

**CONTRACTUAL WILLS
AND OTHER OPTIONS FOR EQUAL DISTRIBUTION**

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CONTRACTUAL WILLS AND OTHER OPTIONS

I. INTRODUCTION¹

One of the most challenging aspects of estate planning is working with clients who do not represent the nuclear family – the married couple with children only from their marriage – a so called "traditional family". Examples of non-nuclear families are couples with children from prior marriages and couples with no children but with collateral relatives (nieces and nephews) or elderly parents for whom a spouse wants to provide. Many times the plan for these types of clients consists of a delicate balancing act between providing for the surviving spouse and the remainder beneficiaries (usually not the children of the surviving spouse) in a way to minimize conflict. (This Article refers to the non-nuclear family as a couple with children from a prior marriage, but often the same principles would be applicable to any non-nuclear family described above.) For some clients, that is not enough; they would prefer to be certain that their children receive their "fair share" at the surviving spouse's death, and issues relating to the relationship between the surviving spouse and the remainder beneficiaries is subordinate to the end goal of equal distribution.

This Article examines and discusses various estate planning techniques available to the couple whose primary goal is the distribution of assets at the second death to the remainder beneficiaries equally (or in a particular manner), and is less concerned about other issues arising in planning for the blended family. Drafting examples for these techniques is contained within the article and the Appendices.

As with all such presentations, this Article is for educational purposes only and cannot be taken as legal advice. Furthermore, any tax discussion in this Article and the appendices is not intended or written to be used, and cannot be used, for the purpose of: (i) avoiding penalties under the Internal Revenue Code, as amended or (ii) promoting, marketing or

recommending to another party any transaction or tax-related matter[s].

II. CONTRACTUAL WILLS AND CONTRACTS CONCERNING SUCCESSION

Under Texas law, there are two types of contractual dispositions that are often lumped together but are discussed herein separately. The first, contractual Wills, are Wills that are "executed pursuant to an agreement between testators to dispose of all of their property in a particular manner, each in consideration of each other." *In the Estate of McFatter*, 94 S.W.3d 729 (Tex.App.—San Antonio 2002, no pet.). The second, contracts concerning succession, are contracts regarding the disposition of assets at death, which are outside of the Will itself.

A. I Thought Those Were a NO-NO

Many practitioners have a vague recollection of a professor or senior attorney at one point mentioning the existence of contractual wills under Texas law, followed immediately by some variation of "they are horribly complicated – avoid them if you can." In fact, in the preparation of this article and discussion of the issues covered herein with other practitioners, the author found that contractual wills have a rather tarnished reputation and are largely overlooked as an estate planning tool. While the following discussion acknowledges that there is a degree of complication involved with contractual Wills as a planning technique, as well as limitations precluding it from being a good option in some cases, in certain circumstances an estate plan with a contractual Will may be the best way to meet a client's estate planning objectives.

B. The Problem

Husband and Wife, estate planning clients, think they have a simple estate plan. They do not want to fuss with those complicated trusts. They each prefer to leave all of their assets to the surviving spouse. They are familiar with accountability issues inherent in trusts for blended families, and believe a simplistic dispositive scheme is the best plan for them. Of course, after both Husband and Wife are deceased, Wife wants to be certain that her one-half of the remaining estate passes to her one child from a prior marriage, and Husband wants to be certain that his one-half passes to his three sons from a prior marriage. When you ask how everyone gets along you note some tension in the room.

¹ The author wishes to sincerely thank Kristi Elsom of Fizer Beck for her contributions to this article and for allowing portions of her article, *Estate Planning for the Blended Family: Synergy or Disharmonic Convergence*, to be included herein, and Karen Gerstner for allowing her *Revocable Trust with Renege Provisions* form, presented at the 2007 *Advanced Drafting: Estate Planning and Probate Course* to be included as a part of this article.

When you explain to these clients that generally fee simple ownership as they described will allow the surviving spouse unfettered dispositive rights under his or her Will, for example allowing the survivor to cut out the deceased spouse's family entirely, they explain to you that your response is unacceptable, and as their attorney they would like for you to solve this problem. What these types of clients are often looking for (without realizing) is a contractual Will plan. The following is a summary of the law of contractual Wills in Texas, and a discussion of ethical and Federal Transfer Tax factors to contemplate in designing an estate plan based on a contractual arrangement.

C. Contractual Wills

1. Generally

Married couples will often have an estate plan which provides for the distribution of their joint assets in the same manner at the death of the second spouse. This plan is seen in reciprocal Wills (two separate Wills providing for similar distribution – e.g. to spouse or alternatively children, sometimes referred to as "Sweetheart Wills"), and to a lesser degree in Joint Wills (two or more people executing a single Will as the Will of both, [Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates, 320 (Sixth Edition, 2000)]). Reciprocal and Joint Wills do not, without meeting additional requirements, constitute contractual Wills. *City of Corpus Christi v. Coleman*, 262 S.W.2d 790, 794 (Tex. Civ.App.—San Antonio 1953, no writ).

In order for these joint or reciprocal Wills to be contractual, certain common law requirements and the proof requirements under Texas Probate Code §59A must be met. The primary characteristic of contractual Wills is a comprehensive plan for the distribution of all property owned by both parties. *In the Estate of McFatter*, 94 S.W.3d 729. Additionally, a Will is contractual when it is apparent from reading the Will that the testators jointly planned the ultimate disposition of their combined estates in a manner evidencing an intent that the survivor would carry out the ultimate disposition without alteration. *Fisher v. Capp*, 597 S.W.2d 393, 398-399 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.). When a Will is found to be contractual, "the balance remaining from the estate of the first to die and the estate of the last to die is treated as a single estate and jointly disposed of by both testators in the secondary dispositive provisions of the Will." *Id. at 399*.

2. Historically

Prior to the enactment of Texas Probate Code §59A in 1979, there existed a significant amount of litigation as to whether certain joint Wills constituted contractual Wills. These cases largely stemmed from "Mama-Papa Wills", or one joint Will written on the same piece of paper using plural pronouns, e.g. "*We, Husband and Wife, of the County of _____ and the State of Texas...do hereby make publish and declare this to be our Joint Will, hereby expressly revoking any and all prior Wills, by us or either of us, heretofore made.*" Unfortunately, these cases had varying outcomes on the issue of whether the plural pronouns and common distribution of the estates constituted a contract between the parties to not alter the disposition at the second death.

Prior to the enactment of the 1979 statute, the common law in Texas recognized the enforceability of contractual Wills as "(i)t would be manifestly unjust to permit the surviving party to the contract to disavow it and its obligations, as those obligations are incorporated in their will, after the other party has fully performed by abiding by it until his ability to revise it has been terminated by death." *Novak v. Stephens*, 596 S.W.2d 848 (Tex. 1980), quoting Cf. Young, *The Doctrinal Relationships of Concerted Wills and Contract*, 29 Tex. L. Rev. 439 (1951).

The major difference under the pre-§59A cases was the method of proving the existence of a contract, as the pre-§59A Wills were not required to state in the Will that a contract existed or the material provisions of the contract. Yet, while §59A clarified the technical requirements that must be included within the four corners of the Will in order for it to be considered a contractual Will, the common law requirements as to the substance of the dispositive provisions must still be met.

While it is outside of the scope of an article on drafting a contractual Will, the pre-1979 law on proving the contractual nature of the Wills may still be applicable in many cases where the first spouse executed a Will (the alleged contract) prior to 1979, and the surviving spouse dies thereafter. The *Reynolds* case discusses the inapplicability of the §59A requirements to a Will executed after 1979 because the alleged contract relating to the Wills (the Will of the first spouse) was executed prior to 1979. *Reynolds v. Estate of Benefield*, 995 S.W.2d 885 (Tex.App.—El Paso 1999, pet. denied). An excellent discussion of the prior law is contained in Professor Gerry W. Beyer's Texas Practice Series, and in Ozgur K. Bayazitoglu's article, *Applying Realist Statutory Interpretation to*

Texas Probate Code §59A – Contracts Concerning Succession 33 *Hous. L.Rev.* 1175 (1996).

3. Current Requirements

A contractual Will executed after September 1, 1979 must meet the requirements of both Texas Probate Code §59A and the common law requirements for a contractual Will. From a drafting standpoint, it is imperative to be cognizant of the fact that Texas courts view claims of contractual Wills cautiously, and the requirements for a valid, enforceable contractual Will should be met in the Will. See *Reynolds v. Estate of Benefield*, 995 S.W.2d 885. Where a Will is unambiguous in the distribution of assets, the court will err on the side of not going beyond the specific terms serving for the testator's intent. In *the Estate of McFatter*, 94 S.W.3d 729. Further, contractual Wills can be established only by full and satisfactory proof, and no presumptions or inferences are indulged in favor of them. *Magids v. American Title Insurance Company et al*, 473 S.W.2d 460 (Tex.Sup. 1971).

a. Two Prong Test

To establish that a Will is contractual, the following two prong test must be met:

- (1) the property at issue must not be conveyed to the survivor as an absolute and unconditional gift, even though it may initially appear to be so; and
- (2) the *balance* remaining from the estate of the first to die and the estate of the last to die is treated as a single estate and *jointly* disposed of by both testators in the secondary dispositive provisions of the will.

Jackson v. Stutt, 737 S.W.2d 597 (Tex.App.—Fort Worth 1987, writ denied); *In re Estate of Friesenhahn*, 185 S.W.3d 16 (Tex.App.—San Antonio 2005) reh'g overruled, (Dec. 12, 2005) and review denied, (Mar. 10, 2006).

The first prong, requiring that the property at issue not be conveyed as an absolute and unconditional gift, should be carefully addressed in a drafting context because the presumption is that an estate in fee simple is devised unless expressly limited. Tex. Prop. Code Ann. §5.001(a) (Vernon 2008). In cases where the court finds that the property was not an absolute and unconditional devise to the survivor, often the language in the Will implies a limitation on the survivor's devise to a life estate, in which case the first prong would be met. *Estate of McFatter*, 94 S.W.3d

at 733. In *Jackson*, the court also noted that "[T]he nature of the estate left to the survivor is not of controlling importance, provided it is not an absolute and unrestricted fee simple gift." *Jackson v. Stutt*, 737 S.W.2d 597. Note, however, that in analyzing the first prong of the test, many cases rely on the presence of a secondary dispositive provision to prove that the disposition of the property on the death of the first was not intended to be an absolute and unconditional gift. *In re Estate of Johnson*, 781 S.W.2d 390 (Tex. Civ. App.—Houston [1st Dist.] writ denied. There are Texas cases in which the surviving spouse was held to receive a fee simple defeasible and the Will still met the requirements of the first prong; however, it is imperative to be certain to not create a fee simple absolute in the survivor and fail the first prong. For this reason, the author suggests expressly stating the survivor's rights in the property, and limitations thereon. Caution should be exercised in not crossing the line between the surviving spouse's liberal use of the property and a gift to the surviving spouse in fee simple absolute.

Note, however, that it is possible to have a valid contractual Will meet the two prong test (life estate to spouse, and comprehensive plan for distribution of all assets at second death) and miss the testator's objective entirely. In *McKamey v. McKamey*, the court found that where the test for contractual Wills was met, and the Will provided that the property shall be "used, occupied, enjoyed, encumbered or conveyed... as such survivor shall desire", that the surviving spouse had full ability to convey the remainder interest in the estate via inter vivos transfer in a manner contrary to the contractual distribution provided for on the death of the second. *McKamey v. McKamey*, 332 S.W.2d 801 (Tex. Civ. App.—San Antonio 1960, writ ref'd). On a related note, in *Meyer v. Shelley* the court held that if testators intend to restrict the ability of the survivor to dispose of the inherited property inter vivos, then they must expressly say so in the Will. *Meyer v. Shelley*, 34 S.W.3d 619, footnote 4 (Tex.App.—Amarillo 2000, no pet.).

In analyzing the second prong of the test, requiring that the Will provide for the balance of the estates be treated as a single estate and *jointly* disposed of by both testators in the secondary dispositive provisions, the courts generally require that there be some secondary dispositive provisions in the Will which directs the distribution of the remaining estates after the death of both the first and last to die. *Friesenhahn*, 185 S.W.3d at 20 citing *McFatter*, 94 S.W.3d at 733 and *Novak*, 596 S.W.2d 848 (Tex.1980).

Typically contractual Wills do not govern property acquired by the surviving spouse after the death of the first spouse, unless the intention to control after-acquired property is "set forth in the will by very plain, specific and unambiguous language." *Murphy v. Slanton*, 154 Tex. 35, 273 S.W.2d 588 (1954).

Note that making a contractual Will does not take away the right of either party to revoke it; the remedy for breach is the imposition of a constructive trust, as described below. *Stephens*, 877 S.W.2d at 804.

b. Texas Probate Code §59A currently provides as follows:

§ 59A. CONTRACTS CONCERNING SUCCESSION.

(1) 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:

- (i) provisions of a written agreement that is binding and enforceable only by:
- (ii) provisions of a will stating that a contract does exist and stating the material provisions of the contract.

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

Added by Acts 1979, 66th Leg., p. 1746, ch. 713, § 10, eff. Aug. 27, 1979.

Subsec. (a) amended by Acts 2003, 78th Leg., ch. 1060, § 9, eff. Sept. 1, 2003.

Section 59A was added in 1979 to address (and effectively eliminate) many of the issues of proving a joint or reciprocal Will was contractual by requiring certain recitals in the Will itself. In addition to the foregoing two prong test, a contractual Will can be established under §59A only by the provisions of the Will itself, or the provisions of a binding and enforceable written agreement. Texas Probate Code Ann. 59A (Vernon 2008), *Friesenhahn*, 185 S.W.3d 16 and *Estate of Hearn v. Hearn*, 101 S.W.3d 657, 662 (Tex. Civ. App.—Houston [1st Dist.] 2003, pet. denied), *holding that the intent of §59A is clear – a contractual will can only be established "by provisions of the Will", and extrinsic evidence will not be*

considered to determine whether a contractual Will exists). Additionally, note the holding in *Coffman* discussed in (c)(ii) below, the word "contract" is not required if the terms of the Will set forth a contractual arrangement meeting the requirements of §59A.

From a drafting standpoint, and in light of the position of Texas courts that a contractual Will can only be established from the Will itself, it is imperative to cover all of the requirements of a contractual Will in the actual document – both the two prong test and the §59A requirements. Attached as Appendix A are inserts to use for a contractual Will.

c. Cases

The best way to understand the application of these tests and to understand what makes a Will "fail" as a contractual Will is to discuss some Texas cases on point:

(1) *Wiemers*. The Texas Supreme Court issued the *Wiemers* opinion in 1984. In *Wiemers*, Husband and Wife executed a joint Will in 1951 which included the following:

- A gift to the survivor of the "full possession, use and enjoyment of all property, both real and personal, separate and community which we or either of us may own at the time of death of the one of us who dies first"
- Specific language for the distribution of assets at the death of the second spouse

The court of appeals held that the Will was not contractual because it did not expressly state that a contract existed; the supreme court overruled on this point as the joint Will at issue was executed prior to the enactment of §59A.

The supreme court HELD: (i) the Will provided for a life estate in the survivor (meeting the first prong), and (ii) contained a comprehensive plan for disposing of all real property. The court noted that this case was different from *Magids*, in which separate Wills addressed only property of which the Testator died possessed, whereas the *Wiemers* Will disposes of all real property of both persons and does so according to a common plan. *Wiemers v. Wiemers*, 683 S.W.2d 355 (Tex. 1984).

(2) *Coffman*. In *Coffman*, Husband and Wife executed a joint Will in 1982. Husband died shortly thereafter, and after his death in 1983, Wife signed a new Will. The 1982 Will provided that "we do each

mutually in consideration of the other making this Will, and of the provisions made herein in each other's behalf, make this our last will and testament and agree that the same cannot be changed or varied by either without the consent in writing of the other." The proponents of the second Will argued that the 1982 Will was not contractual as it did not use the word "contract" and as such did not meet §59A. HELD: §59A does not require the use of the word contract, and under the general principles of contract law, a contract may be created without the use of any particular language, and that in this case the Will clearly delineates the existence of a contract. *Coffman v. Woods*, 696 S.W.2d 386 (Tex. App.—Houston [14th Dist.] writ ref'd n.r.e.).

(3) *Reynolds*. In *Reynolds*, Husband left a Will dated July 1, 1977 which contained no mention of a contract or understanding, and left his estate to his Wife. Based on evidence presented at trial (pre §59A case), the jury found evidence of a contract between Husband and Wife to leave their assets one-half to Wife's son and one-half to Husband's nieces and nephews. Wife appealed, and the court held there was insufficient evidence to support the finding of contractual Wills, most importantly because Husband's Will devised his entire estate to W in fee simple. *Reynolds v. Estate of Benefield*, 995 S.W.2d 885.

(4) *Friesenhahn*. In *Friesenhahn*, Husband and Wife executed Wills in 1996, Husband died four years later. Wife filed an application for declaratory judgment asking the court to make a determination that Husband's Will devised certain real property to her in fee simple, and that the Wills did not meet the statutory test for "contractual Wills". Husband's Will expressly stated that his Will was executed in accordance with a contract between him and his Wife, and that neither Will could be revoked without the consent of the other. Not surprisingly, Husband's children from a previous marriage disagreed with Wife. The trial court held that the Wills were contractual; Wife appealed. HELD: Where testator's Will provided a devise of property to "pass to and vest in my wife... and I do hereby devise said real property to her", such language does not limit the conveyance to Wife, and it is presumed that an estate in fee simple is devised unless provided otherwise, so Husband's Will conveyed absolute gift to Wife in fee simple. FURTHER HELD: Second prong also failed because although Will provided for alternate beneficiary if Wife did not survive, the Will did not include secondary dispositive provisions directing the

distribution of the remaining estates (both Husband's and Wife's) after the death of the second spouse. INTERESTING TO NOTE: Court states that inclusion of language in Wills that the Wills were contractual does not in and of itself make them contractual. *In re Estate of Friesenhahn*, 185 S.W.3d 16.

(5) *Hearn*. The *Hearn* case centered around whether an estate plan consisting of pour over Wills and a revocable trust agreement was contractual, thereby requiring the surviving spouse to place her assets into the joint management trust at the death of the first spouse (slightly unusual fact pattern in the contractual Will arena).

The trust agreement clearly stated that the parties had "contracted that we each will execute and maintain in force a Will which directs our respective executor to make a marital deduction election under certain circumstances... and to evidence and perfect the same in accordance with Section 59A of the Texas Probate Code, I hereby direct that if I am the 'first deceased trustor' within the meaning of the Trust Agreement, my executor shall elect in full Section 2056(b)(7)... to have all property passing to the Marital Trust established under... the Trust Agreement treated as qualified terminable interest property." Husband's Will contained the same provision.

Husband's children sued alleging that this clause establishes a contract regarding succession that requires Wife to place her portion into the Revocable Trust. The court held that the clause met the requirements of §59A by stating that there was a contract and providing the material terms of the contract, but the Court disagreed with Husband's children as to the terms of the contract. In the end, the court HELD: there was a contractual agreement to maintain a Will with the direction to the executor regarding the QTIP election, and that the contract was completed when the Husband died and his executor made the QTIP election. *Estate of Hearn v. Hearn*, 101 S.W.3d 657.

Attached as Appendix C is a list of issues to consider in drafting a contractual Will, including the Texas law requirements discussed in the foregoing cases.

4. Breach of Contract Remedy

What if Survivor Reneges? Generally, contract law, not the law of Wills applies, and the beneficiary who alleges breach of contract must sue under the law of contracts. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates, 320 (Sixth Edition, 2000). The party contending that the

Will is contractual has the burden of proof that the Wills were intended to be contractual **and** resulted from the mutual agreement of both participants. *Reynolds*, 995 S.W.2d at 887-888. If a party dies leaving a Will which does not comply with the contract, the Will is probated but the contract beneficiary is entitled to enforce the contract by imposition of a constructive trust. *Dukeminier & Johanson* at 320; *see also Wiemers*, 683 S.W.2d at 357; *Coffman*, 696 S.W.2d at 388. It is important to note, however, that the imposition of a constructive trust is an equitable remedy, and generally a court has discretion in deciding whether to grant an equitable remedy, and the party seeking equitable relief must show that the relief will not operate inequitably to the opposing party. *Stephens*, 877 S.W.2d at 804.

5. When is a Party in Breach?

Most Texas cases focus on the death of the second spouse who took under the allegedly contractual Will of the first spouse. In those cases, the alleged breach is the subject of litigation after the surviving spouse's death. In the case of *In re Johnson Estate*, the court refused to adopt the English rule of contractual Wills (which states that a contract underlying mutual Wills cannot be enforced by the surviving co-testator when the first testator to die revoked the Will during both testator's lifetimes) and held that only the contractual portion of the Will was irrevocable, and granted a constructive trust in favor of wife. *In re Johnson Estate*, 781 S.W.2d 390. *Stephens*, which contains highly unusual facts such as an impending divorce, discusses breach at the death of the first spouse, and holds that a contractual Will existed but refused to impose a constructive trust. *Stephens*, 877 S.W.2d 801. Note that a major difference in *Johnson* was that the co-testator had no knowledge of the revocation, and in *Stephens* the Wife knew Husband had revoked the Will prior to his death. Professor Beyer's discussion of the English rule acknowledges that notice of repudiation to the survivor during lifetime is key in the application of the English rule. Gerry W. Beyer, *Texas Law of Wills*, in 9 Texas Practice Series §22.22 (3rd edition). Additionally, the opinion in *Stephens* expressly states that "the facts of this case are unique, and our holding is limited to them." *Stephens*, 877 S.W.2d at 805.

In the *Hearn* case discussed above, which involved a revocable trust plan, the children alleged that the surviving spouse's Will became effective on the death of the first spouse, requiring the surviving spouse to transfer her assets into the Revocable Trust.

The court held that as Wife was not yet deceased, the devise to the trust found in her Will is not yet effective, nor is it irrevocable, citing *Meyer v. Shelley*, which held that a breach of contractual agreement to make a certain devise is not ripe until the testator dies. *Estate of Hearn v. Hearn*, 101 S.W.3d at 662; *Meyer v. Shelley*, 34 S.W.3d 619.

In some cases, the party seeking to have the Wills held as contractual when the second spouse dies will allege that the surviving spouse was estopped from executing a new Will after he or she took under the Will of the first to die. In *McFatter*, the court held that where the Will is not in fact contractual, the surviving spouse is not estopped simply by having the Will probated as the individual Will of the first spouse to die and accepting benefits thereunder. 94 S.W. 3d at 734, citing *City of Corpus Christi v. Coleman*, 262 S.W.2d at 794. However, where the Will was contractual, the surviving spouse who takes under the Will is estopped from making dispositions inconsistent with it or which would defeat the rights of remainder beneficiaries. *Murphy v. Slaton*, 154 Tex. 35, 273 S.W.2d 588 (1954).

6. Negating the Issue

Some draftsmen include a provision similar to the following so that, in addition to not meeting the requirements of §59A, the Will expressly negates any allegation that the Will is contractual in nature.

"I hereby declare that I have no contract or other agreement with my wife or any other person obligating me as to the disposition or distribution of my estate, and that no agreement exists between me and any beneficiary hereunder which obligates any beneficiary hereunder to distribute any portion of my estate which such beneficiary owns at his or her death."

D. Widow's Election

One issue to be cognizant of in the preparation and drafting of contractual Wills is the Texas Widow's Election. If the provisions of a Will require a legatee to surrender his property as a condition to taking the property, the legatee must make an election to take the legacy under the Will or to renounce the Will and preserve the right which otherwise would be surrendered. *Comm'r v. Chase Manhattan Bank*, 259 F.2d 231 (5th Cir. 1958). Under Texas law, the presumption exists that the testator intends to dispose of his own property only, and only where the intention to dispose of property that is not his own is shown by

clear and unequivocal is a husband's will construed to devise his wife's property. *Id.*

In the case of contractual Wills, when each of the testators gives to the survivor a life estate in his or her property and also purports to reduce to a life estate the survivor's interest in his or her own estate (either community or separate), the survivor is put to an election. Gerry W. Beyer, *Texas Law of Wills*, in 9 *Texas Practice Series* §22.39 (3rd edition). If the survivor accepts benefits under the decedent's will, the survivor is estopped to deny that the survivor's own property passed under the decedent's will. *Id.*

The result in a contractual Will plan where the Will purports to reduce the survivor's interest, the survivor is deemed to have made a gift of the remainder interest of her property to the remainder beneficiaries while retaining a life estate. *See e.g. Comm'r v. Chase Manhattan Bank*, 259 F.2d 231. Further complicating matters from a tax standpoint, the surviving spouse may have the full value of the transfer brought in to her taxable estate under I.R.C. 2036, and the gift may be valued under Chapter 14 (depending on the remainder beneficiaries). For a discussion of tax consequences of the widow's election, see Kinnebrow and Morgan, "*Community Property Division at Death*," 39 *Baylor Law Review* 1035 (1987).

To avoid election and associated gift tax issues in a contractual Will, it is imperative to be certain that each Will devises only the property of the deceased spouse, not the entire community estate or entire pool of property covered by the contractual plan at the first death.

E. Contracts Concerning Succession

1. Generally

Contracts concerning succession differ from contractual Wills in that these contracts are not part of a Will; instead they are binding agreements outside of the Will regarding the disposition of assets at death. These can be in the form of a contract to make a Will (where an individual promises present services in exchange for a beneficial provision in another individual's Will) or a contract relating to the distribution of certain assets at death (such as a premarital agreement).

2. Historically

Prior to the enactment of §59A, there were numerous Texas cases where one party alleged that the testator had an oral contract whereby the testator agreed to make provisions for the person in exchange

for services during the testator's lifetime. Where the proponent could offer sufficient proof of the contract, it would be upheld. *Leigh v. Weiner*, 679 S.W.2d 46 (Tex. App.—Houston (14th Dist.) 1984, no writ).

When §59A was enacted in 1979, it drastically reduced these types of claims as it required the Will to reference a contract and state the material terms. As enacted in 1979, §59A lacked the current subsection (a)(1), which in effect precluded establishing a contract related to a Will unless the Will stated that the contract did exist and contained the material provisions.

The case of *Taylor v. Johnson* illustrated the problem with the original §59A in the context of a contract concerning succession. *Taylor v. Johnson*, 677 S.W.2d 680 (Tex. App.—Eastland 1984, writ ref'd n.r.e.). In this case, Aunt orally promised to devise Nephew a controlling interest in the company if he would accept a position at the company. (Note that §59A, as amended, would require a written contract). Nephew accepted the offer and began work at the company. Shortly thereafter Aunt informed nephew that she intended to sell the company, and he sued her for anticipatory breach of their oral contract to make a devise. The court held because there was no reference in Aunt's Will to the contract, there was no probative evidence of a contract to make a will or devise pursuant to §59A, and that §59A requirements of a Will referring to the contract was not applicable only in probate proceedings. The enactment of §59A prior to the 2003 revision and the outcome of the *Taylor* case prompted one commentator to note that "the net result of this interpretation of §59A [contained in the Taylor opinion] is that contracts to make a will are effectively dead in Texas." Ozgur K. Bayazitoglu, *Applying Realist Statutory Interpretation to Texas Probate Code §59A – Contracts Concerning Succession* 33 *Hous. L.Rev.* 1175 (1996).

In the 2003 legislative session, HB 1473 was enacted and amended Texas Probate Code §59A to permit a contract to make a will or devise, or not to revoke a will or devise, to be enforced if the contract is contained in the provisions of a written agreement that is binding and enforceable. Glenn Karish's 2003 Legislative Update summarizes the legislation:

"In 1979, the Texas Legislature added Section 59A to the Probate Code. This legislation was intended to deal with two problems: First, and foremost, was the problem of joint wills. The practice of having a husband and wife sign a joint will has mostly died out, but it used to be quite common. These wills led to litigation over whether the joint will was contractual -- whether the surviving spouse was free to adopt a

different dispositive plan or was stuck with the one in the joint will. Section 59A requires a joint will to say that it is contractual, and its enactment in 1979 has effectively eliminated litigation in this area. Second was the problem of caregiver arrangements: an alleged oral agreement that 'if you move in and take care of me until I die, I promise to leave you my house.' See Johanson's Texas Probate Code Annotated (2002), Commentary to Section 59A. Section 59A dealt effectively with the problem as well.

"While the 1979 enactment of Section 59A solved these two problems, it inadvertently created another problem -- the one that HB 1473 fixes. Section 59A was modeled after Section 2-514 of the Uniform Probate Code (UPC). The UPC was drafted by the National Conference of Commissioner on Uniform State Laws and has been enacted in at least 18 states. The UPC version includes a significant provision which was left out of Section 59A: that a contract to make a will or not to revoke a will could be included in a writing signed by the decedent and evidencing a contract but not contained in the will itself. The widespread use of marital property agreements which has sprung up in Texas since 1979 has illustrated the need for this provision to be added to Section 59A. It is common for a testamentary conveyance to be a material part of a pre-marital or post-marital agreement. Other types of agreements which contain these types of provisions and are affected by Texas's failure to follow the UPC approach are divorce property settlements and buy-sell agreements. Many practitioners and commentators believe that these provisions are enforceable even with Section 59A reading the way it read before the HB 1473 change, but the absence of a clear provision in Section 59A resulted in confusion and unnecessary litigation.

"The change made by HB 1473 makes it clear that such a provision in a marital property agreement or buy-sell agreement is permitted."

3. Current Requirements

The revision to §59A now allows a party to establish a contract to make a Will or devise by "the provisions of a **written agreement that is binding and enforceable.**" Tex. Probate Code §59A(a)(1). The contract to make a will must "meet the requirements of contracts in general"; that is, offer and acceptance, and the consideration must be established by the person or persons asserting the existence of the contract. Gerry W. Beyer, Texas Law of Wills, in 9 Texas Practice Series §22.9 (3rd edition). The general doctrine of consideration is applicable to contracts to make a Will,

and if the consideration fails, the Testator may be justified in revoking the Will. *See Beyer*, 9 Texas Practice Series §22.10 and *Williams v. Claunch*, 44 Tex.Civ.App. 25, 97 S.W. 111 (1906, writ ref'd). "When the promisee or intended beneficiaries under a contract to devise or bequeath has no remedy in the probate court, either because the promisor failed to execute the promised will, or, having executed it, breached the contract by revoking it, the remedy must be sought in courts of general jurisdiction." *Beyer*, 9 Texas Practice Series §22.40. Under the new §59A, a promisee under a contract concerning succession would be required to prove the obligation by written contract, and would have the remedies available under contract rights.

4. Drafting Where Separate Contract Exists

In drafting a Will for a testator subject to a freestanding contract to make a particular distribution, the possibility exists of paying twice. For example, if a premarital agreement obligated the testator to give the wife \$1 million at his death, and his Will gives her \$2 million, the possibility exists that the Wife could allege that the gift under the Will is separate and distinct (and was in addition to) the obligation under the marital agreement. In these cases, particularly where the obligation relates to a cash gift rather than a specific asset, it is advisable to reference the contract creating the obligation and specify whether the gift is intended to satisfy the contractual obligations. Stephen Dyer's article from the 2007 Advanced Drafting: Estate Planning and Probate Course titled "*Planning for Spouses – Not Just QTIPs*" contains excellent form language for specifying that a gift is intended to satisfy the obligation under a premarital agreement.

F. **This Is Very Interesting...But What If Estate Consists Mostly of Non-Probate Assets?**

In drafting a contractual Will plan with significant non-probate assets, it is important to consider the most effective way of incorporating all of the assets, not just the those passing under the Will. In the author's opinion, the better method of preparing a contractual Will plan is to prepare both the freestanding contract to make a Will and the contractual Wills, which reference and comply with the freestanding contract. Clearly defining the non-probate assets which are to be included in the overall contractual plan in the free standing contract will bolster the beneficiary's argument that the non-probate assets were included in the contract even though they

do not pass under the Will and that the imposition of a constructive trust should include those funds.

G. Tax Problems

1. Marital Deduction under IRC§2056/ Consideration Offset

Contractual Wills or contracts concerning succession (along the lines of Appendices A and B attached hereto) cause some or all of the property passing to the spouse to fail to qualify for the marital deduction. Under 2056(b)(4), which provides as follows, the deduction is reduced by the value of the obligation.

2056(b)(4) VALUATION OF INTEREST PASSING TO SURVIVING SPOUSE. --

In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section --

2056(b)(4)(A) there shall be taken into account the effect which the tax imposed by [section 2001](#), or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

2056(b)(4)(B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

See also Technical Advice Memorandum 9023004 (February 20, 1990), discussing the marital deduction being unavailable for a contractual Will under Texas law. Due to these Federal Estate Tax limitations, contractual Wills (specifically along the lines of Appendices A and B) should not be used in cases where a portion of the estate of the first to die needs to qualify for the Marital Deduction.

2. Taxable Gift by Survivor on First Death?

In most contractual Will scenarios not triggering the Widow's election, no gift is made by the surviving spouse on the first death. The rationale is that at the first death, a contractual Will passes no present interest in the property of the survivor – its effect is contractual, not dispositive. See *Brown v.*

Commissioner, 52 T.C. 50 (1969) acq. in result only, 1969 C.B. XXIV; *Hambleton v. Commissioner*, 60 T.C. 558 (1973), acq. in result only, 1974 –1 C.B. 1 (**both Texas cases**), and PLR 7944009 (July 10, 1979). See discussion in D, above, regarding taxable gift being made by surviving spouse under an election Will.

H. Ethical Concerns

Unless each spouse had an advisor before the marriage, it is not unusual for a couple to jointly seek estate planning assistance. The first item the professional must assess is whether there is a conflict of interest between the two spouses, and if there is, determine if the conflict is an impediment to joint representation by the professional.

An attorney shall not represent a client if the representation of that client will be directly adverse to another client unless the attorney reasonably believes one representation will not adversely affect the other, and both clients consent after consultation, that is confirmed in writing. When representation of multiple clients in a single matter is undertaken, the consultation shall include an explanation of the common representation and the advantages and risks involved. Rules 1.06 and 1.07 of the Texas Disciplinary Rules of Professional Conduct. Other professionals are covered by similar restrictions that are imposed by the licensing group or as a creed of an association.

Clearly, there is the potential for a conflict of interest in dealing with the various needs and wishes of blended families, particularly if the preparation of contractual Wills is involved. In fact, in such situations the estate planning advisor is obligated to educate the husband and wife regarding these conflicts and/or potential conflicts. In some cases the conflict is such that the professional must withdraw from or decline the joint representation.

Assuming there is no ethical violation, in some instances the clients may be better served when represented by the same estate planning professionals who have an overall understanding of the family's entire situation and who can coordinate the various components of the estate plan. In such cases, if the professional proceeds with a joint representation of the husband and wife, the professional should clearly disclose the potential conflicts at the outset, advise the clients of the ramifications of the conflicts, and remain vigilant should the need to withdraw arise. See ACTEC Commentaries on the Model Rules of Professional Conduct (Third Edition, March 1999).

For examples of engagement letters, see the ACTEC website.

For attorneys, the clients particularly need to understand that once the attorney undertakes to represent both husband and wife, then neither spouse can have discussions relative to the matter that will be held "confidential" from the other spouse by the attorney. The duty to lay out advantages and disadvantages of a proposed plan to both spouses when there is joint representation should be made clear.

III. NON-CONTRACTUAL WILL OPTIONS

As most estate planners discuss with blended family clients on a daily basis, there are issues inherent in implementing the basic plan with a non-traditional family, which include characterization of assets as separate or community property at death, and the surviving spouse (especially if serving as trustee) taking distributions from the Marital and Bypass Trusts, which results in a diminution in the inheritance left for the children of the deceased spouse. Adding to these technical issues are the unfortunate but real family dynamic issues – maybe the kids never liked second wife anyways, and now that Dad is gone they have less of a reason to keep up pleasantries.

A. Changes to the Standard Bypass/Marital Plan

In typical blended family situations, the estate planner will often offer suggestions and options for tweaking the standard plan to work for the blended family. These techniques, which work well in some cases, include the following:

1. Requiring a corporate Trustee or Co-Trustee for the Bypass and Marital Trusts at all times;
2. Prohibiting Distributions of Principal from the Bypass or Marital (and discussing with clients whether there should be any exceptions to this);
3. Making a large gift (often up to the exemption amount) to the children of the first to die so that they do not have to wait for their step mother to die to receive their inheritance;
4. Eliminating the Power of Appointment for the surviving spouse, so that at the end of the day the remaining assets are distributed as the testator intended;

5. Using a broad and thorough No-Contest Clause (less helpful in Contractual Will setting as the Testator is most concerned about his children receiving remaining assets, and such a clause could cause them to lose their inheritance if drafted too broadly); and

6. Ensuring that a Marital Agreement is in place so characterization issues do not arise during the administration and funding process of the first spouse to die.

However, these changes do not fully address the problem that the select group of clients to which this Article is targeted are most concerned: the equal split at the end of the day. Often a Contractual Will structure or the Revocable Trust Plan with Renege Provisions will better meet these clients' objectives.

B. Revocable Trust with Renege Provision

After reviewing the foregoing discussion and cases on contractual Wills, one cannot help but ask, "Is there an easier way to do this?" Karen Gerstner discussed an alternative method of achieving this planning objective at the 2007 Advanced Drafting: Estate Planning and Probate Course. Her idea is the creation of a revocable trust with a renege provision, designed to protect the ultimate beneficiaries of the first spouse to die from changes to the joint estate plan made by the surviving spouse. Under the enclosed form attached as Appendix D, Husband and Wife each have two children from a prior marriage. The mechanics of the plan come in two phases:

1. At the first death, if the first to die keeps to the plan (split between Husband's children and Wife's children at the second death), the bypass and marital trusts are funded with the surviving spouse having no powers of appointment. However, if the first to die changes the plan (i.e. by exercising his general power of appointment over the revocable trust), then the survivor is not obligated to continue the joint plan and any provisions providing for the surviving spouse's property to pass to the deceased spouse's children are ineffective.
2. At the second death, if the surviving spouse reneges and does not provide for an equal division of his or her share to all four children, then the remaining assets in the bypass and marital deduction trusts pass to the deceased spouse's descendants. If the surviving spouse kept to the plan, then his or her assets and all

remaining trust assets are split equally among all four children.

3. Using numbers, here is how this would work (note this is a overly simplified example for illustration purposes, and assumes that the Bypass Trust and the survivor's Estate would be equal at the second death). Assume Husband and Wife each have a \$2 million estate, and the exemption at both of their deaths is \$2 million. Husband dies first and leaves his estate to the Bypass Trust for Wife, with remainder to all 4 kids equally at her death.

a. If Wife follows the plan, then the following distribution occurs at the second death:

Beneficiary	Distribution from W's estate	Distribution from Family Trust	Total
Wife's Child A	500,000	500,000	\$1 million
Wife's Child B	500,000	500,000	\$1 million
Husband's Child 1	500,000	500,000	\$1 million
Husband's Child 2	500,000	500,000	\$1 million

b. Under a standard plan without the renege provisions, Wife could then change her Will to include only her children. After the change, the following would be the distribution of the combined estates at the second death:

Beneficiary	Distribution from W's estate	Distribution from Family Trust	Total
Wife's Child A	\$1 million	500,000	\$1.5 million
Wife's Child B	\$1 million	500,000	\$1.5 million
Husband's Child 1	0	500,000	500,000
Husband's Child 2	0	500,000	500,000

c. Under the Revocable Trust Plan with renege provisions, the distribution of the remaining Bypass Trust assets hinges on what Wife does under her Will. If Wife does not treat all four children equally, all distributions from the Bypass Trust to her children are eliminated, resulting in the following:

Beneficiary	Distribution from W's estate	Distribution from Family Trust	Total
Wife's Child A	\$1 million	0	\$1 million
Wife's Child B	\$1 million	0	\$1 million
Husband's Child 1	0	\$1 million	\$1 million
Husband's Child 2	0	\$1 million	\$1 million

Some benefits to using the revocable trust/renege plan over the traditional contractual Will are as follows:

- It is more obvious to the surviving spouse that she is changing the joint plan if he has to (i) withdraw assets from the funded revocable trust; (ii) amend the revocable trust agreement governing his portion of the combined assets, and/or (iii) retitle assets into his individual name or the name of a new revocable trust.

- The ultimate distribution is determined by the actions of the surviving spouse: if she keeps to the plan, her estate and the trusts created at the first death split equally; if she reneges, the distribution of the remaining trust assets excludes her children – and the discussion above about contractual Wills, consideration, including material provisions of the contract are inapplicable!

- If the surviving spouse defaults, the terms of the Revocable Trust Agreement self adjust and provide for the distribution to only the children of the deceased spouse – no need for the children of the deceased spouse to file suit and seek imposition of constructive trust. However, there exists room for litigation over whether the spouse's actions triggered the renege provision.

- The disposition of non-probate assets at the second death can be addressed in the self-adjusting clause.

- As discussed herein, the consideration offset doctrine serves to reduce the marital deduction by the consideration the surviving spouse gives in exchange for the bequest. Under the Revocable Trust with Renege plan, no contract exists and the surviving spouse did not take the gift subject to a contractual obligation, so the consideration offset issue is avoided.

Downsides:

- If the clients truly are adverse to creating a trust for the surviving spouse, they may prefer the contractual Will arrangement.

- Also, the above example shows four children, two being Wife's children and two being Husband's children. If each spouse did not have an equal number of children, the split between his heirs and her heirs

could be achieved, but it would be difficult to ensure that each child received the same amount.

- Lastly, if surviving spouse truly intended to renege, she might spend out of the Bypass Trust first and try to preserve her assets. This can be addressed to some extent by fine tuning the distribution provisions and/or by requiring a corporate trustee.

C. Using the New Unitrust Statute

Some clients may become overwhelmed with the discussion of contractual Wills, and may not like the means to the end. (You mean my wife can change her Will, and my kids will have to sue her to get their inheritance back?). They also may have a fundamental opposition to funding a Revocable Trust during lifetime (and the revocable trust with renege provisions operates best if fully funded at creation).

These clients may be comforted by setting up a plan under which they can reasonably estimate what will be left for the remainder beneficiaries at the end of the day, and if that reasonable estimate is close to what the surviving spouse will have at her death to leave to her children (based on a reasonable estimate), the plan may be a better fit. It is nearly impossible to estimate what will be left under a standard Marital/Bypass trust plan allowing distributions of income and principal for Health, Support, Maintenance and Education. It may also be hard to estimate what will remain in an income only trust, not knowing what will be "trust accounting income" in the years to come based on the assets owned by the trust. However, if the client (or his financial advisor) can make estimates on typical market increases over time, and calculate with some degree of certainty what will be left in the trusts at the end of the day, the client may feel comfortable creating trusts for the spouse with his children as the remainder beneficiaries, and assuming that his spouse will take care of her children with her assets. That raises the question: How do you draft a trust which allows a reasonable calculation of remaining assets and qualify for the Marital Deduction? The answer is by taking advantage of Texas Trust Code §116.007.

The 2003 Legislative Session gave us not only our new and improved 59A, but it also added Texas Trust Code §116.007, which provides as follows:

§ 116.007. PROVISIONS REGARDING NONCHARITABLE UNITRUSTS.

1. This section does not apply to a charitable remainder unitrust as defined by Section 664(d), Internal Revenue Code of 1986 (26 U.S.C. Section 664), as amended.

2. In this section:

a. "Unitrust" means a trust the terms of which require distribution of a unitrust amount.

b. "Unitrust amount" means a distribution mandated by the terms of a trust in an amount equal to a fixed percentage of not less than three or more than five percent per year of the net fair market value of the trust's assets, valued at least annually. The unitrust amount may be determined by reference to the net fair market value of the trust's assets in one year or more than one year.

c. Distribution of the unitrust amount is considered a distribution of all of the income of the unitrust and shall not be considered a fundamental departure from applicable state law. A distribution of the unitrust amount reasonably apportions the total return of a unitrust.

d. Unless the terms of the trust specifically provide otherwise, a distribution of the unitrust amount shall be treated as first being made from the following sources in order of priority:

(1) from net accounting income determined as if the trust were not a unitrust;

(2) from ordinary accounting income not allocable to net accounting income;

(3) from net realized short-term capital gains;

(4) from net realized long-term capital gains; and

(5) from the principal of the trust estate.

Added by Acts 2003, 78th Leg., ch. 659, § 1, eff. Jan. 1, 2004.

It is important to note that 116.007 is not a unitrust conversion statute – but it is in effect for documents being currently drafted to provide for a unitrust

distribution. The statute was intended to take advantage of Treasury Regulation §1.643(b)-1, "Definition of "income", which provides (in part) as follows:

"However, an allocation of amounts between income and principal pursuant to applicable local law will be respected if local law provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust for the year, including ordinary and tax-exempt income, capital gains, and appreciation. For example, a state statute providing that income is a unitrust amount of no less than 3% and no more than 5% of the fair market value of the trust assets, whether determined annually or averaged on a multiple year basis, is a reasonable apportionment of the total return of the trust."

Before the enactment of this statute, it was common to structure a 2056(b)(7) trust as a unitrust, and provide for a mandatory distribution of the greater of income or a unitrust percentage, valued annually. The unitrust was an attractive option where the testator wanted some degree of certainty as to the distributions from the unitrust (e.g. wanted to know approximately what would be left at the end of the day, which is hard to calculate with a trust accounting income distribution standard). Because 2056(b)(7) required a distribution of "all income", the document had to provide for the greater of income or unitrust, and this left some degree of uncertainty in predicting the remaining trust assets at surviving spouse's death. Form Unitrust language for a distribution of the greater of income or unitrust is attached as Appendix E.

However, there is more flexibility for structuring a QTIP trust as a unitrust under the new statute. Section 20.2056(b)-7(d)(2) of the Estate Tax Regulations provides that the principles of section 20.2056(b)-5(f), relating to whether the spouse is entitled for life to all the income from the entire interest or a specific portion of the entire interest for purposes of section 2056(b)(5), apply in determining whether the surviving spouse is entitled for life to all of the income from the property for purposes of Section 2056(b)(7). Section 20.2056(b)-5(f)(1) provides that the surviving spouse's interest shall meet the condition that the spouse is entitled for life to all the income from the property if the spouse is entitled to income as determined by applicable local law that provides for a reasonable apportionment between income and remainder beneficiaries of the total return of the trust and that meets the requirements of section 1.643(b)-1. Under the foregoing reasoning, a spouse who, as the

income beneficiary, is entitled in accordance with state statute and the governing instrument to a unitrust amount of no less than 3% and no more than 5% would be entitled to all the income from the trust for purposes of qualifying the trust for the marital deduction. T.D. 9102 (December 30, 2003).

In summary, in Texas it is now possible to set up a 2056(b)(7) QTIP trust with a mandatory annual distribution of an amount equal to 3%-5% of trust assets, valued annually, and have such trust qualify for the marital deduction. See Hersch, Craig R., "IRS Okays Turning Total Return on Its Head", Trusts and Estates, April 2007, page 26; PLR 20072013. **If the plan includes an IRA passing to a QTIP Unitrust, extra care must be taken to address the IRA income. For a discussion of this issue, see Revenue Ruling 2006-26, May 30, 2006.**

Of course, a unitrust distribution structure for the Bypass Trust does not need to meet the "all income" requirement, so there is more flexibility with setting the unitrust distribution amount. The downside to a unitrust distribution standard in the Bypass Trust is the increase of the surviving spouse's taxable estate by shifting to her estate assets which would not be otherwise taxed if they remained in the Bypass trust.

D. Life Insurance as a Tool

As estate planners, sometimes the challenge lies in finding out why a client prefers a particular plan, and then proposing other ways to accomplish the objective. For example, Husband and Wife may meet with the estate planning attorney and insist on contractual Wills, not because they are committed to that arrangement, but because they have a combined \$4 million estate, they each have two children, and they have their mind set on each child receiving \$1 million when they are both gone. If this dollar amount distribution is the motivating factor, the addition of life insurance in separate irrevocable life insurance trusts (one for each "family") could achieve the underlying planning objective and greatly simplify the testamentary estate plan. This structure could even prove more beneficial than a contractual Will arrangement, as the deceased spouse's children receive assets without waiting until the surviving spouse's death. The structure and benefits of irrevocable life insurance trusts are outside of the scope of this Article, but it is a topic worth discussing in these family situations.

E. Marital Agreements

While the couple with a blended family seeking an equal (or other particular) distribution of assets to the separate families at the second death may choose a Contractual Will plan, or may choose a difference arrangement described herein, it is important to consider whether a Marital Agreement would be beneficial as a part of their estate plan. Marital agreements are often thought of as being tools in the divorce or family law attorney's arsenal. However, estate planners can utilize marital agreements to facilitate the estate plan in a blended family situation. Clients should be urged to enter into marital agreements if the spouses intend to leave their assets other than to each other and if tracing issues might arise (it would be less beneficial in a true contractual Will setting as all assets will likely pass to the surviving spouse). Marital agreements typically involve an agreement to convert community property to separate property. Texas Family Code § 4.102 allows spouses to partition or exchange community property between themselves in order to characterize the property as one spouse's separate property. For example, the spouses may agree that any income from separate property assets (which would otherwise be characterized as community property) remains the separate property of the spouse owning the asset. Explain to the clients how marital agreements can alleviate post-death tensions by setting forth asset characterization in a way that will not be subject to dispute upon the death of one of the spouses. Unless the agreement is primarily for estate planning techniques such as creating separate property to make gifts to an insurance trust that the other spouse is a beneficiary, both parties should have separate representation.

**APPENDIX A – CONTRACTUAL WILL INSERTS
(to be used with Contract Concerning Succession, Appendix B)**

ARTICLE II - CONTRACT

2.1 I declare that I make certain provisions in this Will as a contract between my wife, CAROL BRADY, and me, pursuant to that Agreement Regarding Contractual Wills of even date herewith (the "Agreement"). The contractual provisions of this Will and the Agreement are those bequests set forth in Article III of this Will. All other provisions in this Will are not contractual and may be revoked or modified by me at any time and for any reason.

2.2 I make the contractual bequests identified in Article III of this Will in consideration of the Will made by my wife of even date herewith, in consideration of the provisions made in that Will on my behalf and in consideration of the Agreement made by my wife and myself of even date herewith. The material provisions of such Agreement provide that all of the estate of the first to die of my wife and me (the first to die referred to as the "Deceased Spouse") which consists of community property (the "Property") shall pass to the survivor of my wife and me. Upon the death of the second to die of my wife and me (the "Surviving Spouse"), the remaining estate of the Deceased Spouse which passed to the Surviving Spouse (after its use during the Surviving Spouse's lifetime), including the Deceased Spouse's interest in the community property, and/or the Deceased Spouse's share of sales proceeds traceable from the sale of the community property, and the estate of the Surviving Spouse which consists of property which was formerly characterized as community property of my wife and me, and the Surviving Spouse's share of sales proceeds traceable from the sale of any such community or real property shall be distributed to my descendants², per stirpes. The Agreement is not applicable to any assets previously or subsequently inherited by my wife or me from any person other my wife or me or to assets held in trust for the benefit of my wife or me.

2.3 While my wife and I are both alive and competent to act, the contractual bequests identified in subsection 3.1 and 3.2 of the Agreement may be changed, modified, varied, or revoked only by an agreement in writing signed by both of us. My wife and I reserve the right to make such an agreement without the consent of any other person. The contractual bequests identified in Article III of the Agreement and the contract made by the terms of this Will may not be changed, modified, varied or in any way revoked after my Wife has died or become mentally incapacitated leaving the contractual bequests of her Will of even date herewith, unrevoked and unmodified.

ARTICLE III - RESIDUE

3.1 If my wife survives me, and pursuant to the terms of the Agreement executed by my wife and me of even date herewith, I give to her all of my estate and property for her use during her lifetime, provided however that pursuant to the Agreement, at my wife's death (i) the property held by my wife traceable to my estate (after its use during my wife's lifetime), including (but not limited to) my interest in the Property, and/or my share of sales proceeds traceable from the sale of the Property, and (ii) the estate of my wife which consists of property which

² Will defined "my descendants" as his and her descendants in earlier section.

Contractual Wills and Other Options for Equal Distribution

was formerly characterized as community property of my wife and me and my wife's share of sales proceeds traceable from the sale of any such community or real property shall be distributed to my descendants, per stirpes. During my wife's lifetime, she shall have the rights and responsibilities described in Article III-A with respect to the Property passing under this Will.

3.2 If my wife fails to survive me, I give the rest and residue of my estate and property to my descendants who survive me, per stirpes.

3.3 If my wife survives me, and pursuant to the terms of the Agreement executed by my wife and me of even date herewith, my wife agrees that upon her death she shall give all of her estate and property, as defined in the Agreement, to my descendants, per stirpes, who survive her.

3.4 If all of the persons named above fail to survive me and if no descendant of any such person survives me, I give all of my estate and property to those persons who are living ninety-one days after the date of my death and who would have been my heirs at law had I died intestate and single at such time.

ARTICLE III-A – RESPONSIBILITIES AND RIGHTS OF WIFE

My wife shall have the following responsibilities and rights regarding the Property during her lifetime:

- (a) To retain, in the absolute and uncontrolled discretion of my wife, the Property for my wife's use and enjoyment during her lifetime, without liability for any depreciation or loss occasioned by such retention;
- (b) To exchange, sell or lease all or any part of the Property for cash, property or credit, from time to time, publicly or privately, at such prices, on such terms, times and conditions and by instruments of such character and with such covenants my wife may deem proper, in her sole and absolute discretion;
- (c) To maintain such insurance on the Property, as my wife deems necessary to protect the Property from damage or destruction;
- (d) To make all tax payments required to be made on the Property to protect the Property from any liens or government foreclosures;
- (e) To upkeep the Property, as my wife deems necessary to prevent the Property's deterioration or decrease in fair market value for lack of maintenance;
- (f) To invest and reinvest any sales proceeds from the sale of the Property, in any kind of property whatsoever, real or personal (including oil, gas and other mineral leases, royalties, overriding royalties and other interests), whether or not productive of income, and without the duty to diversify investments; and
- (g) To refrain from borrowing money from any source and to mortgage, pledge, or in any other manner encumber all or any part of the Property and any sales proceeds from the sale of the Property.

APPENDIX B – INSERTS TO INCLUDE IN CONTRACT CONCERNING SUCCESSION

(to be used with Appendix A – Contractual Will Inserts)

WHEREAS, the Parties intend to ensure that their community estate shall pass to the survivor of the Husband and Wife, for such spouse's use during such spouse's lifetime, and with the remainder passing to the Parties' descendants, per stirpes.

NOW, THEREFORE, in consideration of the mutual promises set forth below, Husband and Wife agree as follows:

ARTICLE I – EXECUTION OF WILL

Husband and Wife shall each execute a contractual Last Will and Testament (the "Wills") devising and bequeathing all of the community property estate owned by the first to die of Husband or Wife in one of their respective names or in joint names, to the other at the first death, and then at the second death, the second to die of Husband and Wife devising and bequeathing all of the remainder of such property to the Parties' descendants who are then living, per stirpes, at the second death of either Husband or Wife; provided, however, that the survivor shall have complete use of such property during his or her lifetime. This Agreement shall not apply to any assets previously or subsequently inherited by Husband or Wife from any person other than a party to this Agreement or to assets held in trust for the benefit of one of them. These Wills shall be executed immediately after the execution of this Agreement.

ARTICLE II – RESTRICTION ON REVOCATION

The contractual provisions of the Wills executed pursuant to this Agreement shall not be subject to revocation by either Husband or Wife, after either Husband or Wife has died or become mentally incapacitated, as determined in writing by two independent physicians.

ARTICLE III – RIGHTS AND OBLIGATIONS OF SURVIVOR

3.1 Upon the death of the first to die of the Husband and Wife (the "Deceased Spouse"), the Deceased Spouse shall bequeath to or cause to be transferred to the survivor of the Husband and the Wife (the "Surviving Spouse") all of the estate of the Deceased Spouse which consists of community property (such community property referred to as the "Property"). The Surviving Spouse shall have total control over whether to retain the Property or to sell such Property, as well as what to do with such sales proceeds. The Property shall pass to the Surviving Spouse for his or her use and enjoyment during the lifetime of the Surviving Spouse, outright and free of trust. However, the Surviving Spouse shall not have the right to make inter vivos gifts of the Property received under the Will of the Deceased Spouse. As stated above, this Agreement shall not apply to any assets previously or subsequently inherited by Husband or Wife from any person other than a party to this Agreement or to assets held in trust for the benefit of one of them.

3.2 Husband and Wife hereby agree that upon the Surviving Spouse's death, (i) the property held by the Surviving Spouse traceable to the estate of the Deceased Spouse (after its use during the Surviving Spouse's lifetime), including (but not limited to) the Deceased Spouse's interest in the Property, and/or the Deceased Spouse's share of

Contractual Wills and Other Options for Equal Distribution

sales proceeds traceable from the sale of the Property, and (ii) the estate of the Surviving Spouse which consists of property which was formerly characterized as community property of the Parties and the Surviving Spouse's share of sales proceeds traceable from the sale of any such community or real property shall be distributed to Parties' descendants, per stirpes. As stated above, this Agreement shall not apply to any assets previously or subsequently inherited by Husband or Wife from any person other than a party to this Agreement or to assets held in trust for the benefit of one of them.

3.3 The Surviving Spouse shall have the following responsibilities and rights regarding the Property:

(a) To retain, in the absolute and uncontrolled discretion of the Surviving Spouse, the Property for the Surviving Spouse's use and enjoyment during his or her lifetime, without liability for any depreciation or loss occasioned by such retention;

(b) To exchange, sell or lease all or any part of the Property for cash, property or credit, from time to time, publicly or privately, at such prices, on such terms, times and conditions and by instruments of such character and with such covenants as the Surviving Spouse may deem proper, in such Spouse's sole and absolute discretion;

(c) To maintain such insurance on the Property, as the Surviving Spouse deems necessary to protect the Property from damage or destruction;

(d) To make all tax payments required to be made on the Property to protect the Property from any liens or government foreclosures;

(e) To upkeep the Property, as the Surviving Spouse deems necessary to prevent the Property's deterioration or decrease in fair market value for lack of maintenance;

(f) To invest and reinvest any sales proceeds from the sale of the Property, in any kind of property whatsoever, real or personal (including oil, gas and other mineral leases, royalties, overriding royalties and other interests), whether or not productive of income, and without the duty to diversify investments; and

(g) To refrain from borrowing money from any source and to mortgage, pledge, or in any other manner encumber all or any part of the Property and any sales proceeds from the sale of the Property.

OTHER:

While Husband and Wife are both alive and competent to act (as defined below), this Agreement may be changed, modified, varied, or revoked only by an acknowledged agreement in writing executed by Husband and Wife. Husband and Wife reserve the right to make such an agreement without the consent of any other person. The terms of this Agreement may not be changed, modified, varied or in any way revoked after either Husband or Wife has died, leaving the contractual bequests of his or her Will of even date herewith, unrevoked and unmodified, or after either Husband or Wife has become mentally incapacitated, with such incapacity determined in writing by two independent physicians.

In the event it becomes necessary for Husband, Wife or any of their descendants to this Agreement to file a suit to enforce this Agreement or any provisions contained herein, the party prevailing in such action shall be entitled to recover, in addition to all other remedies or damages, reasonable attorneys' fees and court costs incurred by such prevailing party in such suit.

Husband and Wife represent and warrant that they have the requisite authority and mental capacity to enter into this Agreement and that Husband and Wife hereto shall be bound by their respective signatures to this Agreement.

HUSBAND AND WIFE HEREBY EXPRESSLY WARRANT AND REPRESENT THAT NO PROMISE OR AGREEMENT THAT IS NOT HEREIN EXPRESSED HAS BEEN MADE TO EACH OTHER IN EXECUTING THIS AGREEMENT, AND THAT HUSBAND AND WIFE HAVE HAD THE OPPORTUNITY TO BE REPRESENTED BY COUNSEL OF HIS OR HER OWN CHOOSING ON THIS MATTER. FURTHERMORE, HUSBAND'S AND WIFE'S SIGNATURES BELOW HEREBY AFFIRM THAT HUSBAND AND WIFE HAVE DECLINED TO OBTAIN THE SEPARATE ADVICE OF COUNSEL ON THIS MATTER OR THAT THE AFORESAID LEGAL COUNSEL, IF ANY, HAS READ AND EXPLAINED TO HUSBAND AND WIFE THE ENTIRE CONTENTS OF THIS AGREEMENT AS WELL AS THE LEGAL CONSEQUENCES OF THIS AGREEMENT.

Appendix C
Issues to Consider in Drafting Contractual Wills

1. Consider whether the Revocable Trust with Renege Provisions is a better option, or one of the Blended Family Planning Techniques might work better.
2. Carefully consider the Consideration Offset/2056 deductibility issues if any portion of the estate of the first to die needs to qualify for the Marital Deduction.
3. Consider representation issues and conflicts. If you are representing both spouses in the preparation of contractual Wills, make sure your engagement letter covers every contingency and that clients acknowledge they could seek separate counsel but chose not to.
4. Do not draft one joint Will meeting the contractual Will requirements. Although the cases discussed herein often involved joint Wills, separate Wills are the better way to prepare a contractual Will plan. Note Professor Johanson's comment to 59A in the 2008 Annotated Probate Code: "Some lawyers are still foisting joint Wills upon clients....My advice to lay persons who have a joint Will: Get a new Will immediately, and don't go back to the same lawyer because that attorney does not know what he or she is doing."
5. Meet the common law test prong one: Property should not be conveyed to the surviving spouse as an absolute and unconditional gift
 - i. Be careful in giving surviving spouse the ability to make lifetime gifts from inherited property – spouse could still be bound by contract for transfer at death but could dispose of entire estate during lifetime in manner contrary to planned disposition (address this specifically)
 - ii. Be careful that gift to survivor does not include such a liberal use as to constitute a gift in fee
6. Meet common law test prong two: Expressly address the distribution at the second death as a combination of both testators' estates.
7. Meet the requirements of §59A (fairly self explanatory)
8. Think carefully about the remainder beneficiaries: then living descendants is different from children, as a deceased child's estate would pursue the constructive trust instead of the living descendants.
- 9. Consider drafting an actual Contract Concerning Succession in addition to the Contractual Wills.**
10. Specify whether contractual arrangement covers after-acquired property and non-probate assets.
11. Address the ability of the parties to terminate the contract and on what notice requirements.
12. DO NOT DRAFT AN ELECTION WILL.
13. Think carefully about inserting a no-contest clause. While a beneficiary seeking to impose a constructive trust is arguably not TECHNICALLY challenging the Will (in fact the "bad" Will would be admitted and the constructive trust would be imposed on the assets) a broadly drafted no-contest clause could thwart the intention of the contractual plan: i.e. the ultimate beneficiary's ability to enforce.

14. Consider reviewing Will of deceased spouse if you are preparing a Will for surviving spouse. If your client does not know about the contract, or does not plan to honor it, your client may benefit from seeking a declaratory judgment during lifetime as to whether the deceased spouse's Will was contractual.

Appendix E

Drafting Distribution Section for 2056(b)(7) Trust – Greater of Income or Unitrust

The trust administered pursuant to the provisions of this Article shall be called by my name. My wife shall be the sole beneficiary of this trust during her lifetime, and no distributions may be made to anyone else during her lifetime. My Trustee shall distribute to my wife at least quarterly the greater of the following:

- (a) the net income of the trust administered pursuant to this Article; or
- (b) an amount equal to five percent (5%) of the fair market value of the trust valued as of the beginning of such calendar year; provided that in the case of a short year (being the beginning year of the trust, or the final year of the trust), such amount shall be prorated based on the number of days in such year.

Notwithstanding anything to the contrary contained herein, my wife shall have the power to require that any unproductive property in this trust be converted into productive property within a reasonable time. Upon the death of my wife, my Trustee shall distribute to my wife's estate all of the accrued income of the trust administered pursuant to this Article through the date of my wife's death.

Appendix F

Distribution Section for 2056(b)(7) Trust –Unitrust Distribution Only

The trust administered pursuant to the provisions of this Article shall be called by my name. My wife shall be the sole beneficiary of this trust during her lifetime, and no distributions may be made to anyone else during her lifetime. My Trustee shall distribute to my wife annually an amount equal to three percent (3%) of the net fair market value of the trust administered pursuant to this Article, valued as of the beginning of such calendar year (the "Unitrust Payment"), provided that such distributions shall not be made in one lump sum, but shall instead be made over the course of the calendar year not less frequently than quarterly; provided that in the case of a short calendar year (being the beginning year of the trust, or the final year of the trust) such amount shall be prorated based on the number of days in such year. The distribution provided for in the preceding sentence shall be considered a distribution of all trust income pursuant to Texas Trust Code section 116.007(c), and is intended to meet the income distribution requirements of Section 2056 of the Internal Revenue Code as defined in Section 643(b) of the Internal Revenue Code. Notwithstanding anything to the contrary contained herein, my wife shall have the power to require that any unproductive property in this trust be converted into productive property within a reasonable time. Upon the death of my wife, my Trustee shall distribute to my wife's estate all of the prorated Unitrust Payment.

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