.

In *Zeh*, decided four months earlier by the same court, a joint will stated in part:

SECOND: We give, devise and bequeath all of the Estate, of whatsoever kind and nature and wheresoever situated, of which we, or either of us, may die seized and/or possessed . . . each unto the other, meaning thereby that the survivor of us shall be the absolute owner, to him or to her . . . absolutely and forever of all that both of us possess.

THIRD: Upon the death of the survivor of us, or in the event that our deaths should occur simultaneously, or approximately so, or in the same common accident or disaster, . . . we, or the survivor of us, give, devise and bequeath unto our children Fanny Rebecca Howell and William Arthur Zeh all of the Estate of which we, or said survivor, shall die seized and/or possessed. . . .

J. DUKMINIER & S. JOHANSEN, *supra*, at 388. The court failed to mention the gift over in the third clause and despite similar wording and the use of plural pronouns as used in *Muller*, the court held the will was not contractual. The court in *Zeh* placed great emphasis on the words of the gift in the second clause which gave the survivor all of the property "absolutely and forever." J. DUKMINIER, S. JOHANSEN, *supra*, at 384-92.

63. See *Young*, *supra* note 11, at 444.

64. *Id.*; see also SPARKS, *supra* note 1, at 26-29.

65. *Id.*

66. *Id.*

67. Professor Eagleton states that in the usual case there are five general

The Uniform Probate Code or a Requirement of a Writing

A growing minority of states are not satisfied with the results when extrinsic evidence is allowed to establish the existence of a contract not to revoke a will.⁶⁸ Recognizing the problems of inconsistent holdings and excess litigation,⁶⁹ these states have adopted some form of statutory law which allows only written evidence to establish that a will is subject to a contract.⁷⁰ Almost all of these statutes are modeled after or adoptions of Section 2-701 of the Uniform Probate Code.⁷¹ Section 2-701 states:

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this Act, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual will does not create a presumption of a contract not to revoke the will or wills.⁷²

This provision covers all contracts to wills including those found in joint or mutual wills.⁷³

types of evidence from a consideration of all of which the intention of the testators to enter in a contract must be determined:

1. A separate written contract;
2. The wills themselves;
3. Surrounding circumstances;
4. Oral statements of the parties made in reference to the execution of the will or wills;
5. The scheme of distribution in the wills.

See *Eagleton*, *supra* note 11, at 373. See also *supra* note 7 and accompanying text.

68. See, e.g., the official comment to Maine's adoption of a written requirement for contractual will states: "It is the purpose of this section to tighten the methods by which contracts concerning succession may be proved." ME. REV. STAT. ANN. tit. 18A § 2-701 (1979). See also *infra* note 75.

69. See *infra* note 75.

70. See *infra* note 72.

71. The following states have adopted Section 2-701: Alaska - ALASKA STAT. § 13.11 285 (198__); Arizona - ARIZ. REV. STAT. ANN. § 14-2701 (1974); Colorado - COLO. REV. STAT. § 15-11-701 (1974); Florida - FLA. STAT. ANN. § 732-701 (1975) (West); Idaho - IDAHO CODE § 15-2-701 (1971); Maine - ME. REV. STAT. ANN. tit. 18A, § 2-701 (1979); Michigan - MICH. COMP. LAWS ANN. § 700.140 (1978); Minnesota - MINN. STAT. ANN. § 524.2-701 (1975); Nebraska - NEB. REV. STAT. § 30-2351 (1974); New Mexico - N.M. STAT. ANN. § 45-2-701 (1975); North Dakota - N.D. CENT. CODE § 30.1-09-13 (1973); Utah - UTAH CODE ANN. § 75-2-701 (1975).

72. UNIF. PROBATE CODE § 2-701 (1977).

73. *Id.*

Under this section, oral or implied contracts not to revoke joint or mutual wills are no longer valid.⁷⁴ The Code discourages the practice of basing a contract not to revoke on outside circumstances and facts surrounding the execution of a will.⁷⁵ Section 2-701 requires a signed writing by the decedent as minimum evidence of the contract.⁷⁶ A will, to suffice as this signed writing, must set out the material provisions of the contract or make express reference to a contract.⁷⁷ Further, the denial of the creation of a presumption of a contract from the mere execution of a joint or mutual will is in accordance with the weight of authority.⁷⁸

Section 2-701 has been subjected to the criticism that it is too vague.⁷⁹ The critics claim that while it suggests the methods by which a contract not to revoke must be established, it fails to define those factors which will assure the parties acted with the requisite contractual intent.⁸⁰ The general point of disfavor with the section is that it will not afford enough protection in the case of joint or mutual wills against the danger of finding a contract where no intent to contract really existed.⁸¹

A close reading of Section 2-701, however, reveals that such criticism is misplaced. The section does set down strict guidelines for determining whether a will was executed pursuant to a

74. See Curry, *West Virginia and the Uniform Probate Code: An Overview Part 1*, 76 W. VA. L. REV. 111, 145 (1974) [hereinafter cited as Curry].

75. The Comment to Section 2-701 states:

It is the purpose of this section to tighten the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to much litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a presumption that the parties had contracted not to revoke the will except by consent of both. This section requires that either the will must set forth the material provisions of the contract, or the will must make express reference to the contract and extrinsic evidence [proving] the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract. Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence.

UNIF. PROBATE CODE § 2-701 comment (1977).

76. See *supra* note 66.

77. See *supra* note 69.

78. See *Contracts Not to Revoke*, *supra* note 29.

79. *Id.* at 152. See also ROLLISON, COMMENTARY ON THE UNIFORM PROBATE CODE 18 (1970).

80. See *Contracts Not to Revoke*, *supra* note 39, at 152.

81. *Id.* See generally Curry, *supra* note 39, at 152.

contract.⁸² Without express written reference to a contract or a separate writing of a contract, none can be implied to exist.⁸³ The extrinsic factors, which the critics say are not defined, will only be allowed to prove the terms of a contract after express written evidence of a contractual understanding is apparent.⁸⁴

The official comment to Section 2-701 clearly shows the criticism of the section is without merit.⁸⁵ The comment states that the will must set forth the material provisions of the contract or make express reference to a contract in the will for an adopting jurisdiction to hold a contract exists.⁸⁶ The comment also states that the only way a writing in and of itself will be enough to prove a contract exists will be a writing other than the will.⁸⁷ This separate writing suggests a separate written contract, and stifles the criticism that the courts can still find a contract only from ambiguous terminology in the text of a will. This section will only accept an express writing as evidence of intent to contract. This section does afford substantial protection against finding a contract where there is no indication in a will itself whether the testators intended to enter into a binding contract.

The Uniform Probate Code has taken a legitimate step toward clearing up the inherent problems in executing joint or mutual wills. State legislators are cognizant of the confusion surrounding ascertaining testators' intent and many states are seriously considering the adoption of Section 2-701 or similar writing requirements. Since its acceptance in 1969, twelve of the fourteen states which have adopted all or part of the Code have adopted Section 2-701.⁸⁸ Still other states, which have not adopted the code, have seen fit to include in their probate statutes writing requirement provisions modeled after 2-701.⁸⁹ The number of states adopting a writing re-

82. See *supra* note 66 and accompanying text.

83. *Id.*

84. See *supra* note 69.

85. *Id.*

86. *Id.*

87. *Id.*

88. See *supra* note 65.

89. See, e.g., TEX. PROB. CODE ANN. § 59A (Vernon 1980):
Section 59A. Contracts Concerning Succession

(a) A contract to make a will or devise, or not to revoke a will or devise, if executed or entered into on or after September 1, 1979, can be established only by provisions of a will stating that a contract does exist and stating the material provisions of the contract.

(b) The execution of a joint will or reciprocal will does not by

quirement continues to grow as state courts continue to reach unclear and inconsistent contractual will decisions.

CONTRACTUAL JOINT AND MUTUAL WILLS IN INDIANA

The validity of a contract to devise is unquestioned in Indiana.⁹⁰ A testator or group of testators may create a binding contract to dispose of their property through will in a particular manner.⁹¹ Such a contract will be enforceable as long as it possesses the usual contractual requisites.⁹² It follows then that a contract or contract not to revoke created pursuant to a joint or mutual will is valid and enforceable and will bind the executing testators to the testamentary dispositions in the will or wills.

Essential to any contract is proof of its existence. In the case of a contract to devise, a court must be especially careful in evaluating evidence purporting to establish the existence of an oral or implied contract due to the notion that testators intending their wills to be irrevocable pursuant to a contract probably would want to state such clearly and sufficiently and not leave to conjecture what can be settled in a few written words of promise.⁹³ Contracts to devise are

itself suffice as evidence of the existence of a contract.

See also N.J.S.A. 3B:1-4. Although New Jersey has not adopted the Uniform Probate Code, it has adopted an identical section to Section 2-701 entitled "Contractual Arrangements Relating to Death." *Id.*

90. See *Lawrence v. Ashba*, 115 Ind. App. 485, 490, 59 N.E.2d 568, 570 (1945); *Manrow v. Deveney*, 104 Ind. App. 264, 266, 33 N.E.2d 371, 372 (1941).

91. *Id.*

92. The contract must include valid consideration, certainty and definiteness in its terms and mutual assent. It must be fair and just. See *Lawrence v. Ashba*, 115 Ind. App. 485, 490, 59 N.E.2d 568, 570 (1945), citing *Plemmons v. Pemberton*, 346 Mo. 45, 139 S.W.2d 910 (1940).

93. Professor Sparks discusses the difference between a mere agreement between testators and an actual consent between them:

When two people execute a common document as the will of each of them or when they execute separate documents at approximately the same time and in identical or almost identical language there is a tendency to pass too easily to the conclusion that such action must have been the result of a contract.

The clear weight of authority, and certainly the sounder view, is that the mere presence of either joint or mutual wills does not raise any presumption that they were executed in pursuance of a contract. Nor is this rule altered by evidence that the parties had "agreed" to the making of such wills. Of course they had so agreed. The mere presence of such wills reveals that the parties must have talked the matter over and must have arrived at an understanding or agreement concerning their testamentary dispositions. Such discussions and such understandings between persons of close affinities, especially between husbands and wives,

not well accepted by the entire legal profession.⁹⁴ Thus, unequivocal proof that the testators knowingly and willingly intended their wills to be burdened by the constraints of a contract is most important for the legitimacy of a decision finding such a contract.

The burden of proof that a joint or mutual will was executed pursuant to a valid contract is on the party who asserts that the contract exists.⁹⁵ At the present time Indiana courts follow the majority of courts in allowing a wide variety of extrinsic evidence to prove an underlying contract to devise.⁹⁶ When confronted with the claim of a contract or contract not to revoke a joint or mutual will, a court will first look for written evidence of an express contract.⁹⁷

are not unusual and the fact that they have taken place is no indication that there has been any thought of a binding contract.

SPARKS, *supra* note 1, at 27-28.

94. See *supra* notes 4-5 and accompanying text. See also *Joint and Mutual Wills*, *supra* note 3, at 679 ("Contracts to devise are not favored children of the law."). See also *Moore v. Harvey*, ___ Ind. App. ___, ___, 406 N.E.2d 354, 358 (1980).

95. See *Lawrence v. Ashba*, 115 Ind. App. 485, 490, 59 N.E.2d 568, 570 (1945), citing *Edson v. Parsons*, 155 N.Y. 555, 50 N.E. 265 (1898).

96. See *infra* notes 105-74 and accompanying text. See *supra* notes 58-60 and accompanying text.

97. See, e.g., *Mountz v. Brown*, 119 Ind. App. 38, 81 N.E.2d 374 (1948). In *Mountz* a husband and wife executed a written contract where they agreed in consideration of mutual devises that upon the death of the survivor their property should be distributed as provided for by a previously executed joint will. The contract stated:

This agreement, made and entered into this 16th day of May, 1934, by and between Daniel Brown and Ettie V. Brown, husband and wife, of Butler Indiana, Witnesses:

That whereas the said parties have heretofore entered into a certain joint will and contract, by which they agreed as to the final disposition of the property of which they shall die possessed and which joint will and contract was executed by each of them for a good and valuable consideration and is binding upon them, and which joint will and contract was by them executed and witnessed when executed by Charles Swift and Bertha Swift, his wife;

And whereas the said parties have mutually agreed and do now agree that the final distribution and the disposition of their said property shall be made in accordance with the terms and conditions of the said joint contract and will;

And whereas the said parties desire to have mutually agreed that during the life time of them and the survivor of them the terms of said joint contract and will shall not take effect or become public and that the survivor of them shall take all of said property at the death of the other and hold the title to it absolutely so long as such survivor lives;

Therefore, in consideration of the mutual considerations resulting from the execution and performance of this agreement and the execution of the said several wills of the parties as herein provided for, it is agreed

When there is no written contract or reference to a written contract, the court then looks to the will document itself to determine whether the provisions in it establish a contract.⁹⁸ When the will or wills alone are not sufficient to establish a contract, the court will go further and look to testimony of witnesses who know the facts, to admissions, acts, and conduct of the parties, and to "other circumstances,"⁹⁹ which may prove the existence of an underlying con-

that contemporaneous with the execution of the agreement, and in consideration thereof, each of said parties shall execute a will whereby each shall devise and bequeath to the other, in the event of the survival of said other, all of the property both real and personal of which each shall die possessed and that the survivor shall take and hold the said property during the remainder of his or her life subject to the terms and conditions of the said joint will and contract, and holding said property in trust only to such extent as may be necessary to fully carry out the terms of the said joint will and contract and to fully protect the rights of all persons for whom provision is made and is to be made under the terms of said joint will and contract, and upon the death of the survivor of these parties, Daniel Brown and Ettie V. Brown, the said property then remaining of which these parties, either and both of them died possessed, shall be distributed as in said joint will and contract had been the last will and testament of each and both of these parties.

And each of these parties covenant and agree, in consideration, of the execution of the wills herein provided for and executed contemporaneous herewith, not to make any other or different disposition of any of their property except as provided for herein and agree to fully perform and carry out all the terms and conditions of all of said agreements and wills, including said instrument referred to as said joint will and contract.

Id. at ___, 81 N.E.2d at 375-76. The importance of this early case is that it shows, in certain terms, the testators' intent to enter into a contract making their testamentary dispositions irrevocable. This detailed written contract, executed along with the accompanying wills, does not leave the testators' intent in doubt as in cases where an oral or implied contract is alleged.

98. In *Sample v. Butler Univ.*, 211 Ind. 122, 4 N.E.2d 545, *reh'g denied*, *modified on other grounds*, 211 Ind. 122, 5 N.E.2d 888 (1936), mutual wills executed by husband and wife stated in part:

Whereas, it has been agreed . . . that we shall each make a separate will bearing the same date disposing of our property owned by us jointly as husband and wife and situated in the State of Indiana, in such a way that our children shall derive a certain benefit therefrom after the death of the survivor of us, and that after said wills are so made neither of us will revoke or destroy either of such wills or make any other will or codicil without the full consent and agreement of both.

The court held that this provision was clearly determinative of the parties' intention to enter into a contract not to revoke their wills. *Id.* at ___, 4 N.E.2d at 548. *See also* *Brown v. Union Trust Co. of Greensburg*, 229 Ind. 404, 98 N.E.2d 901 (1951).

99. *See* *Cramer v. Echelbarger*, 142 Ind. App. 374, 377, 234 N.E.2d 864 (1968); *Lawrence v. Ashba*, 115 Ind. App. 485, 490, 59 N.E.2d 568, 570 (1945); *Plemmons v. Pemberton*, 346 Mo. 45, ___, 139 S.W.2d 910, 915 (1940). The criteria of "other cir-

tract. The standard that Indiana courts adhere to is that evidence to support a contract to devise must be "clear, definite, convincing, unequivocal and satisfactory."¹⁰⁰ On its face this standard appears to be a demanding one.

Several recent Indiana Court of Appeals decisions show that the state courts do not apply the clear and convincing standard consistently or with the same rigidity. Through ambiguous and loose language two distinct interpretations of the clear and convincing standard as it applies to claims of oral or implied contracts pursuant to joint or mutual wills emerge. In some cases the court is very liberal in its interpretation of the clear and convincing standard and appears willing to imply a contract from the mere execution of a joint or mutual will as long as a few "magic" words of devise show up in the will itself.¹⁰¹ This practice is clearly against the weight of authority throughout the country.¹⁰² In other cases the court retreats and becomes very demanding in its interpretation of the clear and convincing standard.¹⁰³ In these latter cases the court desires much more of a showing of contractual intent and will not find a contract based on evidence which clearly would suffice in those cases where the court was liberal in its clear and convincing interpretation. Further, the court tries and fails to distinguish the liberal interpretation from the stricter one, and in doing so leaves the issue of determining testator intent in disarray.¹⁰⁴ The following discussion will highlight the inconsistency the court has shown in the determination of testator intent concerning oral or implied contracts executed pursuant to joint or mutual wills.

A Liberal Interpretation of the Clear and Convincing Standard

In *Cramer v. Echelbarger*,¹⁰⁵ the court was confronted with a will contest and action to quiet title based on the allegation that

cumstances" seems to leave open the question of various kinds of evidence arising from the unique set of facts in each controversy. "Other circumstances" remains undefined under Indiana case law.

100. *Lawrence v. Ashba*, 115 Ind. App. 485, 490, 59 N.E.2d 568, 570 (1945), citing *Plemmons v. Pemberton*, 346 Mo. 45, ___, 134 S.W.2d 910, 918 (1940). See also *infra* note 114.

101. See *Estate of Maloney v. Carsten*, ___ Ind. App. ___, 381 N.E.2d 1263 (1978); *Cramer v. Echelbarger*, 142 Ind. App. 374, 234 N.E.2d 864 (1968). See also *infra* notes 105-32 and accompanying text.

102. See *supra* note 60.

103. See *Moore v. Harvey*, ___ Ind. App. ___, 406 N.E.2d 354 (1980); *Wisler v. McCormack*, ___ Ind. App. ___, 406 N.E.2d 361 (1980).

104. See *infra* notes 105-39 and accompanying text.

105. 142 Ind. App. 374, 234 N.E.2d 864 (1968).

mutual wills were executed pursuant to a contract which bound the surviving testator to certain testamentary dispositions. A husband and wife, both previously married, executed mutual wills. A provision of the wills stated that the survivor would receive all of the property of the decedent testator, and that the survivor would will or convey all of the property in that survivor's possession at death to the daughter of the wife by a previous marriage. Of special interest in this case was a farm the wife brought into the marriage which was owned by her family for over one hundred twenty-five years. Subsequent to the marriage of the testators, the farm was conveyed through a trustee to both testators in the entirety.

At the wife's death, the husband took all of her property, including the farm, pursuant to the will. He then remarried and had all of his property reconveyed to himself and his third wife as tenants by the entirety. He further executed a new will which left all of his estate to his new wife if she survived him and only to his step-daughter if his wife predeceased him.¹⁰⁶ The husband died and his last will was entered into probate. His third wife survived him. However, his step-daughter claimed the execution of the last will and the act of having the farm and other property conveyed to himself and his third wife contravened a contract existing between him and his second wife.

The court ruled that the original mutual wills were executed pursuant to a valid and enforceable contract which bound the husband to leave the farm and other property he received from his second wife to his step-daughter.¹⁰⁷ Thus, the surviving husband's act of reconveying the property and treating the step-daughter differently under his new will was a breach of that contract. However, a look at the evidence shows that the court was liberal in its application of the clear and convincing standard to the evidence offered to establish the existence of a contract.

The court stated, without going into detail, that the evidence showed an "agreement" between the testators was well known to their friends and associates.¹⁰⁸ The court further found credence in a provision of the will which stated:

106. Actually, after the death of his second wife, the husband executed a series of wills. The first will bequeathed his personal property to his third wife and his real estate, including the farm, to his step-daughter. The second will devised one-half of the real estate to his third wife and one-half to his step-daughter. The final execution bequeathed to his third wife all of the real estate and only if she predeceased him would it go to his step-daughter. *Id.* at 376-77, 234 N.E.2d at 866.

107. *Id.* at 377, 234 N.E.2d at 866.

108. This evidence is presumably oral testimony. *Id.*

I hereby give, devise and bequeath all of my property, be the same real or personal, wherever situate, to my husband. . . . In making this bequest, I am not unmindful of my daughter . . . but have the fullest confidence in the promise of my husband that, at his death, he will leave all of our property of which he has possession to [her].¹⁰⁹

Based on this evidence alone the court ruled that a binding contract existed between both testators and that the husband was bound to leave the farm and other property pursuant to this contract to his step-daughter.¹¹⁰

The evidence presented in *Cramer* is equivocal on the question of the existence of a contract binding the testators to the dispositions set forth in the mutual wills. There is no clear demonstration that the testators mutually agreed that the survivor was bound to leave all of his property in his possession at death to his step-daughter. The evidence presented does show that the testators talked of leaving property to the step-daughter; however, such talk falls short of unequivocal proof of contract. The provision in the will of the wife which the court found persuasive makes reference only to a promise but not to a contract.¹¹¹ The will says nothing definite about the husband's rights or duties with his property while he is alive and further states nothing about the farm in particular. The reference in the will to the wife's "fullest confidence" in her husband's promise suggests that there may have been only a moral obligation to leave the property to the step-daughter.¹¹² Further, one must ask why, if the testators intended to enter into a contract to devise, such contract or reference to a contract does not appear in the will.

The *Cramer* court stated that a contract must be shown by clear and convincing evidence, and that the contract must be clear, definite and unequivocal.¹¹³ The evidence presented falls short of

109. *Id.*

110. *Id.* at 376-77, 234 N.E.2d at 865-66.

111. See *supra* note 109 and accompanying text.

112. At least one court has stated that a constructive trust cannot be found on a moral obligation alone. In *Oursler v. Armstrong*, 10 N.Y.2d 385, 223 N.Y.S.2d 477, 179 N.E.2d 489 (1961), a husband and wife, both in their second marriage, executed mutual wills providing for their respective children of previous marriages upon the death of the survivor. After the husband died, the wife revoked her will and executed a new one which provided only for her children and which disinherited her step-children. The court failed to imply a contract not to revoke the original wills. See Comment, *Wills - Mutual Wills - Moral Obligation Not Sufficient to Establish Constructive Trust*, 13 SYRACUSE L. REV. 621 (1961-62).

113. *Cramer v. Echelbarger*, 142 Ind. App. 374, 377, 234 N.E.2d 864, 866 (1968).

such a demanding evidentiary standard and the court displays a very liberal interpretation of what evidence will meet the clear and convincing standard.¹¹⁴ The facts presented do not create the impression that the parties intended to enter into an irrevocable contract to devise.¹¹⁵ In holding that there was a contract, the court seriously usurps the ambulatory characteristic of the will in question.¹¹⁶ In a more recent case, the Court of Appeals continued to show its liberal interpretation of the clear and convincing evidentiary standard.

In *Estate of Maloney v. Carsten*,¹¹⁷ a husband and wife executed a joint will, with reciprocal provisions, which provided that on the death of the survivor the property of the estate was to be divided among relatives of both testators.¹¹⁸ The husband died and the wife

114. The clear and convincing standard is "utilized when . . . the legal and social ramifications of the civil proceedings are serious." *Tucker v. Marion County Dept. of Public Welfare*, ___ Ind. App. ___, ___, 408 N.E.2d 814, 820 (1980). In equating the requirement of clear and convincing evidence, such evidence is a quantum of proof "which leave no reasonable doubt in the mind of the trier of fact." *In re Estate of Dawson*, 103 Ill. App. 2d 362, 371, 243 N.E.2d 1, 5 (1968).

115. See *infra* note 137 and accompanying text.

116. See *infra* notes 138-39 and accompanying text.

117. ___ Ind. App. ___, 381 N.E.2d 2163 (1978).

118. The will stated as follows:

JOINT LAST WILL AND TESTAMENT OF JOHN F.

MALONEY AND LENA N. MALONEY, HUSBAND AND WIFE

We, John F. Maloney and Lena N. Maloney, husband and wife, of Churusbuco, Whitley County, Indiana, desiring to protect each other in the disposition of our property and desiring to make final disposition thereof upon the death of the survivor of us, do now make, publish, acknowledge, and declare this to be our joint last Will and Testament.

Item One

It is our desire and will that the just and legal indebtedness of each of us shall be paid as soon as possible after our decease by our executor hereinafter named. At the death of the survivor of us, we give and bequeath the sum of Five Hundred Dollars (\$500.00) for Masses for ourselves to Ege Catholic Church, Ege, Indiana.

Item Two

We each give and bequeath unto the survivor of us all personal property of every description of which we may be possessed or the owner at the time of our death.

Item Three

The real estate of which we or either of us may die seized or acquire, we give, devise and bequeath unto the survivor of us for and during the period of the natural life of such survivor. At this time we are both of the opinion that it would be to the best interests of the survivor of us to keep our real estate but on account of illness or from some other unforesee cause it would be necessary for the comfort, happiness, and best interest of the survivor to sell our real estate or a portion thereof,

subsequently executed a new will in which she substantially changed the testamentary scheme of the original joint will. Upon her death, suit was filed against her estate. The claim was filed by descendants of the beneficiaries who were named in the joint will but unmentioned in the subsequent will.¹¹⁹ The claimants alleged that the joint will was executed pursuant to a contract not to revoke and that execution of the second will, which revoked the first, was a breach of the contract. The claimants asked for a constructive trust to be imposed on the property passing by the subsequent will and to give effect to the testamentary dispositions set forth in the original joint will. The court concluded that the will itself was sufficient evidence that the testators had entered into a contract not to revoke and imposed a constructive trust on the estate property.¹²⁰

The resolution of the contractual issue in *Maloney* is a poor one. The court based its decision on weak reasoning and in addressing the critical dispute of the existence of a contract, begged the

they may do so.

Item Four

Subject to Items One, Two, and Three, of this our joint last Will and Testament, we give, devise, and bequeath all our property both real and personal a one-half share thereof to the relatives of John F. Maloney hereinafter named; and a one-half share thereof to the relatives of Lena N. Maloney hereinafter named: that is to say

William C. Maloney brother of John F. Maloney shall receive 50 per cent of said one-half share.

Thereon Grawcock and Oscar Joe Grawcock nephews of the testator, John F. Maloney, shall receive 25 percent each, of said undivided one-half share.

Robert Benward and Clarence Benward brothers of the testatrix, Lena N. Maloney, shall take equal shares of 75 percent of said one-half share.

Mary Ellen McCormick niece of the testatrix, Lena N. Maloney, shall take 25 percent of said one-half share of said estate. Should Mary Ellen McCormick die without children then her share in our estate shall go to Robert Benward and Clarence Benward in equal shares.

Item Five

On the death of either of us, it is our will that the survivor act as executor or executrix of our estate. Provided, however, that on the death of the survivor, it is our desire and request that Churubusco State Bank, Churubusco, Indiana act as executor of our estate.

In Witness Whereof, we have hereunto subscribed our names and seals, this 13th day of July, 1951.

Id. at ____, 381 N.E.2d at 1266.

119. *Id.* at ____, 381 N.E.2d at 1266.

120. *Id.*

essential question.¹²¹ The opinion stated that not finding an implied contract from the terms of the will would be inconsistent with the intention of the testators.¹²² However, the initial question was did the testators intend a contract? The court pointed to no unequivocal evidence that the testators did intend to enter a binding contract not to revoke. The factors that the court offered as proof of a contract showed no more than the testators' desire to mutually execute a joint will.

The preamble of the will stated the intention of the testators was to "protect" each other and to make "final disposition" of the property involved. The court concluded that these words were strong evidence of the parties intent to create a contract.¹²³ It is evident that the parties wanted to protect each other by executing the will, but this intent does not imply an intent to enter into a contract. The meaning of the word "protect" is unclear.¹²⁴ The court seemed to think that one party wanted to protect himself from the other party after death and that this protection would be warranted by finding an implied contract.¹²⁵ An equally logical interpretation is that the meaning of "protect" referred to protecting the other testator upon the death of the first. It is very common for a spouse, when executing a will, to make dispositions which insure that the survivor will have means by which to live.¹²⁶ This is especially true when one spouse has been primarily responsible for most of the income.¹²⁷ Further, if the testator's idea of protection meant to protect himself from the actions of the survivor, that testator may well have mentioned protecting the third-party beneficiaries as well.¹²⁸ Arguably, one who is worried about a surviving spouse changing

121. The court appears to assume the matter at issue (testator intent) in its conclusion when it states: "Any other conclusion would be inconsistent with the intentions of the testators. . . ." *Id.* at ____, 381 N.E.2d at 1267.

122. *Id.*

123. *Id.*

124. The preamble stated:

We, John F. Maloney and Lena M. Maloney, husband and wife, of Churubusco, Whitley County, Indiana, desiring to protect each other in the disposition of our property and desiring to make final disposition thereof upon the death of the survivor of us, do now . . . declare this to be our joint last Will and Testament.

Id. at ____, 381 N.E.2d at 1266.

125. *Id.*

126. See generally *Lamberg v. Callahan*, 455 F.2d 1213, 1218 (3d Cir. 1972).

127. *Id.*

128. There was no mention of third-party beneficiaries in the preamble. See *Estate of Maloney v. Carsten*, __ Ind. App. ____, ____, 381 N.E.2d 1263, 1267 (1978).

provisions in a will, and thinks in terms of protecting himself, would want to make certain that the beneficiaries to whom he intends his estate to pass are likewise protected.

The court also placed considerable weight on the words "final disposition" in the preamble.¹²⁹ It felt that if the intent of the parties was to make a "final disposition," then they must have intended that disposition to be guarded by a contract.¹³⁰ This interpretation of the word "final" is questionable because of the context within which the word is used. Words like "final," "last," and "ultimate" are very common in the preamble of wills. These are common words of devise. It is questionable to hold that executing a "final will" or "last will" is substantial evidence of a contract that binds the testator to the terms forever.¹³¹ The primary feature of a will is its finality unless or until it is revoked by a subsequent will.¹³² In *Maloney*, the words of the preamble do express the testators' desire to make a final disposition, but do so in a manner similar to all wills. The preamble does not show any extraordinary intent to bind the testators to an irrevocable contract.

The court also gave weight to the testamentary scheme of the will.¹³³ The will provided that upon the death of the survivor the estate would be divided equally among the family of each testator.¹³⁴ This scheme, the court held, was further evidence of an implied contract not to revoke the will.¹³⁵ Here again the court might have implied that a moral obligation is the same as a contract, and in doing so undermined the clear and convincing standard which must be met to prove a contract.¹³⁶

In both *Cramer* and *Maloney* the existence of a contract to devise is unclear. The facts are at best equivocal in proving the in-

129. See *supra* note 124 and accompanying text.

130. The court stated the testators "very clearly and unambiguously stated that their purpose in executing the joint will was 'to protect each other in the disposition of our property' and 'to make final disposition thereof upon the death of the survivor of us.'" *Maloney*, at ___, 381 N.E.2d at 1267.

131. While the most common preamble found in a will asserts merely to be a "last will," see generally ATKINSON, LAW OF WILLS § 147 at 819 (1953), the fact that the word "final" was used in the preamble, absent other significant contractual writing, should not be conclusive of a contract in light of the clear and convincing standard.

132. 1 BOWE-PARKER: PAGE ON WILLS § 1.2, at 3 (3d ed. 1960).

133. See *Estate of Maloney v. Carsten*, ___, Ind. App. ___, ___, 381 N.E.2d 1263, 1267 (1980).

134. *Id.*

135. *Id.*

136. See *supra* note 114.

tent of the testators to enter into an agreement where they bargained away their ambulatory rights to convey property. It is not hard to see how the court reached its decisions because in both cases the facts show that there was a moral reason to bind the testators to their original wills.¹³⁷ However, in reaching what may have been the "right" decision, the court fails to uphold the ambulatory nature of a will and fails to uphold the substantial burden of the clear and convincing standard. The court, in both cases, began with the premise that a contract would be implied only if the evidence left nothing to conjecture.¹³⁸ This is the basic premise of the clear and convincing standard.¹³⁹ But the courts in both cases appear to retreat from the demands of that standard and base contracts on unclear, ambiguous evidence and in so doing create questions as to what will or will not meet the clear and convincing test.

Creating a Stricter Burden of Proof

Soon after the ruling in *Maloney*, the Court of Appeals was confronted with two more claims of contracts not to revoke joint wills.¹⁴⁰ In both cases the court retreated from the liberal interpretation of the clear and convincing standard it displayed in *Maloney* and *Cramer*. The court demanded much more of a showing that the testators intended to enter a contract to devise, and in doing so demonstrated a completely different interpretation of what type of evidence would meet the clear and convincing standard. The court failed to acknowledge this change in approach and failed to adequately distinguish the earlier cases. Consequently, the court left unanswered important questions as to its position on proving testator intent.

In *Moore v. Harvey*,¹⁴¹ a husband and wife executed a joint will. The will left all the property to the survivor of the two, and then listed a testamentary scheme effective upon the survivor's death.¹⁴²

137. In *Cramer*, not finding a contract would have meant a third party receiving in fee simple a farm which was owned by another family for over one hundred twenty-five years. In *Maloney*, not finding a contract would have meant the surviving wife would have had the power to disinherit her husband's blood relatives after he died.

138. *Cramer v. Echelbarger*, 142 Ind. App. 374, 377, 234 N.E.2d 864, 866 (1968); *Estate of Maloney v. Carsten*, ___ Ind. App. ___, ___, 381 N.E.2d 1263, 1267 (1978).

139. See *supra* note 114 and accompanying text.

140. *Moore v. Harvey*, ___ Ind. App. ___, 406 N.E.2d 354 (1980); *Wisler v. McCormack*, ___ Ind. App. ___, 406 N.E.2d 361 (1980).

141. ___ Ind. App. ___, 406 N.E.2d 354 (1980).

142. *Id.* at ___, 406 N.E.2d at 356.

Two particular parcels of land were specifically devised, one to their son and one to their daughter.¹⁴³ Thirteen years after the husband died the wife was diagnosed as having terminal cancer of the lung. She was forced to have constant medical care and went to live with her daughter. Several days before she died, the wife conveyed both parcels of land, the one intended for her daughter plus the one intended for her son, to her daughter by deed.¹⁴⁴ The son, upon learning of this conveyance, brought an action against his mother's estate claiming the original joint will was executed pursuant to an irrevocable contract and that the act of conveying the property *inter vivos* contravened that contract.¹⁴⁵

The preamble of the will in *Moore* stated:

We, Landis M. Moore and Carrie M. Moore, husband and wife, of Hamilton County, Indiana, having mutually agreed to make the devises and bequests hereinafter set out, and in consideration of the testamentary disposition of our property hereinafter made, hereby make, declare and publish this our joint will.¹⁴⁶

The remainder of the will left the property in fee simple to the survivor and then upon the death of the survivor the will contained provisions disposing of all of the assets owned by the survivor.¹⁴⁷ The court held that this evidence was not enough to meet the clear and convincing standard and failed to establish an implied contract not to revoke the will.¹⁴⁸

143. *Id.*

144. *Id.*

145. *Id.* at ____, 406 N.E.2d at 357.

146. *Id.*

147. *Id.* at ____, 406 N.E.2d at 358.

148. The court stated:

The only evidence offered by Moore at trial on the issue of an agreement of irrevocability was the will itself. . . . Hence, there was nothing other than the preamble for the trial court to consider in determining whether Carrie and Landis intended to bind each other to the terms of their joint will. The trial court determined Moore failed in his burden of establishing a contract of irrevocability. An examination of the preamble compels our agreement with the trial court's determination that the language in the preamble of the will is insufficient to establish an express or implied contract of irrevocability. The language in the preamble expresses a present agreement to effect a certain disposition after their deaths but does not expressly state an agreement that the presently agreed disposition is forever binding. Thus, the trial court correctly determined the preamble was not an express contract of irrevocability.

Id.

The decision in *Moore* not to imply a contract appears to be a correct evaluation of the evidence presented against the rigorous demands of the clear and convincing standard. However, the decision is suspect in light of the earlier approach taken by the court in *Cramer and Maloney*. In *Maloney*, the court stated that the correct construction of a will is that which is consistent with the intent of the testator as it appears in the will.¹⁴⁹ Further, the court in *Maloney* gave great weight to the preamble which stated the purpose of the testators executing a joint will. In *Moore*, the testators executed a will which provided for specific bequests to both the son and daughter. By upholding the *inter vivos* transfer, the court does not give full effect to the intentions of both testators, which was to provide for both children. Further, the preamble states that the testator's "mutually agreed" to the bequests therein and in "consideration of the testamentary dispositions" published their joint will.¹⁵⁰ This language is clearly language of contract. The court does not give adequate treatment to these factors.

The facts in *Moore* were very uncertain on the issue of whether the testators entered into a contract not to revoke. However, in light of the earlier *Maloney* decision where the court displayed a liberal interpretation of what evidence would meet the clear and convincing standard, *Moore* creates uncertainty as to when the court will be convinced of a contract. Perhaps the *Moore* court thought the *Maloney* decision was a poor one. If this was so, then the *Moore* decision was the place to voice that criticism. One month later, in another implied contract claim, the Court of Appeals tried to set some definite standards in this area, but still did not adequately explain the shift in interpretation of the clear and convincing standard.

In *Wisler v. McCormack*,¹⁵¹ a husband and wife executed a joint will with reciprocal provisions. The will provided that on the death of the surviving testator all of the property would transfer in equal shares to the testators' nieces and nephews.¹⁵² The key difference

149. *Estate of Maloney v. Carsten*, ___ Ind. App. ___, ___, 381 N.E.2d 1263 at 1267 (1978), citing *Brown v. Union Trust Co. of Greensburg*, 229 Ind. 404, 98 N.E.2d 901 (1951).

150. See *supra* note 146 and accompanying text.

151. ___ Ind. App. ___, 406 N.E.2d 361 (1980).

152. The will provided:

KNOW ALL MEN BY THESE PRESENTS:

That we, Clayton E. Weis and Bertha S. Weis, husband and wife, of St. Joseph County, Indiana, both being of sound mind and memory, do make,

between the joint will in *Maloney* and the one in *Wisler* was a provision in the latter will which gave a certain parcel of land and some money owned by the husband to named third parties outside the family.¹⁵³ After the husband died the wife executed a new will which disposed of her property in a substantially different manner than the joint will. Upon her death, a claim against her estate was filed by a residuary devisee under the joint will. The claimant alleged that the joint will embodied a contract not to revoke its provisions. He relied on the court's ruling in *Maloney*¹⁵⁴ to claim that he was entitled to a portion of the estate.¹⁵⁵

The *Wisler* case presented facts very similar to the *Maloney* case.¹⁵⁶ However, the court failed to find a contract. The court dis-

publish and declare this instrument to be jointly as well as severally, our last will and testament, hereby revoking all former wills.

1. We direct that all just debts and funeral expenses shall at all times be fully paid and the erection of monument and markers.

2. Upon the decease of the said Clayton E. Weis, we give and devise all of the property owned by the said Clayton E. Weis in the South East Quarter (1/4) of the South East Quarter (1/4) of Section Twenty-eight (28), Township Thirty-seven (37) North, Range Three (3) East, in St. Joseph County, Indiana; unto Carl M. Fulmer.

3. Upon the decease of the said Clayton E. Weis, we give and bequeath unto the Coalbush Evangelical United Brethren Church of Penn Township, St. Joseph County, Indiana, the sum of Ten Thousand (\$10,000.00) Dollars.

4. We give, bequeath, and devise all of the rest and residue of our property, real as well as personal, of which we may be possessed or entitled to dispose of at the time of the decease of either of us, to the survivor.

5. Upon the decease of the survivor of us, we give, bequeath, and devise all of the property of such survivor, real as well as personal, to the nephews and nieces of each of us, to be shared by them as tenants in common, share and share alike.

6. We nominate and appoint the said Carl M. Fulmer to act as executor of this, our last will and testament.

In witness whereof, we have hereunto subscribed our names this ____ day of June, 1947.

Id. at ____, 406 N.E.2d at 362-63.

153. See *supra* note 152 provisions #2 and #3.

154. *Maloney v. Carsten*, ____ Ind. App. ____, 381 N.E.2d 1263 (1978).

155. In holding that *Maloney* was not applicable, the court stated: "*Maloney*, relied upon by the claimant is inapposite. . . . In the instant case no comparable language can be found." *Wisler v. McCormack* at ____, 406 N.E.2d 364, n.2.

156. In both cases a husband and wife had executed joint wills with no express

regarded the path of reasoning used in the *Maloney* decision and instead cited an Illinois case as persuasive authority.¹⁵⁷ This Illinois case set out guidelines compiled from a study of opinions which had analyzed various implied contract allegations in various cases.¹⁵⁸ These guidelines were much stricter than the guidelines used by the court in *Maloney*. The court held that the necessities for finding an implied contract were the mutuality of promises or reciprocal considerations, the intent of the testators to merge both estates into one corpus, a limitation on the use of the property by the survivor, and an actual agreement not to revoke, or evidence showing such an agreement.¹⁵⁹

In *Maloney*, the evidence that led the court to find a contract was the language of finality in the preamble and the dividing of the total estate in equal shares to relatives.¹⁶⁰ Evidence of both of these factors was present in *Wisler*, but the court did not find it persuasive.¹⁶¹ Instead, the court, in making its decision, noted that the will did not contain a specific recital that was contractual.¹⁶² Although the will did employ plural pronouns, the court ruled that these pronouns by themselves amounted to nothing more than the natural usage of language by two testators executing their wills in one document.¹⁶³

The court in *Wisler* paid particular attention to the provisions in the will which devised land and some money to named third par-

contract or reference to a contract. In both cases the husband died and wife subsequently executed a new will which substantially changed the provisions of the original joint will. In *Maloney*, the joint will provided for all of the estate to be divided equally among both testators' relatives. In *Wisler*, the joint will provided for most of the estate property to be divided equally among the testators' nieces and nephews.

157. See *Wisler v. McCormack* at ___, 406 N.E.2d at 363-64, citing *Estate of Mueller*, 26 Ill. App. 3d 163, 324 N.E.2d 674 (1975).

158. *Id.*

159. *Id.*

160. See *supra* notes 120-34 and accompanying text.

161. The preamble stated:

KNOW ALL MEN BY THESE PRESENTS:

That we, Clayton E. Weis and Bertha S. Weis, husband and wife, of St. Joseph County, Indiana, both being of sound mind and memory, do make, publish and declare this instrument to be jointly we well as severally, our last will and testament, hereby revoking all former wills.

Wisler v. McCormack, ___ Ind. App. ___, 406 N.E.2d 361, 362 (1980).

162. *Id.* at ___, 406 N.E.2d at 364.

163. The court cited *Reynolds v. Park*, ___ Tex. Cir. App. ___, 521 S.W.2d 300 (1975), to support the finding that the contract claim failed in part because there was no specific contractual recital. *Wisler v. McCormack*, ___ Ind. App. ___, ___, 406 N.E.2d 361, 364 (1980).

ties on the death of the husband.¹⁶⁴ The court held that these provisions showed there was no joinder of property into one corpus, and that the intent of the testators was to separately execute their wills by one instrument. This reasoning is suspect. The wording of these provisions contained similar plural pronouns to those used in the remaining distributions.¹⁶⁵ Therefore, in all of the devises, both parties were executing control over each disposition. It is arguable then that there was joinder of all the assets because both testators jointly controlled each disposition. In any event, there was definitely joinder of assets of all of the property of both testators, except for the specific land and money, pursuant to bequest number four.¹⁶⁶

The result in *Wisler*, of not finding an implied contract, seems appropriate. The specific facts presented did not present clear and convincing evidence of an irrevocable contract. However, the credibility of the decision in light of the previous *Maloney* holding is weak. *Wisler's* weakness lies in the court's analysis and handling of its earlier decision in *Maloney*. The court attempted to distinguish the cases and in doing so created more confusion than clarity.

The facts of *Maloney* and *Wisler* are so similar that one would have expected the court to resolve the cases with the same reasoning and holding. Instead, the *Wisler* court tried to distinguish its earlier finding in *Maloney* by comparing the language of the two wills.¹⁶⁷ In a footnote to the opinion, the court stated that there was no comparable language in the *Wisler* preamble to the words "protect" and "final" found in the *Maloney* preamble.¹⁶⁸ Although there were no words to this effect, this is not enough to justify the different holdings of the cases. The cases can only be distinguished on the basis that the court was holding an implied contract claim to a new, stricter application of the clear and convincing standard. The

164. See *supra* note 152.

165. *Id.*

166. The fourth bequest stated that all the remaining property of either decedent would pass to the survivor. The fifth bequest then stated that relatives from both testators' family would share all of this property equally upon the death of the survivor. *Wisler v. McCormack*, ___ Ind. App. ___, ___, 406 N.E.2d 361, 362-63 (1980). This appears to be the joinder of property into one corpus the *Wisler* court said was necessary to imply a contract. Notwithstanding the two specific devises, it can be argued the rest of the estate was subject to the constraint of a contract pursuant to the *Maloney* decision.

167. *Wisler v. McCormack*, ___ Ind. App. ___, ___, 406 N.E.2d 361, 364 n.2 (1980).

168. *Id.*

court in *Wisler* was changing the approach taken in *Maloney*, thus rendering its continued validity questionable.

Maloney and *Wisler* epitomize two completely different approaches to solving the same problem. Unfortunately, this is difficult to understand since both decisions came from one court,¹⁶⁹ and the latter did not claim to criticize the former. In *Maloney* the court appeared willing to infer the existence of a contract from a minimum of evidence.¹⁷⁰ It also appeared willing to determine the testator's intent from the use of a few ambiguous words in the will's preamble.¹⁷¹ In *Wisler*, the court took a stricter approach to resolving the question of testator intent by listing very specific guidelines which should be followed. These include the actual recital of a contractual arrangement.¹⁷² In *Maloney*, the court appeared to take the position that it could infer from a few commonly used words what the testators intended.¹⁷³ In *Wisler*, the same court demanded that if the testators intended to form a contract they must have expressly stated that intent. There is no consistency between these two case resolutions. Further, there are no reasonable grounds upon which to distinguish the approaches taken by the court.¹⁷⁴

169. Both *Maloney* and *Wisler* were appeals to the Court of Appeals of Indiana, Third District. In *Maloney*, Judge Staton wrote the opinion, Judge Hoffman and Judge Chipman (by designation) concurred. In *Wisler*, Judge Hoffman wrote the opinion, Judge Garrard concurred, and Judge Staton concurred in the result.

170. See *supra* notes 120-32 and accompanying text.

171. See *supra* notes 133-36 and accompanying text.

172. *Wisler v. McCormack*, ___ Ind. App. ___, ___, 406 N.E.2d 361, 363 (1980).

173. See *supra* notes 123-32 and accompanying text.

174. One may question the inconsistencies apparent between *Moore* and *Wisler*. Both of these cases establish the strict approach to interpreting joint wills. However, *Moore* only cites Indiana precedent in establishing the strict standard. *Moore* cites *Lawrence v. Ashba*, 115 Ind. App. 485, 59 N.E.2d 568 (1945), which held that an implied contract can only be found when the evidence is "clear, definite, unequivocal, and satisfactory." *Id.* at 490, 59 N.E.2d at 570. The *Moore* court then determined that the will did not warrant finding an implied contract, and suggested that the claimant should have offered more evidence in the way of witnesses who knew the facts, admissions of the parties, acts and conduct of the parties, and other circumstances surrounding the execution of the will. *Moore v. Harvey*, ___ Ind. App. ___, ___, 406 N.E.2d 354, 358 (1980).

In *Wisler*, the court also cited *Lawrence v. Ashba*, 115 Ind. App. 485, 59 N.E.2d 568 (1945), to establish the evidentiary standard. However, *Wisler* went one step further and cited as persuasive authority out-of-state cases which discussed guidelines to follow in applying the strict "clear and convincing" standard. See *supra* notes 157 and 163 and accompanying text. The *Wisler* court then applied these out-of-state guidelines as requisites to finding an implied contract in Indiana. While both *Moore* and *Wisler* work to establish a strict evidentiary approach, *Wisler* substantiates its decision with case law while *Moore* offers none.

REFLECTIONS ON THE INCONSISTENCIES

It is argued that determining whether testators intended to enter into an irrevocable contract when executing a joint or mutual will is an area of the law particularly suited for free decision and lack of standardized treatment.¹⁷⁵ This argument is based on the fact that there are countless sets of different facts surrounding each contract claim and also because the court may use concepts of fairness¹⁷⁶ as a motivator beyond the basic law of wills and contracts. But this argument loses its validity when resolutions of similar issues are so different and so inconsistent that general guidelines are not predictable or ascertainable. Although a case-by-case analysis is necessary because the facts of each estate will differ, the court cannot "afford to stultify itself through erratic and inarticulate decisions."¹⁷⁷ If a contract is to be the basis for enforcing a joint will and the contract depends for its proof on pure form, then there is no room for consideration of the fairness of the dispositive scheme.¹⁷⁸ The ultimate and only question that must be answered is whether the evidence shows an intent of the parties to enter forever into a binding contract.¹⁷⁹ The problem with an *ad hoc* method of resolution is that no one can be sure, before the court actually submits its opinion, what facts and evidence will or will not be persuasive of a contract. A theory used in one case to do justice may not be employed in other cases because the court feels differently about how justice can be served. "The price of perfect flexibility is that no case serves as a guide for the next."¹⁸⁰

Since the applicable law in most implied contract claims is controlled by precedent, the resolutions of prior cases are important to all parties involved in similar subsequent claims.¹⁸¹ Trial courts need to be able to look to past resolutions of similar issues to be sure that the decision they will render is consistent with the law in the state.¹⁸² The trial court needs to show that the treatment a case has received is the same treatment the case would receive in a higher

175. See *Young*, *supra* note 11, at 440.

176. *Id.* See also *Eagleton*, *supra* note 5, at 379.

177. *Young*, *supra* note 11, at 440.

178. *Id.* at 447. Professor Eagleton has stated that "considerations of fairness" may exert a conscious or unconscious influence on the court. *Eagleton*, *supra* note 5, at 379; see also *Young*, *supra* note 11, at 448-51.

179. *Cramer v. Echelbarger*, 142 Ind. App. 374, 377, 234 N.E.2d 864, 866 (1968).

180. *Young*, *supra* note 11, at 449.

181. *Id.*

182. The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the

court. Attorneys and parties to lawsuits also look at past cases for some degree of predictability when deciding whether to proceed in an original claim or appeal from an unfavorable judgment. The more cases that are clearly and consistently decided on the lower court level, the less chance that the same case will have to be reviewed.

The four recent Indiana cases discussed are not serving collectively as a guide to subsequent contract claims. The Court of Appeals has invited excess litigation by representing two inconsistent resolutions to the same issue. A third party beneficiary who thinks he may have been defrauded would be foolish not to bring a claim based on an implied contract in a joint or mutual will which is silent to a contractual undertaking. Claimants of an alleged contract will ask the court to take a liberal approach and rely on *Maloney* and *Cramer*.¹⁸³ Opponents of the contract will assume the strict approach of *Moore* and *Wisler*.¹⁸⁴

This is not to say that in those cases where the Court of Appeals found a contract there was no evidence which would lead to such a holding. There were specific words and implications which when looked at in the most favorable light may have suggested the chance that the testators entered into a contract.¹⁸⁵ However, in light of the substantial burden which must be met to sustain the clear and convincing standard, the evidence presented simply leaves too much in doubt to clearly establish a contract. The court cannot imply an agreement based on the execution of a joint or mutual will where the circumstances are inconclusive and permit an inference either way.¹⁸⁶

It is important to note that the Court of Appeals in the *Wisler*¹⁸⁷ decision held the clear and convincing standard to the high

doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case. This is a method of reasoning necessary for the law, but it has characteristics which under other circumstances might be considered imperfections.

E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1949).

183. ____ Ind. App. ____, 381 N.E.2d 1263 (1978).

184. *Wisler v. McCormack*, ____ Ind. App. ____, 406 N.E.2d 361 (1980); *Moore v. Harvey*, ____ Ind. App. ____, 406 N.E.2d 354 (1980).

185. See *supra* notes 105-139 and accompanying text.

186. See *Kimmel v. Roberts*, 179 Neb. 8, ____, 136 N.W.2d 208, 212-13 (1965) (McCown concurring).

187. ____ Ind. App. ____, 406 N.E.2d 361 (1980).

burden it purports to establish.¹⁸⁸ Further, in that same decision the court may have adopted some definite standards from out-of-state cases by which to determine testator intent.¹⁸⁹ The problem still remains, however, that each set of facts will consistently be different from the last and the determination of an oral or implied contract based on evidence other than a written contract is bound to create confusion. Only when the clear and convincing standard is applied with the utmost rigor, and this may mean finding a contract only when one is clearly and expressly written in or along with a will, can that standard be useful in this area.

The Indiana court must make sure they adequately distinguish between the law of wills and the law of contracts. In *Cramer* and *Maloney*, where the evidence was not clear that the testators contracted not to revoke their wills, holding the opposite severely undermined basic contractual theory as well as the ambulatory characteristic of a will. It is ironic that when the court has the written will in front of it and only an inference of a contractual undertaking, many times the court's holding turns the will into a contract and obviates the revocable nature of the tangible instrument.

RECOMMENDATIONS AND CONCLUSION

In an area as important as the disposition of deceased persons' estates, there must be assurance that a court-ordered disposition is in the manner in which the deceased intended prior to his death. The court cannot go farther than the will itself provides, nor can the court rewrite the will. In a claim of an oral or implied contract not to revoke a joint or mutual will, the will itself must be the starting point for the decision of whether such a contract does in fact exist. If there is no unequivocal proof that the testators did mutually agree and contract to make their testamentary schemes irrevocable, then the wills should not be held to any contractual restraints.

From the estate planner's point of view, the problems inherent in joint or mutual wills can be avoided by simple awareness of the possible problems involved.¹⁹⁰ The most obvious solution to inconsistent decisions based on different sets of facts applied to an ambiguous evidentiary standard is to expressly state or negate the existence of a contract in clear terms. If joint or mutual wills are ex-

188. See *supra* note 114.

189. See *supra* note 159 and accompanying text.

190. Note, *Recent Developments of the Iowa Law of Joint and Mutual Wills*, 44 IOWA L. REV. 523, 541 (1959).

ecuted and the testators desire a contract not to revoke, an express document embodying all of the terms should be prepared and referred to or embodied in the wills.¹⁹¹ If a contract is not intended, then a provision negating any contractual undertaking should be included.¹⁹²

The courts should also focus on the attorney when deciding whether a specific will was executed pursuant to a contract not to revoke. One should assume that the attorney initiated and discussed the possibility and consequences of a contract with the execution of a joint or mutual will. This is an assumption the court must make if it does indeed find a contract. If there was an agreement between the parties to enter a contract, it seems reasonable to assume that the attorney would make sure that the contract and its terms were specifically stated. A capable attorney would not leave to conjecture what could easily be expressed in clear and definite terms.¹⁹³ Thus, the absence of an express written contract should infer the non-existence of an irrevocable contract.

The Indiana courts must fulfill their responsibility to the legal system and clear up the confusion they have created in ascertaining testators' intent to contract when executing a joint or mutual will. There are two paths to alleviate the problems the courts have created. Neither solution presents major insurmountable difficulties.

The first step the court should take is to discuss the obvious differences in the resolution of the recent cases. The most recent cases show that the court will apply a very strict evidentiary standard to a claim of an implied contract not to revoke a joint will. In the background, however, the liberal application of the evidentiary standard in *Maloney* still looms as valid law. The *Maloney* decision appears to be a "catch all" case which may be cited as precedent for any finding of a contract in a joint will claim. With *Maloney* as valid precedent, the court need only point to specific words, used in the text of the will itself, which the court thinks are evidence of a contractual arrangement between the testators.

191. *Id.*

192. *Id.*

193. In *Oursler v. Armstrong*, 10 N.Y.2d 385, ___, 223 N.Y.S.2d 477, ___, 179 N.E.2d 489, 492 (1981), the court addressed the attorney's role in the execution of mutual wills. Referring to the absence of an express writing of a contract the court said: "[I]t is remarkable that it [contract] was not put in writing . . . by so experienced and competent a lawyer as Mr. Ernst." *Id.* In addressing the testimony of the attorney who prepared the will, the court found it conclusive that he did not testify that the parties intended an irrevocable contract along with the will. *Id.*

The latest resolutions to implied contract claims assert and demand that only unequivocal evidence of testators' intent to enter a binding contract will prove an underlying bargain. However, it is not enough to assume that the liberal *Maloney* decision has been overruled *sub silentio*. The Court of Appeals recognized *Maloney* as valid law in both subsequent cases and then struggled to evade its earlier finding. The court must clearly and unequivocally state that it was wrong in *Maloney* or once and for all state whether the liberal or strict application of "clear and convincing" is the standard by which to resolve implied contract claims. The finding of a contract based on mere "word-choice" would be in complete disregard of the approach taken by the courts in most recent cases.

The ultimate resolution to this problem may rest with the state legislature. If the courts do not resolve the issue, then the legislature should adopt the written requirement of the Uniform Probate Code,¹⁹⁴ or some other written requirement. The courts have missed two opportunities to definitively state the desired method of resolving implied contract claims. Therefore, the state legislature should intervene because the court has refused to act. Time is of the essence. Unless some definite steps are taken by the legislature or the courts, inconsistent judicial decisions will certainly continue.

Frank A. Lattal

194. See *supra* notes 68-89 and accompanying text.