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Contractual Wills - Do 1979 Probate Code Revisions Solve the Procedural Problems.

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COMMENTS

CONTRACTUAL WILLS — DO 1979 PROBATE CODE REVISIONS SOLVE THE PROCEDURAL PROBLEMS?

ERWIN SMITH MCGEE

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I. INTRODUCTION

Joint¹ and reciprocal² wills when purported to be mutual³ have histori-

1. See *Crain v. Mitchell*, 479 S.W.2d 956, 958 (Tex. Civ. App.—Fort Worth 1972, writ *dism'd*). “A joint will is a single testamentary instrument containing two wills of two or more persons. It is executed jointly by the parties to it and disposes of property owned jointly, in common, or in severalty by them.” *Id.* at 958. A joint will usually provides for a single dispositive scheme for both testators, such as we desire that our property go to the survivor of us for life, remainder to our children per capita. See, e.g., *Dougherty v. Humphrey*, 424 S.W.2d 617, 619-20 (Tex. 1968); *Nye v. Bradford*, 144 Tex. 618, 620, 193 S.W.2d 165, 166 (1946); *Reynolds v. Park*, 521 S.W.2d 300, 303-04 (Tex. Civ. App.—Amarillo 1975, writ *ref'd n.r.e.*).

2. See *Dickerson v. Yarbrough*, 212 S.W.2d 975, 978 (Tex. Civ. App.—Dallas 1948, no writ): “‘Reciprocal’ wills are those in which the testators name each other as beneficiaries under similar testamentary plans.” *Id.* at 978. A typical reciprocated dispositive scheme is when one spouse leaves everything to the other for life, remainder to children and the other spouse does vice versa. *Id.* at 978; see *Pullen v. Russ*, 226 S.W.2d 876, 879-80 (Tex. Civ. App.—Fort Worth 1950, writ *ref'd n.r.e.*). See generally E. BAILEY, 10 TEXAS PRACTICE, *Wills* § 451 (Vernon 1968).

3. See *Ellexson v. Ellexson*, 467 S.W.2d 515, 519 (Tex. Civ. App.—Amarillo 1971, no writ). “A mutual will . . . is executed pursuant to an agreement between the testators to dispose of their property in a particular manner, each in consideration of the other.” *Id.* at 519. A mutual will is both a contract and a will and invokes both probate and contract law when under consideration. See *Magids v. American Title Ins. Co.*, 473 S.W.2d 460, 464 (Tex.

cally presented problems to Texas courts.⁴ Although distinguishable, such common law contractual wills⁵ share problems of jurisdiction, proof, and enforcement.⁶ This statutory note will discuss these facets of Texas law in light of the 1979 revisions to the Texas Probate Code.⁷

The common damning feature to all purported contractual testamentary instruments is the contract which renders a will irrevocable during the life of the survivor.⁸ Since wills are by definition ambulatory,⁹ probate courts must admit a subsequent "last" will of the surviving testator notwithstanding a previously executed contract not to revoke between the testator and a predeceased contracting testator.¹⁰ Although admission of

1971); *Reynolds v. Park*, 521 S.W.2d 300, 310-12 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

4. 3 A COMPILATION OF INTERIM REPORTS TO THE SIXTY-SIXTH LEGISLATIVE SESSION, "The Judiciary Committee: Proposed Revisions of the Texas Probate Code," 37-38 (Texas Legislative Reference Library 1979); see, e.g., *Lawrence v. Latch*, 431 S.W.2d 307, 308 (Tex. 1968) (mutual but not expressly mutual); *Nesbett v. Nesbett*, 428 S.W.2d 663, 664 (Tex. 1968) (joint will); *Wagnon v. Wagnon*, 16 S.W.2d 366, 368 (Tex. Civ. App.—Austin 1929, writ ref'd) (identically reciprocal). See generally *Bailey, Contracts to Make Wills - Proof of Intent to Contract*, 40 TEXAS L. REV. 941, 941 (1962); *Sparks, Operation of Joint Wills in Texas*, 31 TEX. B.J. 277, 314-18 (April 1968); Comment, *The Contractual Will: Invitation to Litigation and Excess Taxation*, 48 TEXAS L. REV. 909, 909 (1970).

5. Hereafter, the phrase "common law mutual will" or "common law contractual will" is used to distinguish such instruments from post-1979 contractual wills executed in conformance with section 59A of the Code. TEX. PROB. CODE ANN. § 59A (Vernon 1980) ("Contracts Concerning Succession").

6. See, e.g., *Tips v. Yancey*, 431 S.W.2d 763, 764 (Tex. 1968) (jurisdiction); *Chadwick v. Bristow*, 146 Tex. 481, 488, 208 S.W.2d 888, 890-91 (1948) (enforcement); *Reynolds v. Park*, 521 S.W.2d 300, 311-12 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.) (proof). This list of problems with contractual wills is by no means exclusive. See generally Comment, *The Contractual Will: Invitation to Litigation and Excess Taxation*, 48 TEXAS L. REV. 909, 910-23 (1968).

7. Jurisdiction, proof, and enforcement are but three of the many areas of criticism involving contractual testamentary dispositions. For a brief survey of some of the other areas of concern, including inflexibility, what character of property passes under what type wills, what estate does the survivor take, and some of the tax consequences related to the above problems, see generally, Comment, *The Contractual Will: Invitation to Litigation and Excess Taxation*, 48 TEXAS L. REV. 909, 910-23 (1968).

8. See *Ellexson v. Ellexson*, 467 S.W.2d 515, 521 (Tex. Civ. App.—Amarillo 1971, no writ). "A will is a creature of statute . . . which provides for revocation but does not provide for irrevocability." *Id.* at 521; see *Young, The Doctrinal Relationships of Concerted Wills and Contract*, 29 TEXAS L. REV. 439, 439 (1951) (contractual wills contain a "super-testamentary quality").

9. See, e.g., *Magids v. American Title Ins. Co.*, 473 S.W.2d 460, 464 (Tex. 1971); *Weidner v. Crowther*, 157 Tex. 240, 246, 301 S.W.2d 621, 625 (1957); *Richardson v. Lingo*, 274 S.W.2d 883, 885 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.). See generally TEX. PROB. CODE ANN. § 63 (Vernon 1980).

10. *Tips v. Yancey*, 431 S.W.2d 763, 764 (Tex. 1968); *Wyche v. Clapp*, 43 Tex. 543, 548-49 (1875). In *Tips*, the court stated the oft-repeated relegation of probate jurisdiction:

the "last will" is in derogation of contractual agreement, frustrated beneficiaries under the contractual will are not without remedy. These parties may seek to have their derivative contractual rights¹¹ adjudged in district court.¹² Form is scrutinized¹³ in the proof of a contractual feature of mutual wills. In most cases, the mutual feature, evidencing contractual intent, is not expressed, and proof of such intent requires the use of extrinsic evidence.¹⁴ A joint will, whereby one instrument serves as the will of

Whether an instrument should be admitted to probate as an *unrevoked last will* is the matter for determination in an application for probate of a will. That decision is made by determining 'whether it had been revoked, whether it was executed in the manner and conditions required by law, and whether the maker had testamentary capacity and was not under undue influence (if raised) when it was executed.'

Tips v. Yancey, 431 S.W.2d 763, 764 (Tex. 1968) (emphasis added) (citing *Huston v. Cole*, 139 Tex. 150, 152-53, 162 S.W.2d 404, 406 (1942)). Usually when the contractual will is contested, the surviving testator has executed a subsequent last will. The probate court is jurisdiction bound to admit this latter will under these circumstances. *Nesbett v. Nesbett*, 428 S.W.2d 663, 664 (Tex. 1968); *Weidner v. Crowther*, 157 Tex. 240, 246, 301 S.W.2d 621, 625 (1957). *But see* *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (district court may consolidate and render judgment on both in light of recent statutory amendments).

11. "Derivative contractual rights" is used in contradistinction to rights of a beneficiary under a will. *See* *Magids v. American Title Ins. Co.*, 473 S.W.2d 460, 464 (Tex. 1971); *Tips v. Yancey*, 431 S.W.2d 763, 764 (Tex. 1968).

12. *E.g.*, *Tips v. Yancey*, 431 S.W.2d 763, 765 (Tex. 1968); *Nye v. Bradford*, 144 Tex. 618, 626, 193 S.W.2d 165, 170 (1946); *Wyche v. Clapp*, 43 Tex. 543, 548-49 (1875); *see* 21 BAYLOR L. REV. 411, 420-21 (1969). The *Tips* court implicitly noted the anomaly: "Although a survivor may technically revoke his joint and mutual will, the beneficiary under such will has a cause of action and . . . may come into [district] court and enforce his rights." *Tips v. Yancey*, 431 S.W.2d 763, 765 (Tex. 1968).

13. *See generally* E. BAILEY, 10 TEXAS PRACTICE, *Wills* §§ 451-457 (Vernon 1968 & Supp. 1980); Bailey, *Contracts to Make Wills - Proof of Intent to Contract*, 40 TEXAS L. REV. 941 (1962). There is no need to scrutinize form, however, in those rare situations where the instrument is an expressed mutual will, when the existence and terms of the contract are expressed within the four corners of the instrument. *See* *Vickrey v. Gilmore*, 554 S.W.2d 36, 39 (Tex. Civ. App.—Waco 1977, no writ).

14. *E.g.*, *Magids v. American Title Ins. Co.*, 473 S.W.2d 460, 467 (Tex. 1971); *Nye v. Bradford*, 144 Tex. 618, 623, 193 S.W.2d 165, 168 (1946); *Crain v. Mitchell*, 479 S.W.2d 956, 958 (Tex. Civ. App.—Fort Worth 1972, writ *dism'd*). In *Nye v. Bradford*, 144 Tex. 618, 623, 193 S.W.2d 165, 168 (1946), the following rule was pronounced:

One who relies upon a will as a contract has the burden of proving that the will is contractual as well as testamentary in character. Proof may be made by the provisions of the will itself or by competent witnesses who testify to the agreement; and evidence as to declarations of the promisor, relations or conduct of the parties and other facts and circumstances, that tend to prove that an agreement was made are admissible.

Id. at 623, 193 S.W.2d at 167-68. Despite this authority, there appears to be considerable confusion as to the admissibility of such evidence in light of the Statute of Frauds, parol evidence rule and Dead Man's Statute. Considerable commentary accompanies these now academic issues. *See* TEX. PROB. CODE ANN. § 59A(a) (Vernon 1980) (courts relegated to strict four corners of a purported contractual will). For the legal historian, however, the use

two or more testators, evidences the existence of an underlying agreement not to revoke,¹⁵ however, additional evidence is needed to prove contractual intent.¹⁶ A reciprocal will, consisting of a separate instrument containing a similar dispositive scheme to a fellow testator's will, is another will form evidencing a contract, but is even less probative of contractual intent.¹⁷ To prove a reciprocal will is subject to an underlying contract, considerable corroborative evidence may be required.¹⁸ In sum, neither joint nor reciprocal forms raise a presumption of contract; both may require substantial extrinsic evidence of the purported underlying agreement.¹⁹

of the phrase "extrinsic evidence" is admissible to prove common law contractual wills is incorrect without qualification. See E. BAILEY, 10 TEXAS PRACTICE, *Wills* § 451, at 148 (Vernon 1968). More important than extrinsic evidence is the court's flexibility in reading between the lines of a contractual will for language suggesting the existence of a subsisting contract. See *id.* at 150-51 n.14. In effect, it appears that the more the court can imply that the will is subject to a subsisting contract from the terms of that instrument, the more the court relaxes the strict construction of exclusionary evidence rules and admits the testimony. This *ad hoc* balancing heretofore engaged in by Texas probate courts is the butt of much commentary and of no significance here. It is important to this analysis, however, that pre-1979 common law contractual wills were greeted by Texas courts with relaxed rules of evidence and liberal rules of construction. Perhaps the most fruitful discussion of this interplay is in the oral contract, contractual wills, part performance cases. Compare *Meyer v. Texas Nat'l Bank of Commerce*, 424 S.W.2d 417, 419-26 (Tex. 1968) (three elements of part performance required) and *Hooks v. Bridgewater*, 111 Tex. 122, 126-27, 229 S.W. 1114, 1116 (1921) (lead case on part performance) with *Larrabee v. Porter*, 166 S.W. 395, 402-03 (Tex. Civ. App.—Austin 1914, writ ref'd) (court found part performance).

15. Comment, *The Joint and Mutual Will*, 16 BAYLOR L. REV. 167, 175-76 (1964); see, e.g., *Murphy v. Slaton*, 154 Tex. 35, 42-43, 273 S.W.2d 588, 593 (1954); *Nye v. Bradford*, 144 Tex. 618, 624, 193 S.W.2d 165, 168 (1946); *Knolle v. Hunt*, 551 S.W.2d 755, 760 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). See generally E. BAILEY, 10 TEXAS PRACTICE, *Wills* § 457, at 58 (Vernon Supp. 1980).

16. See, e.g., *Bishop v. Scoggins*, 589 S.W.2d 151, 155 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.); *Crain v. Mitchell*, 479 S.W.2d 956, 958-59 (Tex. Civ. App.—Fort Worth 1972, writ dism'd); *Wagnon v. Wagnon*, 16 S.W.2d 366, 368 (Tex. Civ. App.—Austin 1929, writ ref'd n.r.e.). Compare *Magids v. American Title Ins. Co.*, 473 S.W.2d 460, 466 (Tex. 1971) (reciprocal wills, no expression of mutuality) with *Vickrey v. Gilmore*, 554 S.W.2d 36, 38 (Tex. Civ. App.—Waco 1977, no writ) (no extrinsic evidence needed when will entitled "joint and mutual").

17. Compare *Magids v. American Title Ins. Co.*, 473 S.W.2d 460, 466 (Tex. 1971) (reciprocal wills, separate instruments) with *Nye v. Bradford*, 144 Tex. 618, 623, 193 S.W.2d 165, 167-68 (1946) (joint will, joint disposition, one instrument). See generally E. BAILEY, 10 TEXAS PRACTICE, *Wills* § 457, at 164 (Vernon 1968).

18. See *Magids v. American Title Ins. Co.*, 473 S.W.2d 460, 466 (Tex. 1971); *Wagnon v. Wagnon*, 16 S.W.2d 366, 368 (Tex. Civ. App.—Austin 1929, writ ref'd).

19. Comment, *The Joint and Mutual Will*, 16 BAYLOR L. REV. 167, 175-76 (1964); see, e.g., *Nye v. Bradford*, 144 Tex. 618, 623, 193 S.W.2d 165, 167-68 (1946); *Reynolds v. Park*, 521 S.W.2d 300, 310-12 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); *Pullen v. Russ*, 226 S.W.2d 876, 879-80 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.). But see *Tex.*

Once the contractual feature of a will is proved, confusion exists regarding the proper remedy available to the contractual will proponents.²⁰ Although limited authority supports the proposition that specific performance will issue,²¹ courts prefer to reach a like result through the imposition of a constructive trust,²² or a determination there has been an estoppel by election.²³ These remedies are by no means exclusive,²⁴ as a variety of judicially fashioned relief has arisen in the area of contractual

PROB. CODE ANN. § 59A (Vernon 1980) (no extrinsic evidence permitted for wills executed after September 1, 1979).

20. See Young, *The Doctrinal Relationships of Concerted Wills and Contracts*, 29 TEXAS L. REV. 439, 442 (1951) ("riotous growth in theories" developed by Texas courts to enforce contractual wills); 21 BAYLOR L. REV. 411, 419-21 (1969).

21. *Martin v. Martin*, 230 S.W.2d 547, 551 (Tex. Civ. App.—San Antonio 1950, writ ref'd n.r.e.); see *Larrabee v. Porter*, 166 S.W. 395, 403 (Tex. Civ. App.—Austin 1914, writ ref'd). See generally 21 BAYLOR L. REV. 411, 420 (1969). "The reason[s] given for not granting specific performance [are]: (1) the courts will not force a person to make a will leaving property in a given manner; and (2) the courts cannot force a dead man to make a will." *Id.* at 420.

22. *Carstairs v. Bomar*, 119 Tex. 364, 366, 29 S.W.2d 334, 338 (1930) (a constructive trust when the beneficiaries of the purported "last will" are declared trustees); see, e.g., *Knolle v. Hunt*, 551 S.W.2d 755, 763 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); *Lieber v. Mercantile Nat'l Bank*, 331 S.W.2d 463, 473 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.); *Cate v. Cate*, 235 S.W.2d 456, 458 (Tex. Civ. App.—Dallas 1950, writ ref'd). See generally Comment, *Contract to Devise, Constructive Trust*, 10 TEXAS L. REV. 358, 358-63 (1932).

23. E.g., *Murphy v. Slaton*, 154 Tex. 35, 42-43, 273 S.W.2d 588, 593 (1954); *Chadwick v. Bristow*, 146 Tex. 481, 487, 208 S.W.2d 888, 891 (1948); *Russell v. Garrett*, 392 S.W.2d 375, 377 (Tex. Civ. App.—Fort Worth 1965, no writ); cf. *Stern v. Reass*, 559 S.W.2d 898, 900-01 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.) (affirmed lower court's imposition of a constructive trust with estoppel by election reasoning). See generally 9 BAYLOR L. REV. 242, 242-46 (1957). Bailey restates the election doctrine as applied to mutual wills:

When a husband and wife execute their wills at the same time, it is not unnatural, even in the absence of intent to bind each other by contract, for each will, after giving the survivor of the two a life estate, to make provision for the disposition of the remainder interest in the entire community estate, usually by giving it to the children. The result may be stated as follows: The will of the first to die gives to the survivor a life estate in the decedent's property (community or separate, or both)—property which the decedent could have given to other persons if he or she had so desired—and then purports to dispose of an interest in the survivor's property. If the survivor elects to accept the benefits thus offered by the will, he must allow his own property to pass by the decedent's will.

Bailey, Contracts to Make Wills — Proof of Intent to Contract, 40 TEXAS L. REV. 941, 942 (1962).

24. See, e.g., *Dickerson v. Yarbrough*, 212 S.W.2d 975, 978 (Tex. Civ. App.—Dallas 1948, no writ) (enjoying benefits served as "confirmation" of the will); *Sherman v. Goodson's Heirs*, 219 S.W. 839, 841 (Tex. Civ. App.—Texarkana 1920, writ ref'd) (estoppel of the contract and ratification of the will); *Rossetti v. Benevides*, 195 S.W. 208, 209 (Tex. Civ. App.—San Antonio 1917, writ ref'd) (adoption by ratification of the contract). See generally Young, *The Doctrinal Relationships of Concerted Wills and Contract*, 29 TEXAS L. REV. 439, 442 (1951) ("riotous growth in theories" developed by Texas courts to afford relief).

wills due to the conflict between basic precepts of both wills and contract law.²⁵ Wills are always revocable until the death of the testator,²⁶ whereas, contracts are irrevocable except by the mutual consent of the contracting parties.²⁷

II. 1979 PROBATE CODE REVISION: AN OVERVIEW

Prior to 1979, the Texas Probate Code was silent as to contractual wills.²⁸ The Sixty-sixth Texas Legislature addressed the issues of proof²⁹ directly, and jurisdiction³⁰ indirectly, but was silent as to the enforcement of contractual wills.³¹

A. Proof of Contract

The legislature added section 59A to the Texas Probate Code³² which "tightens up the methods by which a contractual will is proved."³³ In essence, section 59A mandates that the material provisions of the contract, parties thereto, and instruments involved be specifically expressed in the will.³⁴ The section further provides that the mere existence of a reciprocal

25. Young, *The Doctrinal Relationships of Concerted Wills and Contract*, 29 TEXAS L. REV. 439, 439 (1951) (contractual wills have a "super-testamentary quality").

26. See *Ellexson v. Ellexson*, 467 S.W.2d 515, 521 (Tex. Civ. App.—Amarillo 1971, no writ).

27. See *Magids v. American Title Ins. Co.*, 473 S.W.2d 460, 464 (Tex. 1971).

28. Cf. TEX. PROB. CODE ANN. § 59A (Vernon 1980) (section 59A addressing contractual wills added in 1979).

29. *Id.*

30. *Id.* § 5A.

31. H.B. 329, First Printing, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979). This bill contained thirty-three provisions, each making substantive changes in the Probate Code and probate related civil statutes. *Id.* Only section 59A directly refers to contractual wills, but it deals only with proof. *Id.* See generally TEX. PROB. CODE ANN. §§ 57-71 (Vernon 1980) (code chapter on "Execution and Revocation of Wills").

32. 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 itself suffice as evidence of the existence of a contract.

Id. § 59A.

33. 3 A COMPILATION OF INTERIM REPORTS TO THE SIXTY-SIXTH LEGISLATIVE SESSION, "The Judiciary Committee: Proposed Revisions of the Texas Probate Code," 38-39 (Texas Legislative Reference Library 1979).

34. See TEX. PROB. CODE ANN. § 59A(a) (Vernon 1980). The statute does not state

or joint will form will not suffice as evidence of an underlying contract.³⁵ Section 59A is purely procedural,³⁶ having no effect on the substantive law,³⁷ remedies available,³⁸ or jurisdiction of probate courts.³⁹ The sparse

whether the will must be admitted to probate. The question is raised, what if the "contract" is valid under section 59A(a), but the "will" is invalid for some reason under sections 59 or 84? The statute provides no guidance. *Id.* § 59A(a).

35. *Id.* § 59A(b).

36. *See id.* § 59A(a). All evidence of legislative intent targets on prescribing the methods of proof. *E.g.*, 3 A COMPILATION OF INTERIM REPORTS TO THE SIXTY-SIXTH LEGISLATIVE SESSION, "The Judiciary Committee: Proposed Revisions of the Texas Probate Code," 37-38 (Texas Legislative Reference Library 1979); Judiciary Committee Member, Representative Uribe's Floor Address, House Debate, H.B. 329, § 10, First Reading, Sixty-sixth Legislative Session, (House Tapes, John H. Reagan State Office Building 1979); H.B. 329, § 10, Bill Analysis, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979). *Compare* H.B. 329, § 10, First Printing, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979) (three methods of proof allowed) with TEX. PROB. CODE ANN. § 59A (Vernon 1980) (only one method, the most strict, retained). Further, the title, "Contracts Concerning Succession," carefully avoids denoting what were common law contractual wills as now being statutorily sanctioned probatable instruments. *Id.* § 59A. *Compare id.* § 59A ("Contracts Concerning Succession") with *id.* § 59 ("Requisites of a Will") (title) and *id.* § 65 (Vernon 1980) ("Requisites of a Noncupative Will") (title) (emphasis added). *But see* H.B. 329, First Printing, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979). The original bill, as introduced, contained the words "(a) contract . . . or to die intestate." *Id.* Chairman Ben Grant, of the Texas House Judiciary Committee and sponsor of H.B. 329, amended the bill to delete the four words "or to die intestate." Amendment 1, H.B. 329, Engrossed Second Printing, Adopted April 11, 1979, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979). Chairman Grant's explanation of the amendment was that the four words were "superfluous." House Debate, H.B. 329, Second Reading, April 11, 1979, Sixty-sixth Legislative Session, (House Tapes, John H. Reagan State Office Building 1979).

37. *Cf. Young, The Doctrinal Relationships of Concerted Wills and Contract*, 29 TEXAS L. REV. 439, 439 (1951). "If the disposition is to be given effect, some principle of law must be invoked that goes beyond the borders of wills with which the parties expected to implement their plan. The search for such a principle has led the courts into some trackless, discomfoting places." *Id.* at 439. *Compare* TEX. PROB. CODE ANN. § 59A (Vernon 1980) (codification of contractual wills) with *Ellexson v. Ellexson*, 467 S.W.2d 515, 517 (Tex. Civ. App.—Amarillo 1971, no writ) (common law treatment of contractual wills).

38. *Compare* *Tips v. Yancey*, 431 S.W.2d 763, 764 (Tex. 1968) (must admit "last" will) with TEX. PROB. CODE ANN. § 59A (Vernon 1980) (silent on admissibility *vel non*). *But see id.* § 5A. The only remedy available in probate proceedings is the admission *vel non* of the will. *Tips v. Yancey*, 431 S.W.2d 763, 764 (Tex. 1968). Section 59A does not address this jurisdictional aspect of contractual wills. *See generally* TEX. PROB. CODE ANN. § 59A (Vernon 1980).

39. *Compare* *Tips v. Yancey*, 431 S.W.2d 763, 764 (Tex. 1968) (to admit "last" will only) with TEX. PROB. CODE ANN. § 59A (Vernon 1980) (section does not make contractual wills competitive instruments for admission). *But see id.* § 5A. Section 59A, under any scrutiny, does not suggest that contractual wills in conformance with the provisions of the statute are subject to probate if the surviving testator has executed a subsequent will (e.g. "last

evidence of legislative intent echoes the narrow purpose of prescribing restraints on the proof of contractual wills.⁴⁰

B. Jurisdiction

District court probate jurisdiction over contractual wills was significantly affected by the 1973 amendment to the Texas Constitution,⁴¹ and subsequent legislative enablements in 1975⁴² and 1977,⁴³ amending section 5 of the Probate Code.⁴⁴ Generally, the legislative approach was to expand the subject matter jurisdiction of the various state courts having probate responsibilities by granting such courts jurisdiction over all *matters appertaining or incident to an estate*.⁴⁵ Legislative enactments were targeted at enlarging the scope of these subject matter jurisdictional phrases without affecting the remedial powers of probate courts.⁴⁶ In 1979, the addition to the Probate Code of section 5A⁴⁷ may have similarly expanded the jurisdiction of other courts in probate matters.⁴⁸ Section

will"). See generally 21 BAYLOR L. REV. 411, 420-21 (1969).

40. The wording of the statute itself compels this interpretation of legislative intent. TEX. PROB. CODE ANN. § 59A (Vernon 1980); see 3 A COMPILATION OF INTERIM REPORTS TO THE SIXTY-SIXTH LEGISLATIVE SESSION, "The Judiciary Committee: Proposed Revisions of the Texas Probate Code," 37-38 (Texas Legislative Reference Library 1979); Judiciary Committee Member, Representative Uribe's Floor Address, House Debate, H.B. 329, First Reading, Sixty-sixth Legislative Session (House Tapes, John H. Reagan State Office Building 1979). Compare H.B. 329, § 10, First Printing, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979) (three methods of proof permitted) with TEX. PROB. CODE ANN. § 59A (Vernon 1980) (two methods of proof deleted).

41. See TEX. CONST. art. V, § 8.

42. See 1975 Tex. Gen. Laws, ch. 701, § 2, at 2195-96 (power to construe wills conferred upon all courts with original probate jurisdiction); cf. Comment, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 323-24 (1975) (commentators argued 1973 revisions conferred power to construe wills).

43. See 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 (power to construe wills granted all Texas courts with original probate jurisdiction, retained).

44. See TEX. PROB. CODE ANN. § 5A (Vernon 1980). Much of section 5(d) in the 1977 Code was modified in 1979 by removing the subject matter jurisdiction definitions from section 5 to the new section 5A. Compare *id.* § 5A ("matters incident to" or "appertaining to" estates defined) and 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 ("matters appertaining to" or "incident to" an estate defined) with TEX. PROB. CODE ANN. § 5 (Vernon 1980) (definitions of these probate jurisdictional phrases omitted).

45. 3 A COMPILATION OF INTERIM REPORTS TO THE SIXTY-SIXTH LEGISLATIVE SESSION, "The Judiciary Committee: Proposed Revisions of the Texas Probate Code," 10-13 (Texas Legislative Reference Library 1979); see *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979).

46. See Comment, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEXAS L. REV. 372, 382-83 (1976).

47. See TEX. PROB. CODE ANN. § 5A (Vernon 1980).

48. Compare *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (holding power to construe wills is power to consolidate last will and contractual will contests and render on both,

5A(b) grants district and statutory probate courts authority to adjudicate all matters "appertaining to estates,"⁴⁹ including, *inter alia*, "all actions for trial of the right of property, all actions to construe wills, the interpretation and administration of testamentary trusts and the appl[ication] of constructive trusts, and generally all matters relating to the settlement . . . and distribution of estates"⁵⁰ Moreover, the section expressly provides the list of inclusions therein is not exclusive.⁵¹ Section 5A(a),⁵² defining the jurisdiction of constitutional and statutory county courts, has language similar to subsection (b) but does not include the grant of power to impose constructive trusts.⁵³ Although none of the powers expressly mention or necessarily relate to contractual will jurisdiction,⁵⁴ the legislative purpose and expansive language of section 5A may be interpreted to allow non-district courts to consolidate and render in contests between contractual and "last" wills.⁵⁵ The Texas Supreme Court already has held that section 5 alone, as amended in 1975 and 1977, was sufficient to allow district courts, exercising their probate function, to consolidate contractual and "last" will contests and to render judgment on both,⁵⁶ even though the statute was silent on the authority of any probate court to

interpreting section 5(d)) and 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 (section 5(d) as interpreted by *Novak* court) with TEX. PROB. CODE ANN. § 5A (Vernon 1980) (power to construe wills granted all Texas courts with original probate jurisdiction).

49. TEX. PROB. CODE ANN. § 5A(b) (Vernon 1980).

50. *Id.* § 5A(b).

51. *Id.* § 5A(b).

52. *Id.* § 5A(a).

53. *Cf.* Comment, *Texas Probate Jurisdiction — There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 337-38 (1975) (section 5 analyzed, subject matter jurisdiction argued to confer power to impose constructive trust). Compare TEX. PROB. CODE ANN. § 5A(a) (Vernon 1980) (no power to impose constructive trust conferred on county courts) with *id.* § 5A(b) (constructive trust power conferred on district and statutory probate courts).

54. See TEX. PROB. CODE ANN. § 5A (Vernon 1980). The closest references to contractual wills are the conferral of power to construe wills and to impose constructive trusts. *Id.* § 5A(b). The latter power is conferred only on district and statutory probate courts. See generally *id.* § 5A(a) (constructive trust language of subsection (b) omitted).

55. *Cf.* *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979) (legislative purpose in amending section 5 to allow probate courts to consolidate all matters regarding decedent's estate into one proceeding). Compare *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (court interprets section 5 as conferring power to construe contractual wills upon district court) with TEX. PROB. CODE ANN. § 5A (Vernon 1980) (legislature confers power to construe wills on all probate courts).

56. *Novak v. Stevens*, 596 S.W.2d 848, 851, 853 (Tex. 1980). It should be noted that the power to construe wills posited in section 5(d) at the time *Novak* was decided read: "(d) All courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate, including . . . actions to construe wills." 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170. When section 5A was added in 1979, the legislature modified section 5(d) deleting the power to construe wills. See 1979 Tex. Gen. Laws, ch. 713, § 2, at 1740.

impose a constructive trust at the time.⁵⁷ Furthermore, the 1979 Probate Code revisions which added section 5A may be construed to confer such authority upon other Texas courts with original probate jurisdiction.⁵⁸

III. ANALYSIS OF SECTION 59A: PROOF OF CONTRACT

Subsection (a) of section 59A states that for a proponent of a contractual will to be entertained in court,⁵⁹ the instrument proffered must expressly state the existence and material provisions of the contract.⁶⁰ No extrinsic evidence is admissible to prove up a contractual will under this provision.⁶¹ Under subsection (b), whatever suggestion at common law that reciprocal or joint will forms evidenced an underlying agreement is expressly abrogated.⁶² Since reciprocal and joint wills *by form alone* were not evidence of contractual intent and extrinsic evidence was required to prove the contract,⁶³ subsection (a), without any assistance from subsection (b), clearly overrules whatever holdings at common law exist as to the *de minimus* suggestion of contract attributed to joint and/or recip-

57. *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980); 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170.

58. Compare 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 (section 5(d) to Probate Code amended to grant all courts with original probate jurisdiction power to construe wills) and *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (interpreting section 5(d) as conferring upon district courts power to consolidate "last" will and contractual will contests and to render on both) with TEX. PROB. CODE ANN. § 5A(a) (Vernon 1980) (power to construe wills conferred upon constitutional and statutory county courts) and *id.* § 5A(b) (power to construe wills conferred upon district and statutory probate courts). See generally *id.* § 5(d) ("construe wills" language omitted). Evidently, the legislature carved the subject matter jurisdiction language out of subsection 5(d) and deposited the same in the newly drafted section 5A. Compare 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 (former subsection 5(d)) with TEX. PROB. CODE ANN. §§ 5, 5A (Vernon 1980) (current law).

59. See TEX. PROB. CODE ANN. §§ 59, 84 (Vernon 1980). Wills submitted for probate must conform with the statutory requirements or no admission order will issue. See *Morgan v. Morgan*, 519 S.W.2d 276, 277 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (§ 84(b)(2)); *Cherry v. Reed*, 512 S.W.2d 705, 705 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (§ 59).

60. TEX. PROB. CODE ANN. § 59A(a) (Vernon 1980).

61. *Id.* The provision states the terms of the contract must be expressed in the instrument. *Id.* Of course, to the extent that Texas courts have adopted the doctrine of incorporation by reference, see *Hinson v. Hinson*, 154 Tex. 561, 567, 280 S.W.2d 731, 735 (1955), it would be permissible to refer directly to an outside instrument, designated as the contract, in existence at the time the will is executed and clearly identified. See *Allday v. Cage*, 148 S.W. 838, 839-40 (Tex. Civ. App.—Fort Worth 1912, writ ref'd).

62. TEX. PROB. CODE ANN. § 59A(b) (Vernon 1980).

63. Comment, *The Joint and Mutual Will*, 16 BAYLOR L. REV. 167, 175 (1964); see, e.g., *Nye v. Bradford*, 144 Tex. 618, 623, 193 S.W.2d 165, 167-68 (1946); *Reynolds v. Park*, 521 S.W.2d 300, 310-11 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); *Pullen v. Russ*, 226 S.W.2d 876, 879 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

cal will forms.⁶⁴ Given the proof requirements stipulated in subsection (a), therefore, it is inconceivable that subsection (b) would have meaningful application.⁶⁵ If the only loss resulting from this redundancy argument were the cost of ink assessed against the state taxpayer for printing the Probate Code, this line of analysis could end here. More serious consequences, however, may ensue.

An examination of the legislative history behind section 59A demonstrates the error. On first reading,⁶⁶ section 59A provided three ways to prove a contractual will, two of which would have permitted the admission of extrinsic evidence.⁶⁷ Prior to the third reading, the sponsor⁶⁸ substituted the present section 59A, omitting the two ways of proving a contractual will which permitted extrinsic evidence.⁶⁹ The substitute bill, as a

64. TEX. PROB. CODE ANN. § 59A(a) (Vernon 1980) (no contractual will unless terms of contract expressed in the instrument).

65. Compare *id.* (must be expressed) with *id.* § 59A(b) (Vernon 1980) (can not be implied). If the existence and terms of the contract must be expressed as required by subsection (a), then will *form* is of no legal consequence.

66. All state legislation must be read three times. TEX. CONST. art. III, § 32. "No bill shall have the force of a law, until it has been read on three several days in each House [unless an emergency]." *Id.*

67. H.B. 329, § 10, First Printing, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979):

Section 59A. Contracts Concerning Succession

(a) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed or entered into after the effective date of this Act, can be established only by:

- (1) provisions of a will stating that a contract does exist and stating the 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.

(b) The execution of a joint will or reciprocal wills does not by itself suffice as evidence of the existence of a contract.

Id. The current 59A was offered as a substitute to the original bill by Chairman Grant of the Texas State House Judiciary Committee. Amendment No. 5, H.B. 329, Adopted March 20, 1979, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979).

68. Ben Z. Grant, Chairman, Texas State House Judiciary Committee, H.B. 329, Original Bill File, Sixty-sixth Legislative Session (Texas State Legislative Research Library 1979).

69. Compare H.B. 329, § 10, First Printing, Original Bill File, Sixty-sixth Legislative Session (Texas State Legislative Reference Library 1979) and 8 U.L.A. ESTATE, PROB. & RELATED LAWS, UNIFORM PROB. CODE, § 2-701, at 364 (West 1972) with H.B. 329, § 10, Engrossed Second Reading, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979) and TEX. PROB. CODE ANN. § 59A (Vernon 1980). The change was presented as a substitute section rather than as an amendment to the original bill. See Sixty-sixth Legislative Session, House Journal 904 (1979).

result, rendered subsection (b) meaningless by eliminating the only two circumstances to which the subsection would apply.⁷⁰ Such an anecdote might be regarded as legal humor, save for the fact that courts abhor adjudicating statutory language, especially entire subsections, as mere surplusage.⁷¹ If subsection (b) must have significance,⁷² the only purpose would be that the subsection was intended to define the scope of section 59A.

To interpret subsection 59A(b) as scope related would sharply reduce the applicability of the entire statute and be in derogation of legislative intent. Subsection 59A(b) simply states the existence of a joint or reciprocal will *form* will not suffice as conclusive of a contractual will.⁷³ Since common law joint or mutual will *forms* were never conclusive evidence of contractual intent,⁷⁴ such a construction may take purported common law "mutual wills" out of the statute.⁷⁵ At common law, extrinsic evidence

70. See 8 U.L.A. ESTATE, PROB. & RELATED LAWS, UNIFORM PROB. CODE, § 2-701, at 364, Comment (West 1972).

71. *E.g.*, Bomar v. Trinity Nat'l Life & Accident Ins. Co., 579 S.W.2d 464, 465 (Tex. 1979); Perkins v. State, 367 S.W.2d 140, 146 (Tex. 1963); Eddins-Walcher Butane Co. v. Calvert, 156 Tex. 587, 591-92, 298 S.W.2d 93, 96 (1957). The Texas Legislature has expressed that such a rule of construction be applied when construing Texas codes. See TEX. REV. CIV. STAT. ANN. art. 5449b-2, § 301(2) (Vernon Supp. 1980). When litigants attempted to use legislative history to modify the words in a statute, the Supreme Court wrote: "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco v. Walling*, 324 U.S. 244, 260 (1945) (interpreting federal labor statutes); *cf.* *Brown v. Memorial Village Water Auth.*, 361 S.W.2d 453, 455 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.) (presumption that legislature did not do a useless thing).

72. See *Citizens Bank v. First State Bank*, 580 S.W.2d 344, 348 (Tex. 1979). "The cardinal rule in statutory interpretation and construction is to seek out the legislative intent from a general view of the enactment as a whole, and, once the intent has been ascertained, to construe the statute so as to give effect to the purpose of the Legislature." *Id.* at 348. This cardinal rule has been used both to add to and to delete statutory provisions. See *Sweeney Hosp. Dist. v. Carr*, 378 S.W.2d 40, 47 (Tex. 1964).

73. TEX. PROB. CODE ANN. § 59A(b) (Vernon 1980).

74. Comment, *The Joint and Mutual Will*, 16 BAYLOR L. REV. 165, 175 (1964); *see, e.g.*, *Nye v. Bradford*, 144 Tex. 618, 623, 193 S.W.2d 165, 167-68 (1946); *Reynolds v. Park*, 521 S.W.2d 300, 310-11 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); *Pullen v. Russ*, 226 S.W.2d 876, 879 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

75. See TEX. PROB. CODE ANN. § 59A(b) (Vernon 1980). The section merely relates to joint or reciprocal will *forms*. *Id.* A mutual will may be in any or no form; mutuality is the contractual feature of a common law contractual will. See *Kastrin v. Janke*, 432 S.W.2d 539, 540 (Tex. Civ. App.—El Paso 1968, writ ref'd n.r.e.). Ironically, *Kastrin* distinguished joint and reciprocal wills from mutual wills and was cited by the Judiciary Committee as an example of the type of situation the legislature was intending to abate. See 3 A COMPILATION OF INTERIM REPORTS TO THE SIXTY-SIXTH LEGISLATIVE SESSION, "The Judiciary Committee: Proposed Revisions of the Texas Probate Code," 38 (Texas Legislative Reference Library

was permitted to prove the mutuality or "contractual feature" of reciprocal and/or joint wills.⁷⁶ Moreover, because common law contractual wills may take combinative forms such as "joint and reciprocal,"⁷⁷ "joint and mutual,"⁷⁸ or "reciprocal and mutual,"⁷⁹ frustrated beneficiaries of such instruments⁸⁰ might contend that such combinative wills are without the

1979). The fact that the Judiciary Committee must be presumed to recognize the distinction between the terms "joint," "mutual," and "reciprocal," *City of Ingleside v. Johnson*, 537 S.W.2d 145, 153 (Tex. Civ. App.—Corpus Christi 1976, no writ), and the fact the Committee's report expressly referred to a case specifically spelling out the distinction, *Kastrin v. Janke*, 432 S.W.2d 539, 540 (Tex. Civ. App.—El Paso 1968, writ ref'd n.r.e.), the intent to exclude "mutual" wills is buttressed if subsection (b) to section 59A is regarded as scope related. 3 A COMPILATION OF INTERIM REPORTS TO THE SIXTY-SIXTH LEGISLATIVE SESSION "The Judiciary Committee: Proposed Revisions of the Texas Probate Code," 38 (Texas Legislative Reference Library 1979).

76. *E.g.*, *Kirk v. Beard*, 162 Tex. 144, 152-53, 345 S.W.2d 267, 270 (1961); *Nye v. Bradford*, 144 Tex. 618, 623, 193 S.W.2d 165, 167 (1946); *Reynolds v. Park*, 521 S.W.2d 300, 311-12 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.). Compare *id.* at 303-06 (mutual wills, extrinsic evidence allowed) with TEX. PROB. CODE ANN. § 59A(a) (Vernon 1980) (no extrinsic evidence allowed unless subsection (b) deemed scope related).

77. See *Reynolds v. Park*, 521 S.W.2d 300, 303-06, 310 (Tex. Civ. App.—Amarillo, 1975, writ ref'd n.r.e.). It should be noted that most "joint" wills will be "reciprocal" if the instrument is replete with plural possessive pronouns. Each disposition in such a case would be perfectly reciprocal joint disposition. See *id.* at 310-11. This being so, if "joint and reciprocal" wills were removed from the prescriptions of section 59A(a), there would be little for the statute to apply which would be a clear violation of a second rule of construction, to wit: to effectuate legislative intent and harmonize conflicting provisions. TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 3.03(1), (5) (Vernon Supp. 1980); *cf.* *Cole v. Texas Employment Comm.*, 563 S.W.2d 363, 367 (Tex. Civ. App.—Fort Worth 1978, writ dismissed) (procedural statute, right to appeal commission order).

78. See *Knolle v. Hunt*, 551 S.W.2d 755, 759 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

79. See *Atkinson v. Schmidt*, 482 S.W.2d 687, 689, 692 (Tex. Civ. App.—Austin 1972, no writ).

80. See *Young*, *The Doctrinal Relationships of Concerted Wills and Contract*, 29 TEXAS L. REV. 439, 445 (1951). Among *Young's* arguments is the necessity to maintain flexibility in proving contractual wills. Frequently, the situation arises when two persons marry, both bringing in children from a previous marriage with both or one of the two having substantial estates. In such situations, the contractual will is one way in which the parties may will all of the estate to the survivor for life, but at the same time preserve the deceased's wishes to devise a per capita portion of the estate for the deceased's children from the previous marriage. The temptation of the survivor to cut out the deceased's children from the previous marriage is ever-present. When such a situation exists, the presumption that a mutual will was intended is necessitated by principles of justice. The relatively flexible rules of proving contractual wills at common law would allow the court to entertain such presumptions. *Young's* thesis is that if there were problems with mutual wills at common law, flexibility in the methods of proof is not one of them. In effect, the legislature has abolished this back door *cy pres* for probate. See *id.* See also TEX. PROB. CODE ANN. § 59A (Vernon 1980) (inflexibility codified).

statutory ambit.⁸¹ Although contractual will cases are frequently hard cases, and inflexibility in proving contractual wills may be undesirable,⁸² given the legislative history⁸³ and narrow legislative purpose,⁸⁴ it is evident subsection 59A(b) was not intended to define the scope. Further, mutuality of an instrument is a common law *feature* of that instrument, not a *form*.⁸⁵ Texas courts should not be adverse either to hold that subsection 59A(b) is indeed mere surplusage or to ignore it altogether.⁸⁶

An additional inquiry is raised by the language of subsection 59A(a) stating the provision shall have no effect on contracts "executed or entered into prior to September 1, 1979."⁸⁷ This phrase requires scrutiny. According to Texas law, the date of execution of an instrument is "when the last act necessary for its formation is done."⁸⁸ Codicils⁸⁹ serve the

81. See TEX. PROB. CODE ANN. § 59A(b) (Vernon 1980). This provision, if regarded as defining the scope of section 59A, would apply only to joint or reciprocal will *forms*, not "joint and reciprocal" wills, due to the disjunctive "or." *Id.* But see *Robinson v. Reliable Life Ins. Co.*, 569 S.W.2d 28, 30 (Tex. 1978); *Bayou Pipeline Corp. v. Railroad Comm'n*, 568 S.W.2d 122, 125 (Tex. 1978); TEX. REV. CIV. STAT. ANN. art. 5429b-2, § 3.03(5) (Vernon Supp. 1980).

82. See *Eagleton, Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing*, 15 CORNELL L.Q. 358, 386 (1929); Young, *The Doctrinal Relationships of Concerted Wills and Contract*, 29 TEXAS L. REV. 439, 447 (1951). "If contract is to be the basis for enforcing a concerted disposition, and the contract depends for its proof on pure form, there is no room for consideration of the fairness of the [dispositive] scheme itself." *Id.* at 447.

83. The pertinent legislative history, the substitute offered on third reading, rendered subsection (b) meaningless, whereas, its significance in the original bill was apparent. Compare H.B. 329, § 10, First Printing, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979) with H.B. 329, § 10, Engrossed Second Printing, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979).

84. The only apparent legislative intent was to "tighten the method by which contractual wills are proved." 3 A COMPILATION OF INTERIM REPORTS TO THE SIXTY-SIXTH LEGISLATIVE SESSION, "The Judiciary Committee: Proposed Revisions of the Texas Probate Code," 38 (Texas Legislative Reference Library 1979); 8 U.L.A. ESTATE, PROB. & RELATED LAWS, UNIFORM PROB. CODE, § 2-701, Comment, at 364 (West 1972).

85. See *Magids v. American Title Ins. Co.*, 473 S.W.2d 460, 465-66 (Tex. 1971).

86. Compare TEX. PROB. CODE ANN. § 59A(a) (Vernon 1980) (all encompassing) with *id.* § 59A(b) (no scope related language such as 'this section shall only apply to . . .').

87. *Id.* § 59A(a).

88. *Texas Employer's Ass'n v. Moore*, 56 S.W.2d 652, 655 (Tex. Civ. App.—Waco 1933, writ ref'd) (contract); see *Fidelity Mut. Life Ass'n v. Harris*, 94 Tex. 25, 35, 57 S.W. 635, 638 (1900) (insurance policy).

89. *Fitzgerald v. Agnew*, 402 S.W.2d 811, 812 (Tex. Civ. App.—Texarkana 1966, no writ). "A codicil . . . must be something that is supplemental to an earlier instrument. It may add to or modify the provision of a will or it may revoke one or more of the earlier provisions of the writings." *Id.* at 812; see *Reynolds v. Park*, 521 S.W.2d 300, 308-09 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); cf. *Weidner v. Crowther*, 157 Tex. 240, 244-45, 301 S.W.2d 621, 624 (1957) (mutual will is irrevocable upon death of either party). If the underlying will is indeed mutual then any valid subsequent codicil must be mutually exe-

dual purpose of altering the disposition or appointments of the estate *and* republishing the will.⁹⁰ The effect to be given a codicil, which brings the will up to the date of the codicil's execution,⁹¹ is unclear when construed in light of the effective date language of section 59A. The issue presented is whether a subsequent execution of a codicil, however minor in scope, operates to change the date of the original will, thereby bringing the instrument within the ambit of section 59A. The expansive phrasing, "or entered into"⁹² may be interpreted to mean the statute expressly excludes a will if any portion thereof was consummated prior to the effective date of the statute.⁹³ Since the rights of contractual will beneficiaries are vested upon the death of one of the contracting testators,⁹⁴ the general rule against construing a statute to be retroactive should be invoked.⁹⁵ Further, the execution of some minor codicil⁹⁶ should not have the effect

cuted by both (all) of the contracting testators. This requirement, of course, forecloses the validity of any codicil executed after the death of any of the parties to a mutual will. *See* *Vickrey v. Gilmore*, 554 S.W.2d 36, 39 (Tex. Civ. App.—Waco 1977, no writ).

90. *See* *Hinson v. Hinson*, 154 Tex. 561, 567, 280 S.W.2d 731, 735 (1955). The *Hinson* court summarized the Texas rule as to republication:

It is well settled that a properly executed and valid codicil which contains sufficient reference to a prior will, operates as a republication of the will . . . , the will and the codicil are then to be regarded as one instrument speaking from the date of the codicil Most jurisdictions in which the question has arisen also hold that a properly executed codicil validates a prior will which was inoperative or invalid because of defective execution, lack of testamentary capacity or undue influence We . . . will assume . . . that such rule does obtain in Texas.

Id. at 735; *see* *Reynolds v. Park*, 521 S.W.2d 300, 308 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.) (codicils to mutual wills must be mutually executed).

91. *Hinson v. Hinson*, 154 Tex. 561, 567, 280 S.W.2d 731, 735 (1955).

92. TEX. PROB. CODE ANN. § 59A(a) (Vernon 1980).

93. Courts should avoid construing statutes as being retroactive in application when statutes regard vested rights. *See, e.g.,* *Haggar v. Helvering*, 308 U.S. 389, 400 (1940) (tax statute); *Government Personnel Mut. Life Ins. Co. v. Wear*, 151 Tex. 454, 460, 251 S.W.2d 525, 528-29 (1952) (penal); *Alvarado v. Gonzales*, 552 S.W.2d 539, 542 (Tex. Civ. App.—Corpus Christi 1977, no writ) (statute of limitations). It is generally held that wills create mere expectancies until the testator's demise. *Hamilton v. Flinn*, 21 Tex. 713, 716-17 (1858); *Willis v. Snodgrass*, 302 S.W.2d 706, 711 (Tex. Civ. App.—Texarkana 1957, writ ref'd n.r.e.). The rights of designated beneficiaries of contractual wills, however, are deemed vested upon the death of one of the contracting testators. *Chadwick v. Bristow*, 146 Tex. 481, 488, 208 S.W.2d 888, 890-91 (1948). Whether "or entered into" applies to written instruments at all is arguable. Generally, one enters into *oral* agreements and "executes" written ones.

94. *Chadwick v. Bristow*, 146 Tex. 481, 488, 208 S.W.2d 888, 890-91 (1948) (rights vested in designated mutual will beneficiaries upon death of either contracting testator).

95. *State v. Humble Oil & Ref. Co.*, 141 Tex. 40, 43, 169 S.W.2d 707, 708-09 (1943).

96. It should be obvious that the rule as to whether a codicil re-executes a will in regard to section 59A(a) can not, by definition, discriminate between the relative significance of the codicil. A codicil either re-executes the will for purposes of section 59A or it does not. *See* *Hinson v. Hinson*, 154 Tex. 561, 567, 280 S.W.2d 731, 735 (1955).

of vicariously transposing a common law contractual will into the prescriptions of section 59A. The preferred interpretation would be that all contractual testamentary instruments, any portion of which were consummated prior to September 1, 1979, would be outside the ambit of 59A.

IV. ANALYSIS OF SECTION 5A: JURISDICTION

Indirectly, the legislature had wholly modified the jurisdictional sequence of contractual wills with regard to district courts in probate proceedings.⁹⁷ This jurisdictional sequence required the common law contractual will proponent to abstain from the proceeding to admit a "last" will and seek redress in district court.⁹⁸ In 1979, the legislature extracted the subject matter jurisdiction language out of the general probate jurisdiction statute, section 5, and formulated section 5A.⁹⁹ In addition to the expansive language of the new section 5A,¹⁰⁰ the legislature expressly granted all courts with probate jurisdiction the authority to "construe wills."¹⁰¹ This same authority was granted all probate courts in the 1977 revised section 5,¹⁰² but deleted from section 5 when section 5A was born.¹⁰³ The power to construe an instrument is an important aspect of contract jurisdiction.¹⁰⁴ Since both sections 5 and 5A directly relate to probate jurisdiction, and much of the wording of the former is duplicated

97. TEX. PROB. CODE ANN. § 5 (Vernon 1980); see *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (expressly overrules prior holdings disallowing consolidation of "last" and "contractual" will contests).

98. See *Tips v. Yancey*, 431 S.W.2d 763, 765 (Tex. 1968); *Nesbett v. Nesbett*, 428 S.W.2d 663, 664 (Tex. 1968); *Huston v. Cole*, 139 Tex. 150, 152-53, 162 S.W.2d 404, 406 (1942). All three of these holdings were expressly overruled in *Novaks v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980).

99. Compare 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 (former subsection 5(d)) with TEX. PROB. CODE ANN. §§ 5, 5A (Vernon 1980) (current law with subject matter jurisdictional phrases defined in the latter section 5A).

100. See TEX. PROB. CODE ANN. § 5 (Vernon 1980); Comment, *Texas Probate Code Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 337-38 (1975).

101. See TEX. PROB. CODE ANN. § 5A (Vernon 1980). This express conferral of power to construe wills was simply lifted from section 5(d) of the preceding Code. Compare 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 (section 5(d) to Probate Code granted all courts with original probate jurisdiction power to construe wills) with TEX. PROB. CODE ANN. § 5A(a) (Vernon 1980) (power to construe wills granted to statutory and constitutional county courts) and *id.* § 5A(b) (same power granted district and statutory courts).

102. 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170.

103. Compare TEX. PROB. CODE ANN. §§ 5, 5A (Vernon 1980) (current probate jurisdiction statutes; probate jurisdiction phrases defined in section 5A) with 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 (former Code subsection 5(d) and section 4 defined probate jurisdictional phrases, similar definition as current law).

104. See Comment, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 343-44 (1975).

in the latter,¹⁰⁵ the ultimate expanse of section 5A may only be appreciated in light of recent Texas Supreme Court interpretations of the old section 5.¹⁰⁶

In *Novak v. Stevens*, the Supreme Court of Texas held section 5, as amended in 1977, gave district courts in probate proceedings jurisdiction to consolidate "last" will and pre-existing contractual will contests into one proceeding and to render final judgment on both.¹⁰⁷ In *Novak*, a contractual will beneficiary filed a contest to the admission of a "last" will, subsequently filing the contractual will for probate with the same county court. On motion, both causes were transferred to the district court.¹⁰⁸ The district court consolidated the causes and admitted the last will. Reversing the district court, the court of civil appeals held in part that a district court, in a probate proceeding, lacked jurisdiction to impose a constructive trust.¹⁰⁹ The supreme court reversed, finding the district court had the authority to consolidate and render on both instruments in one proceeding.¹¹⁰ The court stated; "[w]e conclude that the two contested probated matters were properly transferred to the district court after contests developed in each of them, . . . and the district court in the exercise of its probate jurisdiction had the power to hear 'all matters incident to an estate, including but not limited to . . . actions to construe wills.'"¹¹¹ Given the fact that section 5A, which confers power upon dis-

105. Compare TEX. PROB. CODE ANN. § 5A (Vernon 1980) ("construe wills") with 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 ("construe wills").

106. See *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980); *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979).

107. *Novak v. Stevens*, 596 S.W.2d 848, 849-50 (Tex. 1980); see TEX. CONST. art. V, § 8; 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170.

108. See *Novak v. Stevens*, 596 S.W.2d 848, 849, 853 (Tex. 1980); TEX. PROB. CODE ANN. § 5(b) (Vernon 1980). A motion to remove to the district court in any contested probate proceeding may be made by either of the parties or the court alone. *Id.* § 5(b).

109. *Stevens v. Novak*, 583 S.W.2d 669, 671 (Tex. Civ. App.—Eastland 1979), *rev'd*, 596 S.W.2d 848 (Tex. 1980); see 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 (no express authority to impose constructive trust conferred). It should be noted that the court of civil appeals, in *dicta*, held that the granting of a constructive trust should have been denied summarily even if the proposed joint will were found contractual, since the proponent did not plead for the imposition of a constructive trust. *Stevens v. Novak*, 583 S.W.2d 669, 671 (Tex. Civ. App.—Eastland 1979), *rev'd*, 596 S.W.2d 848 (Tex. 1980); cf. TEX. PROB. CODE ANN. § 9 (Vernon 1980) ("Defects in Pleading" section of code).

110. *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980). The supreme court also reversed the district court in holding the instrument was not contractual. *Id.* at 851.

111. *Id.* at 851. The supreme court skirted the lack of pleadings reasoning of the court of civil appeals:

The trial court correctly admitted the 1976 will to probate which operated to revoke the earlier will. The 1976 will bequeathed and devised certain property to Octavia Novak as well as naming her the independent executrix. It was for that reason that Rhonda Ray Stevens prayed that a constructive trust be imposed upon the estate. It

strict courts to construe wills *and* to impose constructive trusts was not before the courts,¹¹² the *Novak* court's sole rationale regarding the grant of power to "construe wills" is curious in two respects. First, the court's rationale for holding that district courts may consolidate and render judgment on both in contractual and "last" will contests was based upon the fact the legislature had expressly granted district courts the power to "construe wills"¹¹³ under the old subsection 5(d).¹¹⁴ This "construe wills" power was conferred upon all Texas courts with original probate jurisdiction in subsection 5(d)¹¹⁵ and was retained by all courts upon passage of section 5A.¹¹⁶ The issue, therefore, as to whether this conferral of power to construe wills reasoning of *Novak* applies equally to less competent,¹¹⁷ constitutional county courts is presented.¹¹⁸ Although the lone construe wills rationale appears to confer such power on all Texas courts with probate jurisdiction in light of section 5A,¹¹⁹ closer scrutiny demonstrates that the precedent would only be controlling in regard to statutory probate courts.¹²⁰

Even though constitutional and statutory county courts have authority to "construe wills,"¹²¹ they are not so clothed with the power to impose a

is our opinion that such a trust should be imposed.

Id. at 853. Evidently, the court reasoned Ms. Stevens was under the false impression her contractual will was subject to probate admission in lieu of the subsequent last will; this mistake of law, apparently, permitted her to forego the pleading requirement. *See id.* at 853.

112. *See Stevens v. Novak*, 583 S.W.2d 669, 669 (Tex. Civ. App.—Eastland) (opinion rendered May 31, 1979), *rev'd*, 596 S.W.2d 848 (Tex. 1980); 1979 Tex. Gen. Laws, ch. 713, § 35, at 1763-64 (section 5A effective August 27, 1979).

113. *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980). Further, the court pointed to its recent opinions in *English v. Cobb*, 593 S.W.2d 674 (Tex. 1979) and *Lucik v. Taylor*, 596 S.W.2d 514 (Tex. 1980), demonstrating the considerable expanse conferred by the broadly defined "incident to an estate" phrase. *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980).

114. 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 (section 5(d) at time *Novak* was before the district court).

115. *Id.* at 1170.

116. TEX. PROB. CODE ANN. § 5A (Vernon 1980).

117. *See* TEX. CONST. art. V, § 15 (constitutional county judge need not be licensed attorney); Comment, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 325 n.16 (1975) (in 1975, only 72 of 254 constitutional county court judges licensed).

118. TEX. PROB. CODE ANN. § 5A(a) (Vernon 1980) (power to construe wills granted to constitutional county courts).

119. *Compare* *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (interpreting the phrase "construe wills" from section 5(d) of prior code) *and* 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 (section 5(d) at time of *Novak*) *with* TEX. PROB. CODE ANN. § 5A (Vernon 1980) (grants all courts power to construe wills).

120. *See* TEX. PROB. CODE ANN. § 5A (Vernon 1980) (district and statutory probate court jurisdiction is coextensive in probate matters).

121. *See id.* § 5A(a).

constructive trust.¹²² The imposition of constructive trusts is the traditional remedy availed contractual will beneficiaries¹²³ and the preferred contractual will remedy designated by the *Novak* court.¹²⁴ Statutory probate courts, however, are not so limited, having the same power as district courts in imposing constructive trusts.¹²⁵ Additionally, *Novak* may be limited on grounds that a district court, a court of general jurisdiction in most matters,¹²⁶ was in issue.¹²⁷ This limitation is a reasonable distinction in regard to constitutional county courts,¹²⁸ but is a distinction without a difference in regard to equally competent statutory probate courts.¹²⁹ Finally, this concern over possible expansion of constitutional county court probate jurisdiction may be exaggerated since either party, as well as the court itself, may move for removal to a district court when a will contest arises. When the parties so move, removal is mandatory.¹³⁰ The *Novak* court expressly held the contractual and "last" will situation is a "will

122. Compare *id.* § 5A(b) ("to impose constructive trust") with *id.* § 5A(a) (constructive trust authority language omitted). But see *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (power to construe wills alone sufficient to allow court to consolidate contractual and "last" will contests in one probate proceeding and render on both); 1977 Tex. Gen. Laws, ch. 448, § 1, at 1170 (power to construe wills given all courts but statute silent on constructive trusts).

123. See, e.g., *Carstairs v. Bomar*, 119 Tex. 364, 366, 29 S.W.2d 334, 338 (1930); *Knolle v. Hunt*, 551 S.W.2d 755, 763 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); *Lieber v. Merchantile Nat'l Bank*, 331 S.W.2d 463, 473 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.). See generally Comment, *Contract to Devise, Constructive Trust*, 10 TEXAS L. REV. 358, 358-63 (1932).

124. *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980).

125. TEX. PROB. CODE ANN. § 5A(b) (Vernon 1980).

126. TEX. CONST. art. V, § 8 (jurisdiction of district court); see Comment, *Section 5 of the Texas Probate Code: An Indirect Reduction of District Court Jurisdiction?*, 30 BAYLOR L. REV. 129, 129-32 (1978).

127. *Novak v. Stevens*, 596 S.W.2d 848, 848 (Tex. 1980).

128. District courts and constitutional county courts are, of course, on opposite ends of the probate jurisdiction spectrum. See Comment, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 324-26 (1975). Compare TEX. PROB. CODE ANN. § 5A(a) (probate jurisdiction of constitutional and statutory county courts) with *id.* § 5A(b) (probate jurisdiction of district and statutory probate courts). See also *id.* § 5(b)-(c) (right of removal from constitutional county courts into statutory probate and district court when contests arise).

129. See TEX. PROB. CODE ANN. § 5A(b) (Vernon 1980) (statutory probate court jurisdiction is coextensive with that of district court including power to impose constructive trusts); Comment, *Texas Probate Jurisdiction—There's a Will, Where's The Way?*, 53 TEXAS L. REV. 323, 324-25 (1975) (statutory probate courts may be deemed more competent than district courts in probate matters).

130. TEX. PROB. CODE ANN. § 5(b) (Vernon 1980). "[I]n contested probate matters, the judge of the county court may on his own motion, or shall on the motion of any party to the proceeding transfer such proceeding to the district court, which may then hear such proceeding as if originally filed in such court." *Id.* § 5(b).

contest" for removal purposes.¹³¹ Again, like district courts, the statutory probate court is a recipient of removals from less competent courts and is not subject to losing jurisdiction over the action when removal motions are filed.¹³² It would appear, therefore, that full precedential weight of *Novak* would extend only to statutory probate courts, granting such courts jurisdiction to consolidate and render judgment on both.¹³³

Second, the *Novak* court implicitly holds that the power to construe wills is the power to construe contracts.¹³⁴ Texas courts have been adamant in distinguishing the contract from the will in contractual will determinations.¹³⁵ The *Novak* court has, in effect, merged the contract into the will and made the contract but a provision of the will, subject to probate construction and determination, rather than a distinct contract invoking the law and jurisdiction of contract.¹³⁶ This merging of contract into will,¹³⁷ in addition to the legislature's codification of contractual wills in section 59A,¹³⁸ raises the issue of whether statutory contractual wills,

131. See *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980). It should be noted that traditionally the only issue presented in probate court is whether the proposed will is the last will and was executed in conformance with the code without undue influence, fraud, or mistake. See *Tips v. Yancey*, 431 S.W.2d 763, 764 (Tex. 1968) (expressly overruled in *Novak* at 851). Now an additional probate question proviso should be included: "and not subsequent to a validly executed contractual will." See *Novak v. Stevens*, 596 S.W.2d 848, 851, (Tex. 1980).

132. TEX. PROB. CODE ANN. § 5(c) (Vernon 1980).

133. See *id.* § 5A(b) (statutory probate court granted power to impose constructive trust and construe wills; deemed an equally competent court in probate matters); Comment, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 324-25 (1975) (statutory probate courts may be deemed more competent than district courts in probate matters).

134. See *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (implied *sub silentio*).

135. See, e.g., *Magids v. American Title Ins. Co.*, 473 S.W.2d 460, 464 (Tex. 1971); *Knolle v. Hunt*, 551 S.W.2d 755, 762-63 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); *Reynolds v. Park*, 521 S.W.2d 300, 308 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.). But see *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (power to construe wills encompasses power to construe contractual wills). See generally *Young, The Doctrinal Relationships of Concerted Wills and Contract*, 29 TEXAS L. REV. 439, 441 (1951) (and authority cited therein).

136. Compare *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (ignoring law of contract in contractual will determination) with *Magids v. American Title Ins. Co.*, 473 S.W.2d 460, 464 (Tex. 1971) (holds contractual feature *vel non* is governed by law of contract).

137. Compare *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (power to construe wills apparently means power to construe contractual wills) with *Magids v. American Title Ins. Co.*, 473 S.W.2d 460, 464 (Tex. 1971) (distinguishing contract from will in contractual will determinations).

138. The placement of section 59A is significant in that it is between section 59, "Requisites of a Will," which describes the fundamental requisites of the standard testamentary instrument entitled to probate admission, and section 60 "Exception Pertaining to Holographic Wills," which expressly denotes an exception to section 59 requisites when a will is

instruments executed in conformance with section 59A, will be subject to the remedy of direct admission to probate. The *Novak* court side-steps this issue by enforcing the contractual will by imposition of a constructive trust rather than allowing the instrument to compete head to head with a "last" will for admission.¹³⁹ The equitable constructive trust remedy, therefore, remains although subject matter probate jurisdiction has been extended.¹⁴⁰ This holding defers absolutely to the all too well settled principle that legal title to a decedent's property passes on the instant of death¹⁴¹ to devisees designated by a testator's last will¹⁴² or, if intestate, by statutory descent and distribution.¹⁴³ *Novak* affirms this rule *sub silentio* if not making it indelible since the contractual will proponent apparently failed to plead for equitable relief.¹⁴⁴ If one dies testate, legal title passes instantaneously to the designated beneficiaries under the "last" will regardless of the presence of a pre-existing contractual will.¹⁴⁵

holographic or wholly in the handwriting of the testator. TEX. PROB. CODE ANN. §§ 59, 60 (Vernon 1980). The only other instrument subject to admission to probate or, if not an instrument, of being entertained by a probate court, is the nuncupative will which is rare and governed by sections 64 and 65. *Id.* §§ 64, 65. It is true that all these statutes deal with the proving up of the respective instruments, but in doing so, these statutes also govern what instruments may be admitted to probate. Apparently, the mere recognition of contractual wills and the methods by which they are proved being codified, does not elevate these instruments in the same manner the common will, holographic, and nuncupative will sections operate toward their respective instruments. *See Novak v. Stevens*, 596 S.W.2d 848, 851, 853 (Tex. 1980).

139. *Id.* at 851, 853.

140. *See id.* at 848.

141. TEX. PROB. CODE ANN. § 37 (Vernon 1980).

142. *Id.* § 37.

143. *Id.* §§ 37, 38.

144. *Stevens v. Novak*, 583 S.W.2d 669, 671 (Tex. Civ. App.—Eastland 1979), *rev'd*, 596 S.W.2d 848 (Tex. 1980). The Eastland court, in *dicta*, held the granting of a constructive trust, being an equitable remedy, must be pled. *Id.* at 671; *cf.* TEX. PROB. CODE ANN. § 9 (Vernon 1980) ("Defects in Pleading").

145. *See Novaks v. Stevens*, 596 S.W.2d 848, 853 (Tex. 1980); *Buckner Orphans Home v. Berry*, 332 S.W.2d 771, 775-76 (Tex. Civ. App.—Dallas 1960, writ *ref'd n.r.e.*). In *Buckner*, sole beneficiary of a "last" will, with knowledge of its terms and existence, abstained from challenging the probate of a previously executed will of which she was but one of several devisees. After the probate order was granted, she was unsatisfied. She sought more of the estate which was agreed to and signed a release for the post-probate settlement. She then dusted off the "last" will and sought to have it probated. Probate was denied. On appeal, the court, while recognizing legal title vests immediately upon the death of the testator, held that her post-probate release served as a conveyance of the vested interest and that she was now estopped from asserting such interest. *Id.* 775-76. What the court failed to address, indeed, what *Novak* failed to address, is that if legal title vests in the "last" will devisee(s), then no intermediate will devisees can seek comfort in a probate order of that intermediate instrument. In *Buckner*, upon the finding that the beneficiary proposed a subsequent "last" will, the prior probate order should have been declared void. A constructive trust or outright

With legal title so posited by operation of law, only equity affords relief to contractual will beneficiaries. By the codification of contractual wills in section 59A and since the distribution of legal title upon death statute is silent as to "last" wills,¹⁴⁶ it would appear that such adherence to this probate principle is exaggerated. There is not a scintilla of evidence, however, that the legislature intended to do anything more with section 59A than address the means of proving a contractual will.¹⁴⁷ The mere statutory recognition of such instruments does not, apparently, make them subject to direct admission over and in lieu of a "last" will.¹⁴⁸

V. ENFORCEMENT & REMEDIES

Ironically, the legislature failed to address the most perplexing issue regarding contractual wills: whether a will may be rendered irrevocable.¹⁴⁹ So long as Texas probate courts recognize only "last wills,"¹⁵⁰ the enforcement of contractual testamentary instruments must rest in equity.¹⁵¹ The 1979 Probate Code revisions¹⁵² leave wholly unaffected the rule that wills

legal conveyance could have been found to reach the same result. This, the *Buckner* court did not do and as a result, the decision stands for the proposition that "last" wills are not the only validly executed wills subject to probate admission. *See id.* at 775-76. *See also* Smith, *The Draftsman Vis a Vis the Widow's Election and Its Tax Consequences*, 21 Sw. L.J. 591, 594 (1967).

146. *See generally* TEX. PROB. CODE ANN. § 37 (Vernon 1980).

147. *See, e.g., id.* § 59A; 3 A COMPILATION OF INTERIM REPORTS TO THE SIXTY-SIXTH LEGISLATIVE SESSION, "The Judiciary Committee: Proposed Revisions of the Texas Probate Code," 37-38 (Texas Legislative Reference Library 1979); Judiciary Committee Member, Representative Uribe's Floor Address, House Debate, H.B. 329, § 10, First Reading, Sixty-sixth Legislative Session (House Tapes, John H. Reagan State Office Building, Austin 1979). *Compare* H.B. 329, § 10, First Printing, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979) (three methods of proof permitted) *with* TEX. PROB. CODE ANN. § 59A (Vernon 1980) (only one method of proof retained).

148. *See* *Novak v. Stevens*, 596 S.W.2d 848, 851, 853 (Tex. 1980); TEX. PROB. CODE ANN. § 59A (Vernon 1980).

149. Irrevocability, *vel non*, is the common legal incidence of contractual wills that has created problems in both areas of jurisdiction and enforcement. *See* *Ellexson v. Ellexson*, 467 S.W.2d 515, 521 (Tex. Civ. App.—Amarillo 1971, no writ); *cf.* Young, *The Doctrinal Relationships of Concerted Wills and Contract*, 29 TEXAS L. REV. 439, 439 (1951) (contractual wills contain a "super-testamentary quality"). *But see* *Novak v. Stevens*, 596 S.W.2d 848, 849-50 (Tex. 1980) (jurisdictional issue no longer problem in regard to district courts but enforcement still requires equitable relief).

150. *See* *Novak v. Stevens*, 596 S.W.2d 848, 853 (Tex. 1980).

151. *Id.* at 853; *Knolle v. Hunt*, 551 S.W.2d 755, 763 (Tex. Civ. App.—Tyler 1977, writ *ref'd n.r.e.*).

152. *See generally* H.B. 329, First Printing, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979). This bill contained thirty-three provisions, each making substantive changes in the Code and related civil statutes.

are a creature of statute and, therefore, revocable.¹⁵³ The mere statutory recognition of "contracts concerning succession"¹⁵⁴ for the sole purpose of restricting the ways in which such instruments may be proved¹⁵⁵ fails to confer remedial power jurisdiction on any Texas court to admit such instruments to probate.¹⁵⁶ The considerable confusion attendant the remedy available to contractual will beneficiaries can be easily averted by amending section 63, Revocation of Wills,¹⁵⁷ to include the following suggested sentence:

[a]ll wills are revocable in the above-described manner except wills executed pursuant to section 59A of this Code,¹⁵⁸ in which case, they are revocable only by mutual consent of the parties so contracting, by the terms of the contractual will itself, or by operation of law.¹⁵⁹ Contractual wills have presented only two fundamental problems in re-

153. Compare TEX. PROB. CODE ANN. § 59A (Vernon 1980) (section relates only to proof; not revocability) with *Ellexson v. Ellexson*, 467 S.W.2d 515, 521 (Tex. Civ. App.—Amarillo 1971, no writ) (wills are always revocable) and TEX. PROB. CODE ANN. § 63 (Vernon 1980) (wills are revocable).

154. TEX. PROB. CODE ANN § 59A (Vernon 1980) (title).

155. See 3 A COMPILATION OF INTERIM REPORTS TO THE SIXTY-SIXTH LEGISLATIVE SESSION, "The Judiciary Committee: Proposed Revisions of the Texas Probate Code," 37-38 (Texas Legislative Reference Library 1979); Judiciary Committee Member, Representative Uribe's Floor Address, House Debate, H.B. 329, § 10, First Reading, Sixty-sixth Legislative Session (House Tapes, John H. Reagan State Office Building 1979); H.B. 329, § 10, Bill Analysis, Original Bill File, Sixty-sixth Legislative Session (Texas Legislative Reference Library 1979).

156. See *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979); Comment, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEXAS L. REV. 372, 383 (1976).

157. TEX. PROB. CODE ANN. § 63 (Vernon 1980). This section provides:

No will in writing, and no clause thereof or devise therein, shall be revoked, except by a subsequent will, codicil, or declaration in writing, executed with like formalities, or by the testator destroying or cancelling the same, or causing it to be done in his presence.

Id. § 63.

158. It should be noted that nothing in this proposed amendment would expand the application of statutory contractual wills to property excluded or omitted from the dispositive scheme in that instrument. Forms of such property include after acquired property or other property not within the contemplation of the contracting testators at the time the contractual will was executed. See *Murphy v. Slaton*, 154 Tex. 35, 42-43, 273 S.W.2d 588, 597 (1954) (after acquired property); *Wallace v. Turriff*, 531 S.W.2d 692, 694 (Tex. Civ. App.—Tyler 1975, writ *ref'd n.r.e.*) (after acquired property).

159. Author's suggested language. Of course, like any other contract, the parties may abandon or modify the agreement by mutual consent or place conditions in the contract which may effect a revocation even after one of the contracting testators dies. The "by operation of law" proviso is included to account for certain code provided revocations, as well as those general common law principles which operate to revoke or void a contractual agreement. See TEX. PROB. CODE ANN. §§ 67, 69 (Vernon 1980) (after-born children section and voidness arising from divorce section, respectively).

gard to whether such instruments are admissible in probate. First, the contractual feature invoked the law of contract which a probate court was not legally competent to exercise.¹⁶⁰ The *Novak* court demolished this obstacle when they interpreted the old subsection 5(d) "construe wills" language to mean construe contractual wills.¹⁶¹ Secondly, the probate courts only have recognized revocable but unrevoked "last" wills.¹⁶² With the suggested amendment to section 63 of the Code set out above, this second obstacle should be alleviated.

Alternatively, the legislature could simply redenominate the statute from 59A to 63A and retitling the statute "Exception Pertaining to Contractual Wills."¹⁶³ After omitting subsection 59A(b), the legislature could replace it with the following suggested sentence:

(b) Wills executed in conformance with subsection (a) shall be subject to direct admission to probate in any court with probate jurisdiction if uncontested, but, if contested, only in district or statutory probate courts.¹⁶⁴

This alternative would leave little or no room for judicial construction.

The confusion attending available remedies to contractual will beneficiaries and whether subject matter jurisdiction confers remedial power jurisdiction appears unnecessary. There is no reason why all wills must be revocable,¹⁶⁵ or why legal title must pass only to "last" will beneficiaries when a grantor dies testate.¹⁶⁶

160. *E.g.*, *Tips v. Yancey*, 431 S.W.2d 763, 764 (Tex. 1968); *Nesbett v. Nesbett*, 428 S.W.2d 663, 664 (Tex. 1968); *Murphy v. Slaton*, 154 Tex. 35, 42-43, 49, 273 S.W.2d 588, 597 (1954). *But see Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (all three holdings expressly overruled).

161. *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980).

162. *E.g.*, *Magids v. American Title Ins. Co.*, 473 S.W.2d 460, 464 (Tex. 1971); *Weidner v. Crowther*, 157 Tex. 240, 246, 301 S.W.2d 621, 625 (1957); *Richardson v. Lingo*, 274 S.W.2d 883, 885 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.); *see TEX. PROB. CODE ANN. § 63* (Vernon 1980) ("Revocation of Wills").

163. *Compare TEX. PROB. CODE ANN. § 59* (Vernon 1980) ("Requisites of a Will") *with id.* § 60 ("Exception Pertaining to Holographic Wills").

164. Author's suggested amendment. Of course, not all contractual wills are subjected to contest and are, therefore, "last" wills for all intents and purposes. There should be no question that a will executed pursuant to section 59A, even if failing in some formality of subsection 59A(a), should be admitted to probate as a "last" will if in conformance with section 59 and uncontested.

165. *See TEX. PROB. CODE ANN. § 63* (Vernon 1980). This statute states generally that wills are revocable if the revocation is pursued in conformance with the statutory provisions. No where does the statute even intimate that *all* wills must be revocable or that will provisions can not express irrevocability. *Id.* § 63. Such has been the holding of our courts, however, for well nigh a century, and the legislature has not seen fit to expressly change it. *See Young, The Doctrinal Relationships of Concerted Wills and Contract*, 29 TEXAS L. REV. 439, 441 (1951) ("an exaggerated respect for 'contract' and 'will' as individual concepts").

166. *See TEX. PROB. CODE ANN. § 37* (Vernon 1980). The statute states generally that

VI. CONCLUSION

Although the Texas Legislature intended to directly curtail the methods by which common law contractual wills are proved, it appears that the retention of subsection 59A(b) may prove unfortunate toward that end. The defect may be remedied either by judicial interpretation favoring legislative intent over rules of construction or by subsequent legislative repeal of subsection 59A(b).¹⁶⁷

Further, the legislature may have impacted upon the probate jurisdictional issue attending will contests between contractual will beneficiaries and "last" will beneficiaries, although this affection is not certain. The Supreme Court of Texas has held that the lone power to "construe wills" through old section 5 of the Probate Code allowed district courts to consolidate contractual and "last" will contests and render judgment on both. The fact that the new section 5A retains the conferral of power to construe wills upon all Texas courts with probate jurisdiction suggests that less competent constitutional and statutory county courts may have such authority. Since subsection 5A(b) grants statutory probate courts the power to construe wills and the tandem power to impose a constructive trust, there is no doubt that these courts have the power to consolidate and render on both contractual and "last" wills. The constitutional and statutory county courts, however, do not have the power to impose a constructive trust; therefore, it is doubtful these courts have the power to consolidate contractual and "last" will contests. Given the power of removal by contractual and "last" will contestants, the matter may never be litigated.

The only remaining procedural aspect of contractual wills, enforcement, was untouched by the Sixty-sixth Legislative Session, unless section 59A is to be liberally construed to define contractual wills as "testamentary instruments" subject to probate. Given the confusion regarding the remedies availed contractual will proponents and the concomitant jurisdictional aspect of distinguishing the power to construe with the power to impose a constructive trust, this silence is unfortunate. A clarification in this regard, by harmonizing section 63 regarding the revocation of wills with section 59A regarding the proof of contractual or irrevocable wills

the property shall pass on the instant of death to devisees. The statute does not state that it passes to devisees of a "last" will only. *Id.* § 37.

167. See TEX. CONST. art. III, § 5 (legislature meets every two years); TEX. REV. CIV. STAT. ANN. art. 5422 (Vernon 1958) (legislature meets in odd-numbered years). Given the fact that a will executed pursuant to section 59A must be jointly executed on or after September 1, 1979, TEX. PROB. CODE ANN. § 59A(a) (Vernon 1980), and for a contest to develop both testators must die, it is unlikely that section 59A will be litigated prior to the spring 1981 session of the Sixty-seventh Legislature.

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would prove most helpful. The two-part judgment admitting the “last” will only to simultaneously impose upon the “last” will beneficiaries a constructive trust is as anomalous as it is unnecessary.