Separation Agreements to Make Mutual Wills for the Benefit of Third Parties

Gerald Y. Sekiya
SEPARATION AGREEMENTS TO MAKE MUTUAL WILLS FOR THE BENEFIT OF THIRD PARTIES

It has been said that the will and the contract are "the two great institutions without which modern society can scarcely be supposed capable of holding together." At times, the legal significance of these two great institutions is taken for granted and lost in a maze of rules. The formation of a contract to make a will presents an excellent opportunity to delve beyond these rules. What appears to be a collision of established principles compels one to consider certain factors before determining which institution is to prevail.

The recent case of Mitchell v. Marklund involved an agreement to make mutual wills. A husband and wife entered into the following property settlement in connection with a divorce proceeding:

Both parties desire that all of the property of which they die possessed go equally to their two children . . . [I]n order to effect this disposition of their property, the parties hereto agree to execute wills including such provisions and that said wills when executed shall be irrevocable.

Following the divorce, the mother executed a will contrary to the terms of the agreement. The father followed by executing a will naming his second wife sole beneficiary. The father was the first to die and the children of his first marriage brought an action to enforce the agreement and to impose a constructive trust on the property held by his second wife through his will. The court held that the father had no duty to perform his promise for two reasons, namely, that either party was privileged to change his will while both parties were alive, and that the mother's breach released the father from his obligations.

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1 See McMurray, Liberty of Testation and Some Modern Limitations Thereon, 14 ILL. L. REV. 96 (1919), commenting on MAINE, ANCIENT LAW (Pollock ed. 1884).
3 "Mutual wills are the separate wills of two or more persons which are reciprocal in their provisions. A joint and mutual will is one instrument executed jointly by two or more persons, the provisions of which are reciprocal." Daniels v. Bridges, 123 Cal. App. 2d 585, 588-89, 267 P.2d 343, 345 (1954).
4 238 Cal. App. 2d at 400, 47 Cal. Rptr. at 758.
5 Id. at 406, 47 Cal. Rptr. at 762.
6 Id. at 402-03, 47 Cal. Rptr. at 761.
The reasoning of the Mitchell court indicates that this area of California law needs to be examined. A contract to make a will attempts to dispose of property while achieving ends unavailable through the use of other means of disposition. Unlike the creation of an inter vivos trust or the conveyance of a future interest, a contract to make a will attempts to dispose of property remaining at death. Unlike the mere making of a will there is a binding effect due to the contract. The circumstances of Mitchell—a separating couple with children—often accompany agreements to make mutual wills. A plan which would assure support$^7$ for the children without causing the separating couple great inconvenience is sought. Such a plan is found in a property settlement agreement incorporating promises to make wills. Although property settlement agreements are generally recognized$^8$ and favored$^9$ by the courts, problems arise when they attempt to restrict the privilege of testamentary disposition. Additional problems arise when third parties are named as beneficiaries.

The purpose of this discussion is to determine the extent to which a property settlement agreement to make mutual wills restricts either of the agreeing parties from subsequently making different wills without liability for breach of contract. The first question involved is whether an agreement to make mutual wills has the normal effect of a contract comprised of a promise for a promise, such that neither party may renounce his promise without the other's consent. The second question involved is whether the naming of a third party beneficiary requires something more than mutual consent to free the agreeing parties from any obligation to make mutual wills. The third question involved is whether failure of one party to make a will in accordance with this type of separation agreement necessarily means that the other need not perform.

Contracts To Make Wills

A contract to make a will brings the social desirability of compelling performance of a promise into conflict with the policy of allowing individuals to freely dispose of their property at death.$^{10}$ It is well-settled that a contract to make a will is valid and enforceable$^{11}$ both in law$^{12}$ and in equity.$^{13}$ California cases have followed this pattern indicating that a contract with a single promise

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$^7$ Support for children is also provided for by law. See, CAL. CIV. CODE § 196 (obligation of parents to support children); CAL. CIV. CODE § 205 (charging estate of deceased parent).


$^{10}$ See generally, 6 POWELL, REAL PROPERTY § 963 (1965). "The principles which apply to a contract to make a will apply to contracts not to revoke a will which the promisor has made theretofore, to contracts to revoke a will which had been made theretofore, and to die intestate, to contracts to refrain from making a will and to die intestate, and to contracts not to take under a will which the adversary party has made theretofore." 1 PAGE, WILLS § 10.1, at 436 (Bowe & Parker 1960) [Hereinafter cited as PAGE].


$^{12}$ Morrison v. Land, 169 Cal. 580, 584, 147 Pac. 259, 263 (1915).

$^{13}$ Bank of California v. Superior Court, 16 Cal. 2d 516, 524, 106 P.2d 879, 884 (1940).
to make a will merits no special treatment. However, treatment of contracts comprised of promises to make mutual wills seems to deviate from the normal rules of contract law. It is sometimes said that if all the parties to such an agreement are living, any party may repudiate his promise and make a different will without liability for breach of contract. The Mitchell court appears to be first in California to incorporate this proposition in a decision.

Numerous California cases have held that the surviving party to a contract to make mutual wills is estopped from renouncing his promise after one party dies leaving a will in accordance with the agreement. It is unclear why the doctrine of estoppel, rather than normal principles of contract law, is used to enforce such an agreement. An analysis of California cases leads to the conclusion that this concept may have developed by error.

The first case presented to the California Supreme Court involving a contract with a single promise to give property at death was Owens v. McNally. The court recognized the existence of a contractual obligation and said, "[H]e who makes a contract on this subject is as much bound thereby as he would be by any agreement on any other subject." McCabe v. Healy, unequivocally following the principles set forth in the Owens case, was the first to grant what is now

14 See, e.g., Davis v. Jacoby, 1 Cal. 2d 370, 34 P.2d 1026 (1934) (bilateral contract with a promise to perform services exchanged for a promise to give property at death).

15 Deviation from normal principles refers to an exception made to the principle that a promise made in exchange for another promise is consideration to support the formation of a bilateral contract. Hereafter, the discussion of "special treatment" is limited to mean this deviation from normal contract law.

16 "[W]hile both or all of the parties to such an agreement are yet alive, any party may recede therefrom, and revoke his will or make a different disposition . . . on giving proper notice . . . or where such other or others have actual knowledge . . . provided such other is afforded an ample opportunity to make a new will, and has not changed his position, to his detriment, in reliance on the agreement." 97 C.J.S. Wills § 1367, at 306-07 (1957). For a thorough analysis of this proposition as applied in other jurisdictions, see Sparks, Legal Effect of Contracts to Devise or Bequeath Prior to the Death of the Promisor, 53 Minn. L. Rev. 215, 222-31 (1954). Professor Sparks suggests that "the courts give effect to the contract and then offer the completely irrelevant dictum that either party could have revoked while both were living but that neither can do so after one has died." He goes on to say that "only a few cases involving an attempted rescission by the first to die have come before the courts, but those few have almost invariably reached the conclusion that there was never a right of unilateral rescission from the moment the contract was entered into. Cases which appear to reach the opposite result have usually been decided on other grounds." Id. at 230-31. See, e.g., Anderson v. Benson, 117 F. Supp. 765 (D. Neb.), appeal dismissed, 215 F.2d 752 (8th Cir. 1954); Trindle v. Zimmerman, 115 Colo. 323, 172 P.2d 676 (1946); Stewart v. Todd, 190 Iowa 283, 173 N.W. 619 (1919); St. Denis v. Johnson, 143 Kan. 955, 57 P.2d 70 (1936).

17 E.g., Brown v. Superior Court, 34 Cal. 2d 559, 212 P.2d 878 (1949).

18 113 Cal. 444, 45 Pac. 710 (1896) (services given in exchange for a promise to make a will).

19 Id. at 448, 45 Pac. at 711, quoting Rivers v. Rivers, 4 Am. Dec. 609, 611 (S.C. 1811).

20 138 Cal. 81, 70 Pac. 1008 (1902).
known as “quasi-specific performance”\(^2\) of a contract to make a will. With enforceability of a contract with a single promise to make a will firmly established, Estate of Rolls\(^2\) made clear the distinction between treatment of a will and of a contract to make a will. The supreme court pointed out that an enforceable contract has no effect on the probate of a will, and the probate of a will has no effect on the enforcement of a valid contract.\(^2\) It should be noted that none of the above cases deviate from the general principles of contract law, but on the contrary, indicate that a contract to make a will should not merit any special treatment.

Following these cases, Rolls v. Allen\(^2\) presented an action in equity against one who had revoked a mutual will. Here two parties had made mutual wills without an accompanying agreement. One had died with his mutual will unchanged, but before his will was probated, the survivor died leaving a different will. The action was for equitable relief due to the latter’s revocation of his mutual will. Section 1279 of the California Civil Code\(^2\) provided, “A conjoint or mutual will is valid, but may be revoked by any of the testators in like manner as any other will.” The court pointed out that this statute did not give special character to a mutual will but merely provided that such a will is revocable like any other will.\(^2\) Contention was made that the mere making of mutual wills implied promises not to revoke. The court rejected this argument, saying that such a holding would clearly be in violation of legislative intent since it would mean that all mutual wills would in effect be irrevocable.\(^2\) Since there was no accompanying agreement, the court held against the plaintiffs but said that had the survivor retained and enjoyed benefits from the first dying party, he might well have been estopped from exercising his right to revoke.\(^2\)

In Notten v. Mensing,\(^2\) the supreme court was presented with a case involving mutual wills made pursuant to an oral agreement. The statute of frauds provides that an agreement to make a will is unenforceable without some note or mem-

\(^{21}\) "An action of [this type] . . . has been called one for quasi-specific performance of the contract to make a will. . . . Since the making of a will cannot be compelled, there can be no specific performance of such a contract in the strict sense, but under certain circumstances equity will give relief equivalent to specific performance by impressing a constructive trust . . . ." Ludwicki v. Guerin, 57 Cal. 2d 127, 130, 17 Cal. Rptr. 823, 825, 367 P.2d 415, 417 (1961).

\(^{22}\) 193 Cal. 594, 226 Pac. 608 (1924) (probate court lacks jurisdiction to relieve against will not conforming to contract). For a discussion of well-recognized exceptions to this rule where controversies have sufficient connection with a pending probate proceeding see Estate of Baglione, 65 A.C. 189, 53 Cal. Rptr. 139, 417 P.2d 683 (1966).

\(^{23}\) 193 Cal. at 601, 226 Pac. at 610.

\(^{24}\) 204 Cal. 604, 269 Pac. 450 (1928) (parties are the same ones involved in Estate of Rolls, 193 Cal. 594, 226 Pac. 608 (1924), now seeking relief in equity).

\(^{25}\) CAL. CIV. CODE § 1279 (Deering 1925), now CAL. PROB. CODE § 23, without substantial change.

\(^{26}\) 204 Cal. at 607-08, 269 Pac. at 452.

\(^{27}\) Id. at 608, 269 Pac. at 452.

\(^{28}\) Id. at 609, 269 Pac. at 452. This dictum has not been applied in California. See, Note, Mutual Wills, 48 CALIF. L. REV. 858 (1960). "In the absence of contract either testator may revoke his will at anytime without liability, even if he has taken under the will of his co-testator." Id. at 862.

\(^{29}\) 3 Cal. 2d 469, 45 P.2d 198 (1935).
orandum in writing. Here, the surviving party had revoked his will after taking benefits through the mutual will left by the first dying party. The court held that the survivor was estopped from pleading the statute of frauds as a defense, since he had benefited from the oral agreement to make mutual wills.

These two cases introduced the doctrine of estoppel as a remedial device against revocation by surviving parties to mutual wills. It should be noted that the doctrine was introduced in the absence of an accompanying agreement and in the absence of evidence in writing. From these cases alone, there is no logical reason to conclude that enforcement of a valid, written contract to make a will, whether mutual or otherwise, should not be based on normal principles of contract law. In the absence of an enforceable contract, estoppel may lie against one who took and enjoyed benefits from the first-dying party.

If a case immediately following Notten had involved one who repudiated his written agreement to make mutual wills while both parties were alive, it may fairly be surmised that the court would have enforced the agreement under normal principles of contract law. However, the first case with a written agreement to make mutual wills was Sonnicksen v. Sonnicksen, which involved an action against a surviving party. The court held that the survivor could not revoke his mutual will without liability. Instead of basing this decision on a bilateral contractual obligation, the court said, "[H]e thereupon became estopped from making any other or different disposition . . . ." What appears to have been a failure to recognize the circumstances under which the doctrine of estoppel had been applied, gave rise to the implication that an agreement to make mutual wills in California is unenforceable without estoppel. Since Sonnicksen, dicta has appeared indicating that either party to an agreement to make mutual wills is privileged to revoke his will prior to the other's death.

Although Mitchell v. Marklund used this proposition as a reason for its decision, the court also based the decision on another factor. Thus, in spite of Mitchell, it is still questionable that the proposition that either party to an agreement to make mutual wills is free to renounce his promise while all parties are alive is a correct statement of California law. Since it has been said that this is the "general rule," let us turn to the question of whether this position should be adopted by the California courts.

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30 CAL. CIV. CODE § 1624 (6).
31 45 Cal. App. 2d 46, 113 P.2d 495 (1941). Prior to this case, the supreme court had been presented with a case involving a valid agreement to make mutual wills. However, in that case, the agreement to make mutual wills had been fully performed and the problem of inheritance taxes was involved. It should be noted that for the purpose of taxes, the estate involved was said to be "subject to the charge of the valid contract," and no mention of estoppel was made. Estate of Rath, 10 Cal. 2d 399, 404, 75 P.2d 509, 511 (1937).
32 45 Cal. App. 2d at 55, 113 P.2d at 500.
35 See text accompanying note 6 supra.
This "rule" has been justified on the grounds that it is generally desirable to continue one's power to alter the testamentary disposition of his property until his death. It seems that proponents of special treatment for a contract to make a will lose sight of the fact that the privilege of testamentary disposition is merely one of many property interests recognized by law and looked upon favorably by society. The law has provided a means by which one may dispose of property at his death. However, it also recognizes and respects one's right to freely dispose of his property during his lifetime. Both interests are qualified by laws which protect the interests of others. Little objection, if any, is raised against the subjection of inter vivos property transfers to contractual obligations. Yet it is suggested that the privilege to dispose of property at death may be too valuable to allow its subjection to a contractual obligation. This suggestion implies that although freedom to utilize one's property during his lifetime is precious, the freedom to dispose of it at death may be more precious. If it is urged that special attention be directed toward a promise to devise and bequeath, then why shouldn't similar attention be directed toward promises affecting other property interests? In fact, it would seem that if any special privileges such as immunity from a contractual obligation are to be granted, they should be directed toward promises affecting one's property during his lifetime rather than at his death.

One may conclude that the privilege of testamentary disposition and other property interests are equally valuable. However, enforceability of a contract to make a will may be questionable despite this conclusion. Still remaining, is the fact that a will is essentially ambulatory and revocable. It may be argued that

37 Id. at 52-53, 129 P.2d at 821 citing Hirsh, Contracts to Devise and Bequeath, 9 Wis. L. Rev. 267, 275 (1933).
39 See McMurray, Liberty of Testation and Some Modern Limitations Thereon, 14 Ill. L. Rev. 96 (1919). "What is a testament... It is the expression of the will of a man who has no longer any will, respecting property which is no longer his property; it is the action of a man no longer accountable for his actions to mankind, it is an absurdity, and an absurdity ought not have the force of law." Id. at 97 quoting Mirabeau, Discours sur l'égalité de partages (1791). See also, 6 POWELL, REAL PROPERTY ¶ 940 (1965). "Persons untrammeled in the formulation of philosophical viewpoints by a knowledge of history, have insisted that 'the practice of allowing the owner of property to direct its destination after his death... is coeval with civilization itself....' This simply, is not true." Id. at 373. Compare, Costigan, Constructive Trusts Based on Promises Made to Secure Bequests, Devises, or Intestate Succession, 28 Harvard L. Rev. 237 (1914). "The species of contract to bequeath or to devise which results in a joint will, or in a joint and mutual will, or in mutual wills calls for special reference." Id. at 346-47.
40 "Wills are ambulatory by their nature and create no rights which the court can recognize or enforce until they become operative by the death of the testator. 'Acts which remain thus inchoate... are in the nature of unexecuted intentions. The author of them may change his mind, or the state may determine that it is inexpedient to allow them to take effect.'" Estate of Berger, 198 Cal. 103, 106, 243 Pac. 862, 863 (1926). "The word ambulatory is sometimes used to describe the idea of revocability, but it is also frequently used to mean that a will operates upon the facts and situation existing at the time of the testator's death, and may pass property acquired after the will was executed as well as property owned at the time of execution." 1 PACE ¶ 1.2, at 4.
enforceability of a contract to make a will violates this essential characteristic of a will.\(^{41}\)

Why should contract principles be allowed to destroy the privilege to change a will when a will, by its very nature, is revocable and ambulatory? The law is not ignorant of the fact that circumstances and a man's thinking are subject to change.\(^{42}\) Contract law is not directed against the freedom to change one's mind. It results from a balance between this freedom and the interests of others which merit protection.\(^{43}\) Not all promises are enforceable, but merely those that are supported by "consideration" or those which have caused a detrimental change of position.\(^{44}\) Promises in a contract represent future actions which are "revocable and ambulatory in nature" without a contract, otherwise the contract would serve no purpose. So to argue that the privilege of testamentary disposition should not be subject to the normal rules of contract because it is revocable and ambulatory in nature is to beg the question.

Revocability of a will is too often taken for granted. Loose thinking may lead to a conclusion that a will is not only revocable in nature, but is also made revocable by law. A will, as recognized in its Anglo-American form, takes no effect until its maker dies. Since the privilege of testamentary disposition is looked upon as a state-created right rather than as a natural right, there is little doubt that the state could establish the first making of a will as final without being subject to change.\(^{45}\) Fortunately, no effect has been given to such an unjustifiable position, thus a will remains revocable until death of its maker. This, however, does not mean that a will is made revocable by law. It simply means that the law does not make a will irrevocable once it is made. Comparison of a will with a deed illustrates this point. Both instruments represent the abstract process of transferring property. The deed takes effect upon delivery,\(^{46}\) while the will takes effect upon the death of its maker. Both are revocable and alterable prior to these occurrences. It is seldom suggested that the law makes a deed revocable.

\(^{41}\) But cf. Meislin, Revocation of Contracts to Bequeath Benefitting Third Parties, 44 VA. L. REV. 41 (1958). "Lending encouragement to the smudging of finely drawn judicial lines are those texts which oppose differentiation between contracts to bequeath and other agreements. Such a viewpoint fails to take heed of the ambulatory element necessarily present in any plan which substitutes for a will." Id. at 59-60.

\(^{42}\) “Many of us indeed would shudder at the idea of being bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness. Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience.” Cohen, The Basis of Contract, 46 HARV. L. REV. 553, 573 (1932).

\(^{43}\) 1 CONRN, CONTRACTS § 1 (1963).

\(^{44}\) See, Restatement (Second), Contracts §§ 75-90 (Tent. Draft No. 2, 1965).

\(^{45}\) "[T]he right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from statutes... The Legislature may withhold the right altogether, or impose any conditions or limitations upon it which it chooses." Estate of Burnison, 33 Cal. 2d 638, 639-40, 204 P.2d 330, 331 (1949), aff'd sub nom. United States v. Burnison, 339 U.S. 87 (1950).

\(^{46}\) "Delivery is the force that vitalizes the instrument. Here there was no life in the instrument, because there was no delivery." Gould v. Wise, 97 Cal. 532, 535, 32 Pac. 576, 577 (1893).
Yet an essential characteristic of a deed is that it is revocable until there is a delivery. Similarly, an essential characteristic of a will is that it is revocable until the maker dies. Our laws, however, give more emphasis to formalities for revocation of a will. The reason for this emphasis is not that revocability is a more essential characteristic of a will. Death, unlike delivery, is certain to occur. Laws stress the requirements of positive action necessary to give effect to a deed, since without positive action, an executed deed will never take effect. On the other hand, laws stress requirements of positive action necessary to revoke a will, since without positive action, an executed will inevitably will take effect. For these reasons, the suggestion that a will is made revocable by law, should be confined to the basis of its origin, namely to emphasize that a will is inoperative until death of its maker. This suggestion offers no support against enforcement of a contract to make wills according to normal principles of contract law.

California courts have enforced contracts with single promises to make a will according to normal principles of contract law. Only when an executory bilateral contract embodies promises to make wills on both sides of the agreement does enforcement become questionable. Arguments made against normal enforcement of an agreement to make mutual wills, are the same arguments which may be used against enforcement of any agreement with a promise to make a will. Until justification can be found for distinguishing between an agreement with only one promise to make a will and an agreement to make mutual wills, the principles of contract law applied to the former should apply to the latter. Also, without reason for giving the privilege of testamentary disposition greater immunity against contractual obligations than is given to other property interests, an agreement to make mutual wills should constitute an enforceable bilateral contract.

Third Party Beneficiaries

Many agreements to make mutual wills involve third party beneficiaries. The addition of a third party beneficiary should not make an unenforceable agreement suddenly enforceable, since the beneficiary’s rights are dependent on the existence of a contract. If either party to a contract to make mutual wills is allowed to repudiate his promise while both parties are alive, it should follow that the naming of a third party beneficiary does not extinguish this privilege. Assuming that an enforceable third party beneficiary contract does exist, the question arises

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47 "The essential element of revocability follows from the idea that the will is not meant to create any rights in others or to pass any interest in the property covered by the will prior to the maker's death." 1 Page § 1.2, at 3-4.

48 E.g., Davis v. Jacoby, 1 Cal. 2d 370, 34 P.2d 1026 (1934).

49 "Our law has no separate concept of 'will made in pursuance of contract,' we must treat the will part as a will and the contract part as a contract." Atkinson, Wills 224 (2d ed. 1953).

50 "The claim of a beneficiary is dependent upon the validity of the contract that creates it. If that contract is void, voidable, or unenforceable, his claim is likewise affected. Thus an informal promise without consideration cannot be enforced by a beneficiary . . . " 4 Corbin, Contracts § 818, at 266-67 (1951).

51 "The right to enforce such a contract to make a particular disposition of property on death is not restricted to the promisee. Where two parties agree to make mutual wills . . . to certain third persons . . . the intended devisees and legatees are entitled to enforce their rights as beneficiaries under the agreement." Brown v. Superior Court, 34 Cal. 2d 559, 564, 212 P.2d 878, 881 (1949).
whether the contracting parties may mutually rescind the contract and make different wills.

In Riley v. Riley, a case involving an action by third party beneficiaries to enforce a settlement agreement, the court said: "The parties to a contract entered into for the benefit of third persons may rescind or abrogate it without the assent of such third persons at any time before the contract is accepted, adopted or acted upon by such third persons." Subsequently, James v. Pawsey involved a three-party agreement to make mutual wills which would ultimately favor an infant beneficiary. The court distinguished this agreement from the normal agreement to make mutual wills since there was consideration other than promises to make wills, and concluded that rights and obligations were created when the agreement was executed. In answer to a contention that the contract was mutually rescinded, the court said, "Acceptance by a third party donee beneficiary so as to preclude rescission without the consent of the beneficiary... will be presumed, where the beneficiary... is an infant at the time of the making of the contract." As previously discussed, the proposition that either party may unilaterally repudiate an agreement to make mutual wills while both parties are alive is unsound. However, it may be equally unsound to deny the parties the power of mutually consenting to a rescission which would allow them to make different wills. Denial of the power to mutually rescind may result from application of contract principles involving the question of when a third party beneficiary's rights are "vested." Since all contracts to make wills in favor of third persons involve this problem, it is necessary to examine this phase of contract law.

Third party beneficiary rights have developed from a stage of non-recognition to practically uniform recognition in the United States. The leading American

53 Id. at 15, 256 P.2d at 1058. The action in this case was to enforce an agreement to make mutual wills. Promises were made to bequeath interests, which the contracting parties had in trust, in accordance with a separate trust agreement. The court avoided the issue of whether the first to die was privileged to make another will by holding that his promise was not broken because the trust had been validly revoked thus leaving no interest to give in accordance with the agreement. The phrase quoted in text was made with reference to rescission of the trust agreement that accompanied the settlement agreement.
55 Id. at 748, 328 P.2d at 1028.
56 Id. at 747, 328 P.2d at 1028. In this case, rescission was attempted after one of the three parties had already died leaving a will in accordance with the agreement. Thus, there were stronger reasons given by the court to support the decision. However, a contention was made that the first to die had only subjected mere expectancies to the agreement. Although the court held against this contention, the theory of presumption of acceptance by a minor beneficiary was suggested as a reason for denying a privilege to rescind in the absence of grounds for estoppel. It seems that with one party already dead, there could be no rescission anyway, and that the suggestion by the court is mere dicta. However, the case is used here to illustrate some of the confusion that may arise when third party beneficiary problems are combined with problems of agreements to make mutual wills.
57 The term "vested" as used in this discussion means fixed in the contract terms which are unalterable without the beneficiary's consent.
58 See generally 4 CORBIN, CONTRACTS § 772 (1951).
case, Lawrence v. Fox, held that a third party beneficiary was entitled to an action for breach of a contract made in his favor. This case was the forerunner of judicial development of rights in one who was not a party to the contract. Since then, the courts have struggled with the determination of the extent of these rights. It became necessary to harmonize the third party beneficiary contract with orthodox contract law which dealt with a promisee and a promisor. The ultimate question was whether the beneficiary's consent was necessary for subsequent alteration or rescission of the contract. An illustration of a controversial answer to this question is the position taken by the Restatemen of Contracts. Section 142 provides:

Unless the power to do so is reserved, the duty of the promisor to the donee beneficiary cannot be released by the promisee or affected by any agreement between the promise and the promisor . . . .

Section 143 provides:

A discharge of the promisor by the promisee . . . is effective against a creditor beneficiary if . . . the creditor beneficiary does not bring suit upon the promise or otherwise materially change his position in reliance thereon . . . .

The Restatement's position is clear. With respect to the donee beneficiary, his rights are fixed in the terms of the contract once it is made. With respect to the creditor beneficiary, his rights are subject to alteration by the original parties until he brings an action on the contract or changes position in reliance. The situation in California, however, is not so clear.

In California, third party beneficiary rights are based on section 1559 of the California Civil Code which provides, "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

Before going further, the significance of this statute should be noted. It was enacted only thirteen years after Lawrence v. Fox was decided. Although the Lawrence court did not speak of a "creditor beneficiary," the case involved a promise to pay a debt of the promisee. Subsequently, New York Courts refused to extend third party rights beyond the facts of the Lawrence case. Eventually, donee beneficiary rights developed and there now exists in American jurisprudence, the classification of beneficiaries into donees and creditors. The California statute, however, makes no mention of such a classification. It seems to give any person for whose benefit the contract is expressly made, whether donee or creditor,
a right to enforce the contract. It also qualifies the beneficiary's rights with the clause, "before the parties thereto rescind." Simply stated, before the courts were ever faced with determining whether a donee beneficiary should be entitled to enforce the contract made in his favor, or whether the contracting parties could rescind without the beneficiary's consent, section 1559 of the Civil Code had become a part of California law. Perhaps it may be said that section 1559 is as much a forerunner of third party beneficiary rights in California as is Lawrence v. Fox in the United States.

Although the California courts have described beneficiaries as donees and creditors, there is no indication of different principles for each with respect to the time when the rights of the beneficiary are vested. There are three positions available with respect to the time when these rights are vested—when there is a change of position or institution of suit, when the contract is made, at some time in between.

Few would attempt to justify the power to rescind after the beneficiary has changed his position or brought suit. However, holding the contract unalterable without the beneficiary's consent before these stages is questionable. California decisions dealing with this point have reached various conclusions. One outdated case concluded that the making of a third party beneficiary contract is an offer and once it is accepted, the parties may not rescind. Other cases have said that the

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68 Logically, the power of the contracting parties to rescind should not go beyond this point. To allow rescission after institution of suit would in effect, practically nullify any right in the beneficiary to enforce the contract. No cases can be found allowing mutual rescission after the beneficiary has initiated a suit. Also, it seems unnecessary to apply estoppel to prevent rescission since estoppel is a doctrine that stands independent from the existence of an enforceable contract. "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise. The remedy granted for breach may be limited as justice requires." RESTATMENT (SECOND), CONTRACTS § 90 (TENT. DRAFT NO. 2, 1965).

69 An example is the Restatement's position with regard to donee beneficiaries. See text accompanying note 61 supra.

70 There are cases holding that the beneficiary's rights vest when "he learns of" the contract, to when he "expresses assent thereto." SIMPSON, CONTRACTS § 122, at 256 (2d ed. 1965).

71 Central Bank v. Wells Fargo Bank & Union Trust Co., 18 Cal. App. 2d 559, 64 P.2d 405 (1937), hearing den., 18 Cal. App. 2d 567, 65 P.2d 1301 (1937). The denial was based on the finding that there was no rescission and the statements made by the lower court, with regard to "acceptance" preventing rescission, were disapproved. See More v. Hutchinson, 187 Cal. 623, 203 Pac. 97 (1921) (involving the statute of limitations) for a case applying the theory that the third party beneficiary contract is an offer which may be accepted by the beneficiary. In Bogart v. George K. Porter Co., 193 Cal. 197, 223 Pac. 959 (1924) the court rejected the More theory but saved the case by
parties may rescind at anytime prior to institution of suit as long as no estoppel is present. Still others have expressed what is said to be the general rule that the contracting parties may rescind until the contract is accepted, adopted, or acted upon. As previously mentioned, the Pawsey case suggests a presumption of acceptance when the beneficiary is a minor, thus making the contract unalterable once it is made.

The offer-acceptance theory has been amply criticized elsewhere as one which ultimately leads to confusion. It has been rejected in California, yet the idea of "acceptance" has found its way via the "general rule that the contract may not be rescinded once accepted, adopted or acted upon." It should be noted that this position is one which has developed in other jurisdictions. It seems unwise to adopt it merely because it is the general rule if it is otherwise unjustifiable.

As previously mentioned, third party beneficiary rights in California are based on a statute enacted early in 1872. Courts in other jurisdictions have had to struggle to establish rights in one who is not a party to the contract. As said by one court, while referring to this judicial process:

It is useless to endeavor to review the authorities touching the subject with a view of harmonizing them upon any one single theory as to the principle upon which the liability to a third person is based, or as to what are the essential elements to effect it. There is as much confusion, probably, in the judicial holdings in respect to the matter, as on any question of law that can be mentioned. There is confusion not only between different courts but confusion in the decisions in many jurisdictions in the same court.

The position that the contract is fixed once made seems clearly untenable in California. This result has been suggested by way of a presumption of acceptance

distinguishing and then saying that even if the More theory was applied, the offer had lapsed because of an unreasonable time. Id. at 211, 223 Pac. at 965.


73 "After the third person accepts, adopts, or acts upon the contract entered into for his benefit, the parties thereto cannot rescind or modify it without his consent so as to affect or deprive him of his rights thereunder, in the absence of a reservation of the right of rescission or modification in the contract. This rule applies to an agreement to pay another's debts as well as to other third party beneficiary contracts. The rule is held to be predicated, however, upon the third person having knowledge of the terms and conditions of the agreement and not merely knowledge of its existence, and such knowledge must be established by the third person claiming the benefit of such agreement." 17 AM. JUN. Contracts § 318, at 747 (1964). See also 17A C.J.S. Contracts § 390, at 469 (1963).


75 See 4 CORBIN, CONTRACTS § 813, at 245 (1951); Langmaid, supra note 66, at 503; 12 CALIF. L. REV. 328 (1924).

76 See notes 71, 75 supra.

77 Note 74 supra.

78 This position was introduced in California in Riley v. Riley, 118 Cal. App. 2d 11, 15, 256 P.2d 1056, 1058 (1953) citing 12 AM. JUN. Contracts § 390, at 843 (1938). Cases used to support the statement in AM. JUN. include none from California.

79 Tweeddle v. Tweeddle, 116 Wis. 517, 522-23, 93 N.W. 440, 442 (1903).

80 No cases except James v. Pawsey, 162 Cal. App. 2d 740, 328 P.2d 1023 (1958)
in the case of minor beneficiaries. It may yet be attained by other presumptions of acceptance.

The rule that the contracting parties may rescind anytime before institution of suit as long as no estoppel is present seems fair when applied to creditor beneficiaries. If the same rule is to apply to donees and creditors, as appears to be the case in California, there seems little justification for depriving the contracting parties of the power to mutually rescind before the beneficiary changes position or brings a suit. When, for example, a contract to make mutual wills is made, it may be unjust to deny the parties the power to mutually rescind their agreement without consent of the beneficiary merely because he “accepts” the contract. The creditor beneficiary suffers no loss if the contract is rescinded since he still has the original obligation to rely upon. The donee beneficiary “has given no consideration in the past, gives none in the present, and promises nothing in the future.”

As provided in section 1559 of the California Civil Code, such a

have ever suggested that the contracting parties are without the power to rescind once the contract is made. This position would seem to be in direct conflict with the clause providing for rescission in section 1559 of the California Civil Code. This position, which is taken by the Restatement of Contracts finds its support in insurance cases which have held that beneficiaries of life insurance policies may not be changed without the beneficiary’s consent unless the power to do so is reserved in the terms of the contract. See generally 4 Corbin, Contracts § 814, at 247 (1951). But see Vance, The Beneficiary’s Interest in a Life Insurance Policy, 31 Yale L.J. 343, 360 (1922), where Professor Vance concludes that “[T]he doctrine of vested rights in the beneficiary, having its origin in statutes intended primarily to safeguard the interests of married women and children in the proceeds of insurance... when expanded to cover all cases of insurance... when expanded to cover all cases of insurance for the benefit of a third party, has proved unsuited to the needs of the community and destructive of the actual intention of most persons procuring insurance, and that by dint of express stipulation in policies, and very slow judicial retreat, we shall return to the view that seems both just and reasonable, that, with the exception of such special interests as may be secured to married women and children by statute, no rights should be held to accrue to a sole beneficiary until the policy has matured.” Query, if the rule should not be extended to other phases of insurance, why should it be extended beyond insurance cases at all? Support for the Restatement’s position is also found by theoretically looking at the donee beneficiary contract as an irrevocable gift to the donee. 2 Williston, Contracts § 396, at 1067 (3d ed. 1957); 4 Corbin, Contracts § 814, at 254 (1951).

See note 56 supra and accompanying text.

“Such a new right cannot possibly be detrimental... [I]t is quite possible here to indulge the presumption of assent to such a donation without any knowledge or expression of assent on the part of the creditor.” 4 Corbin, Contracts § 815, at 259 (1951) (criticizing the “acceptance” rule when applied to creditor beneficiaries).

It seems better to construct a rule on the basis of estoppel unless the transaction ought to be regarded as an irrevocable gift to the third party from the beginning.” 4 Corbin, Contracts § 815, at 259 (1951).

It is difficult to predict what will constitute “acceptance” if California courts adopt the “general rule.” The only cases found that have suggested denial of the power to rescind before institution of suit or estoppel are James v. Pawsey, 162 Cal. App. 2d 740, 328 P.2d 1023 (1958) and Central Bank v. Wells Fargo Bank & Union Trust Co., 18 Cal. App. 2d 559, 64 P.2d 465 (1937). For a collection of cases from other jurisdictions see 17A C.J.S. Contracts § 390, at 409 (1963).

contract may be enforced by the beneficiary at anytime "before the parties thereto 
rescind it." Thus, an agreement to make mutual wills should be subject to alteration 
by mutual consent of the agreeing parties before the beneficiary changes 
position or initiates a suit.86

The Mitchell court was not concerned with mutual rescission since the decision 
was based on reasons which made the finding of a mutual rescission irrelevant. 
Discussions in the previous and following sections, attempt to show that the 
reasons given by the court may be unsound. Perhaps, the matter of mutual 
rescission should have been litigated.87

*Conditional Performance*

It is not unusual for a couple to include conditions in their agreement to make 
wills. For example, promises might be made to devise and bequeath to the chil-
dren if the parent dies before the child reaches a certain age. A promise of this 
nature is made expressly conditional and the parent, of course, has no duty to 
perform if the condition is not met.88 However, the absence of an express condi-
tion does not necessarily mean that the promise is unconditional, for the law is 
apt to imply other conditions upon which performance is dependent. As will be 
shown, a separation agreement to make mutual wills may sometimes present an 
unusual situation in which a constructive condition, normally applied in bilateral 
contracts, should not be applied.

At one time, promises were independently performable.89 That is, performance 
by one party was not dependent on performance by the other. Today, courts are 
inclined to find constructive dependence of promises in a bilateral contract when-
ever possible.90 In a normal settlement agreement to make mutual wills, each 
spouse promises that he will leave property to the survivor, who in turn will leave 
property to the children. If the first dying party fails to carry out his promise, the

86 The contract doctrine of anticipatory repudiation is applicable to contracts to 
make wills. See, Brewer v. Simpson, 53 Cal. 2d 567, 593, 2 Cal. Rptr. 609, 620, 349 
P.2d 289, 300 (1960). For example, “It has also been recognized that the promises of 
such a contract need not wait until the death of the promisor but may seek equitable 
relief against inter vivos conveyances made by him in fraud of their rights.” Brown v. 
Superior Court, 34 Cal. 2d 559, 564, 212 P.2d 878, 881 (1949). See generally Sparks, 
Legal Effect of Contracts to Devise or Bequeath Prior to the Death of the Promisor: I, 
53 Micn. L. Rev. 1 (1954). Since most agreements to make wills are in writing, alter-
ations other than a complete rescission may encounter an additional problem. For ex-
ample Cal. Civ. Code § 1398 provides, “A contract in writing may be altered by a 
contract in writing, or by an executed oral agreement, and not otherwise.” See also 
87 Compare Page, supra note 85, at 164. “If the contract between A and B is 
executory on both sides, and B has failed to perform the contract to such a degree that 
A could treat the contract as discharged against B, he may also treat it as discharged 
against [the beneficiary] .... In cases like this, A’s right to treat the contract as dis-
charged because of B’s breach is so clear, in most states, that the question of the power of 
A and B to terminate the contract by mutual agreement is of little or no importance.” 
[Emphasis added.]
88 See, 4 CORBIN, CONTRACTS § 818, at 269-72 (1951).
89 See generally 3A CORBIN, CONTRACTS § 654, at 136 (1960).
90 6 WILESTON, CONTRACTS § 827, at 68 (3d ed. 1987).
survivor is under no obligation to perform since the promise he bargained for was broken. Thus, the beneficiaries have no cause of action against the survivor since the survivor has no duty to perform due to the “failure of consideration” upon which his performance was dependent.

In the *Mitchell* case, the wife breached the agreement to make mutual wills before the husband died leaving a nonconforming will. The court concluded that the wife’s breach freed the husband from his obligations. A fine distinction between an agreement to make wills normally made by married couples and the one involved in the *Mitchell* case may have been overlooked by the court. Unlike married couples, separating couples generally have little concern for each other. This lack of concern is evidence by a separation agreement in which the parties promise to will *directly* to the children without providing for the property of the first dying spouse to go to the survivor. The absence of this survivorship clause results in a contract with promises on both sides which wholly benefit the third

91 “A breach of such an agreement by one of the parties may, however, be treated by the other party or parties, at their option, as releasing them from their obligations under the agreement.” 97 C.J.S. *Wills* § 1367, at 307 (1957). This section was quoted in *Mitchell v. Marklund*, 238 Cal. App. 2d 398, 405, 47 Cal. Rptr. 756, 761 (1965).

92 “In innumerable cases, however, a promise has been declared to be unenforceable because there has been a 'failure of the consideration.' This does not mean lack of consideration; nor does it often mean that the promise, now unenforceable, was never a valid contract. It does mean, on the other hand, that a performance for which the promisor bargained has not been rendered; in many cases, though not in all, that failure is a good legal excuse for his refusal to perform his own promise, and it may be a good reason for compelling restitution if he has already performed.” 1 CORWIN, CONTRACTS § 133, at 572 (1951). “A party to a contract may rescind the contract... if the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds.” CAL. CIV. CODE § 1699. This section enumerates the grounds for rescinding a contract, in addition to mutual consent. See also CAL. CIV. CODE §§ 1691 (procedural requirements for rescission), 1692 (relief based on rescission), 1693 (effect of delay in notice or in restoration). These statutes were amended in 1961 as an attempt to clarify some of the confusion that existed with respect to rescission of a contract. See generally 3 CALIFORNIA LAW REVISION COMM’N, REPORTS, RECOMMENDATIONS & STUDIES D-5 (1961). The sections mentioned above are applicable to third party beneficiary contracts, since the rescission clause in CAL. CIV. CODE § 1559 (third party beneficiary rights) “means all manner of rescission provided by law.” R. J. Cardinal Co. v. Ritchie, 218 Cal. App. 2d 124, 150, 32 Cal. Rptr. 545, 561 (1963).

93 *Mitchell v. Marklund*, 238 Cal. App. 2d 398, 405, 47 Cal. Rptr. 756, 761 (1965). The court’s conclusion that the wife’s conduct was a breach of contract seems to conflict with the conclusion that either party may repudiate his promise while both parties are alive. It could be reasoned that the wife had failed to meet the requirements of a privileged unilateral repudiation. However, the husband had time to and did change his will, so calling the wife’s conduct a breach presents an inconsistency. Query, would the court have called the wife’s repudiation a breach had the action been brought against her?

94 The normal definition of mutual wills does not include wills made without survivorship provisions. See note 3 supra. However, the *Mitchell* court did not seem hesitant about labeling these promises as promises to make mutual wills. The discussion in text is applicable to such promises whether they are called promises to make mutual wills or not.
party beneficiary. Such a contract presents the problem of deciding whether performance by one should be a condition to performance by the other, since neither party gains material benefit from performance by the other.

There is support for the position that a contract comprised of promises on both sides which wholly benefit a donee beneficiary are consideration to support each other, but performance by one is not dependent upon performance by the other. This position is justifiable simply because there is no reason for implying dependency of these promises. Constructive conditions are implied by the courts, because of some feeling that they should exist. As said by Mr. Justice Holmes:

You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.

In applying mutual dependency of promises, the compelling attitudes seem to be the desire to carry out the intention of the parties and principles of fairness and justice. When separating couples execute a settlement agreement providing for the making of mutual wills and fail to express whether they intended to have their promises mutually dependent, they leave to the court the question of whether or not they would have inserted such a clause had the question arisen when the agreement was made. Undoubtedly, arguments may be presented to support either conclusion. In most contracts, there seems to exist at least a slight implication that the parties are bargaining for the performance of the other. Perhaps no such implication should be made with regard to certain types of separation agreements. The circumstances in Mitchell are typical—a lasting bitterness between the parties. Little can be said of the concern this separating couple had toward each other's activities. Each party, when entering the agreement, seemed to be bargaining for no more than a legal right in their children to enforce a contractual obligation of the other spouse. A determination of what the parties intended is not an easy one. Professor Williston suggests:

The truth is, if the intention of the parties is to be brought into the doctrine of conditions which are in reality constructive, it can only be an intention which the court assumes the parties would have had if they had considered the matter, and had made some provision regarding it. The only justification for such an assumption is the fairness of dependency, as compared with independency, of promises in bilateral contracts, and this being so it is better to drop any talk

95 "Promises for an agreed exchange . . . means mutual promises in a bilateral contract where the performance promised by one party is the agreed exchange for the performance promised by the other party. . . . In all bilateral contracts where the only consideration on each side consists of promises, all the promises on one side . . . and all the promises on the other side taken collectively are promises for an agreed exchange except . . . where the promise of each party is wholly or to a material degree for the benefit of a donee beneficiary." Restatement, Contracts, § 266, at 382 (1932). See also 4 Corbin, Contracts § 818, at 271-72 (1951).


97 Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 466 (1897).

98 3A Corbin, Contracts § 654, at 140 (1960).
about intention of the parties where they express none and rest doctrines of constructive dependency solely on their fairness—a quite sufficient basis.\textsuperscript{99} In the Mitchell case, fairness requires that no condition be applied. The parties are not without the power to mutually rescind their agreement. They could have provided for dependency but failed to do so. The agreement serves as the fulfillment of a moral obligation to society and to the children to promote the well-being of victims of a broken family. In all likelihood, the choice of a contract to make wills was made over alternatives which would have provided for the children in some other manner. Without reasons to imply any conditions, the contractual obligations should stand as expressed in the contract.\textsuperscript{100} Situations such as this require that abrogation of the contract be accomplished by mutual consent rather than by spiteful reaction. If the parties are unable to mutually agree to a discharge of each other's obligation, enforcement by the beneficiaries against one party should not depend on whether the other party has performed. In the absence of circumstances justifying a contrary finding, a separation agreement to make mutual wills which solely benefit the children should constitute a bilateral contract with independent promises.

\textbf{Conclusion}

An attempt has been made to show that testamentary disposition is but one property interest within the realm of many. Those who favor immunity against normal contract principles of a promise to devise and bequeath must take heed of the dual purpose served by enforcement of that promise. Such a contract affords the promisee the benefits of his bargain and at the same time gives the promisor the power to utilize the privilege of testamentary disposition as a bargaining asset during his lifetime. Contract law plays a primary role in the workings of our society.\textsuperscript{101} To avoid undue harshness which may result from compelling one to perform a promise, the principles of equity, mutual assent, consideration, fraud, and others have developed. In spite of these protective measures, contract law is, and always will be, subject to adjustment. It is not until a contractual obligation is created in an interest, such as the privilege of testamentary disposition, that the established rules are given a second thought. The proposition that an agreement to make mutual wills is unenforceable without estoppel, is perhaps the result of a latent dislike for the rule, now taken for granted, that a promise may serve as consideration for another promise.\textsuperscript{102} In the case of third party beneficiaries, it

\textsuperscript{99} \textsc{Williston, Contracts} § 825, at 59-60 (3d ed. 1957).

\textsuperscript{100} "[N]o obligation of a contract is to be regarded as a condition precedent unless made so by express terms or necessary implication." Verdier v. Verdier, 133 Cal. App. 2d 325, 334, 284 P.2d 94, 100 (1955). The case involved a property settlement agreement in connection with a separation. The wife broke her promise not to disturb her husband, so the husband contended he need not make payments in accordance with the agreement. \textit{Held}, the promises are independent. \textit{Id.} at 336, 284 P.2d at 100.

\textsuperscript{101} Llewellyn, \textit{What Price Contract?—An Essay in Perspective}, 40 \textsc{Yale L.J.} 704, 709 (1931).

\textsuperscript{102} "What logical justification is there for holding mutual promises good consideration for each other? None, it is submitted." \textsc{Williston, Consideration in Bilateral Contracts}, 27 \textsc{Harv. L. Rev.} 503, 508 (1914) (quoting Pollock). "[I]t is also true that whatever may be the requirements of sufficient consideration, those requirements, like all rules of law, are in a broad sense dictated by public policy." \textit{Id.} at 504-05.