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The Enforceability of a Spouse's Consent to a Will

Obtaining consent to the terms of a will from the testator's spouse is a routine part of estate planning to many attorneys, yet few of them have considered the effect of such a consent. The author of this Note analyzes the enforceability of a spouse's consent agreement under ordinary contract principles and under special statutory provisions dealing with such agreements. He concludes that although a spouse's consent may have some value, it is subject to limitations that substantially impair its usefulness in most jurisdictions.

INTRODUCTION

A surviving spouse has long had a right that cannot be defeated by will to share in her spouse's estate. If the surviving spouse exercises this right by electing to take against a will, the testator's plan of testamentary disposition will be frustrated. Often a testator attempts to prevent such frustration by obtaining his spouse's consent to the terms of his will before his death. The consent agreement has an obvious advantage over such other methods of estate planning as inter vivos gifts because it enables the testator to retain control over his assets.

The purpose of this Note is to examine the effect of a consent

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1. The common-law estates of dower and curtesy have been either abolished or substantially modified in many states. Even in such states, however, a surviving spouse has a statutory right to share in her spouse's estate that cannot be defeated by will. Vernier, American Family Laws §§ 188-89, 216 (1935).

2. See Shannon v. Eno, 120 Conn. 77, 179 Atl. 479 (1935); In re Estate of Donovan, 409 Ill. 195, 98 N.E.2d 757 (1951); Mercantile Trust Co. v. Schloss, 165 Md. 166, 166 Atl. 599 (1933); Campbell v. Cason, 206 Miss. 420, 40 So. 2d 258 (1949); Stachnick Estate, 376 Pa. 592, 103 A.2d 765 (1954). See generally Comment, 38 Marq. L. Rev. 36 (1954); Comment, 15 Sw. L.J. 85, 123 (1961). The testator's plan will probably also be frustrated with respect to beneficiaries other than the electing spouse, for they must contribute unless there is sufficient intestate property to satisfy the electing spouse's statutory share. See Hart v. Hart, 95 Colo. 471, 37 P.2d 754 (1934); Ruh's Ex'trs v. Ruh, 270 Ky. 792, 110 S.W.2d 1097 (1937); Latta v. Brown, 96 Tenn. 343, 34 S.W. 417 (1896). See generally Annot., 36 A.L.R.2d 291 (1954).

to the terms of a will, given during the testator's lifetime, that
purports to waive dower or similar rights solely in exchange for
certain provisions in the will. The historical treatment of a consent
agreement and its effect both under contract principles and under
various statutory provisions will be analyzed.

I. EFFECT OF A CONSENT AGREEMENT UNDER
CONTRACT PRINCIPLES

A. HISTORICAL TREATMENT OF A CONSENT AGREEMENT

Until comparatively recent times, agreements by which a spouse
purported to waive her dower or similar rights were generally held
to be void4 regardless of the agreement's fairness5 or of the fact

4. A spouse's consent given during the testator's lifetime could not have been sustained under the doctrine of election. This doctrine presupposes a plurality of rights or gifts. See GARDNER, WILLS § 168 (1903); PAGE, WILLS § 710 (1901). Since a spouse does not derive rights from a will until the testator's death, she does not have a plurality of rights prior to her spouse's death. See Owen v. Paramount Prods., Inc., 41 F. Supp. 557 (S.D. Cal. 1941); Cook v. Cook, 17 Cal. 2d 639, 111 P.2d 322 (1941); Strange v. State Tax Comm'n, 192 Miss. 765, 7 So. 2d 542 (1942); Dawson v. Corbett, 71 S.D. 106, 21 N.W.2d 758 (1946). Furthermore, a married woman was considered incompetent to make an election. 2 STORY, EQUITY JURISPRUDENCE § 1097 (12th ed. 1877).

An obligation to elect did not arise merely because the testator had named his spouse a beneficiary of his will. Since there was a presumption that a devise or bequest to a widow was to be taken in addition to dower, the testator had to indicate clearly that the testamentary provisions for his spouse were to be in lieu of her dower right to compel an election by the widow. Trafton v. Trafton, 96 N.H. 188, 72 A.2d 457 (1950); see Estate of Ettlinger, 73 Cal. App. 2d 967, 167 P.2d 738 (Dist. Ct. App. 1946). When the testator had obtained his spouse's consent to the terms of his will, however, the presumption was easily overcome because the intended effect of the consent was to waive dower. See Kreiser's Appeal, 69 Pa. 194 (1870). Therefore, the courts could not hold that the widow had no obligation to elect and were compelled to determine the effect of the consent agreement. Statutes have changed the common-law presumption in many states. E.g., MASS. ANN. LAWS ch. 191, § 17 (1955); OHIO REV. CODE ANN. § 2107.42 (Page 1954). See generally Phelps, The Widow's Right of Election in the Estate of Her Husband, 37 MICH. L. REV. 236, 241 (1938).

5. See Whitworth v. Carter, 43 Miss. 61 (1870); Huntley v. Whitner, 77 N.C. 392 (1877). Equity courts sometimes gave effect to an agreement by which a wife purported to waive dower. E.g., Manning v. Pippen, 86 Ala. 357, 5 So. 757 (1889); Eberhart v. Rath, 89 Kan. 329, 131 Pac. 604 (1913); Kaiser's Estate, 199 Pa. 269, 49 Atl. 79 (1901); see 3 STORY, EQUITY JURISPRUDENCE § 1799 (14th ed. 1918). Such agreements were presumptively invalid in equity, however, because the wife was thought to be under the control of the husband. Ireland v. Ireland, 43 N.J. Eq. 311, 12 Atl. 184 (Ch. 1888). To overcome this presumption, the husband (or his representative) had the burden of showing that the "contract was fair, open, reasonable, and well understood." Id. at 315, 12 Atl. at 186.
that the spouse had received consideration for her waiver. At common law, a wife was under a general disability to contract or to dispose of real property by will, she could, therefore, make no agreement of any kind. Nearly all of the common-law disabilities imposed upon married women have now been removed by married women's legislation and maxims of equity. Since a married woman now has the capacity to make a will and to contract, a consent to a will by either husband or wife is governed by ordinary contract principles.

Moreover, husband and wife were regarded as a single legal person at common law and hence were incapable of contracting inter se. Contracts between husband and wife are now generally sub-

8. Osgood v. Breed, 12 Mass. 525 (1815); GARDNER, WILLS § 25 (1903). A married woman did, however, have the right to make a will of personally with her husband's consent. Burton v. Holly, 18 Ala. 408 (1850); Morse v. Thompson, 56 Mass. (4 Cush.) 562 (1849); Marston v. Norton, 5 N.H. 205 (1830). The husband's consent was similar to an unexecuted gift, for the ownership of her personal property vested absolutely in her husband at the time of marriage. Allen v. Hooper, 50 Me. 371 (1862).
9. See 3 VERNIER, op. cit. supra note 1, § 156.
10. SCHOULER, WILLS § 25 (2d ed. 1892).
12. See, e.g., CAL. CIV. CODE § 158; CONN. GEN. STAT. REV. § 46-9 (1958); ILL. REV. STAT. ch. 68, § 6 (1961); IND. ANN. STAT. § 38-101 (1949); MICH. COMP. LAWS § 26.181 (1948). A statute that purports to enable a married woman to contract as if she were unmarried does not necessarily allow her to contract with her husband. 3 VERNIER, op. cit. supra note 1, § 156. For a statute to allow husband and wife to contract inter se, it must be construed as not only removing the inability of a wife to make a binding promise, but also as dispensing with the common-law doctrine that husband and wife are a single legal entity. Some states have retained the common-law prohibition of contracts between husband and wife. E.g., MASS. ANN. LAWS ch. 209, § 2 (1955); VT. STAT. ANN. tit. 15, § 61 (1958). Some states prohibit certain kinds of contracts between husband and wife. E.g., LA. CIV. CODE ANN. art. 1790 (West 1952); MINN. STAT. § 519.06 (1961).
13. Rowe v. Hamilton, 3 Me. 63 (1824); Robertson v. Robertson, 114
ject to ordinary contract principles. Due to the confidential relationship that exists between them, however, a high standard of fairness is demanded of such contracts on the ground that one of the parties is likely to have dominated the other. In the con-

N.J.L. 558, 177 Atl. 896 (Sup. Ct. 1935); Henricks v. Isaacs, 117 N.Y. 411, 22 N.E. 1029 (1889). At least one court recognized that the single person concept was merely a technical ground for not enforcing agreements between husband and wife, and that the real basis for the rule was that the wife was so under the influence of her husband that she was deprived of her contractual volition. Brown v. Dalton, 105 Ky. 669, 49 S.W. 443 (1899).

13. Vock v. Vock, 365 Ill. 432, 6 N.E.2d 843 (1937); Rudd v. Rudd, 318 Mo. 935, 2 S.W.2d 585 (1928). The effect that the Statute of Frauds may have upon a consent agreement is uncertain. The agreement would seem to be within the statute. A contract to devise land is clearly within the statute's sale of land provision and hence must be in writing. Fred v. Asbury, 105 Ark. 494, 152 S.W. 155 (1912); Snyder v. French, 272 Ill. 43, 111 N.E. 489 (1916); Wright v. Green, 67 Ind. App. 433, 119 N.E. 379 (1918); Swash v. Sharpstein, 14 Wash. 426, 44 Pac. 862 (1896); Nelson v. Christensen, 169 Wis. 373, 172 N.W. 741 (1919). Similarly, a contract to bequeath personality in excess of a certain amount must be in writing. Wallace v. Long, 105 Ind. 522, 5 N.E. 666 (1886); Maloney v. Maloney, 258 Ky. 567, 80 S.W.2d 611 (1935); Boyle v. Dudley, 87 N.H. 282, 179 Atl. 11 (1935). But a writing does not satisfy the Statute of Frauds unless it shows an intent to make a contract. Brought v. Howard, 30 Ariz. 522, 249 Pac. 76 (1926); Curry v. Cotton, 356 Ill. 538, 548, 191 N.E. 307, 311 (1934); Gibson v. Crawford, 247 Ky. 228, 56 S.W.2d 985 (1932); Hale v. Hale, 90 Va. 728, 731, 19 S.E. 739, 741 (1894). The will and consent construed together would not seem to be sufficient evidence that the testator intended to create an irrevocable will. See note 23 infra and accompanying text. The will and consent clearly manifest the testator's intention to make some kind of a contract, for his purpose in procuring a consent to his will is to have his spouse agree to a particular disposition. Even if this is true, however, there does not appear to be sufficient writings to charge the testator's estate with an enforceable obligation; the testator has not signed a memorandum indicating his intent to make a contract. In contrast, since a consent explicitly states an intention to agree to take under a particular will, there would clearly appear to be sufficient writings to charge the consenting spouse with an enforceable obligation. See 20 CALIF. L. REV. 217, 218 (1932).

Two writers have examined in great detail the effect that the Statute of Frauds can have upon a contract to make a will. SPARKS, CONTRACTS TO MAKE WILLS 39-49 (1956); Schnebly, Contracts To Make Testamentary Dispositions as Affected by the Statute of Frauds, 24 MICH. L. REV. 749 (1926).

text of consent agreements, this confidential relationship at least imposes a duty upon the testator to disclose to his spouse the amount of his property and her statutory rights in that property.¹⁰

Even more recently, a few courts have analogized a wife's dower interest prior to her husband's death to an expectant heir's interest in his ancestor's property; therefore, they held that dower could not be released because it was a mere expectancy.¹⁷ Most courts, however, have distinguished the interest of a spouse from an expectancy and have concluded that it could be released prior to the husband's death because it is a present interest in property that cannot be defeated by will.¹⁸

B. Effect of the Agreement Prior to the Testator's Death

The validity of a consent agreement is difficult to sustain under bilateral contract principles because it seems to lack mutuality of obligation.²⁹ A will is in effect an unexecuted gift, and therefore, the testator can change or revoke his will at any time prior to his death.²⁹ This problem of mutuality could be obviated by holding that when a testator has obtained his spouse's consent to the terms of his will, he has by implication created an irrevocable will.²¹

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¹⁷ McGee v. Sigmund, 109 Ohio St. 375, 142 N.E. 676 (1924); see Merchants' Nat'l Bank v. Hubbard, 222 Ala. 518, 133 So. 723 (1931). The reasoning most frequently used to prevent the sale of an expectant heir's interest was that he had no present interest to sell. E.g., Dart v. Dart, 7 Conn. 250 (1828). Public policy was also thought to prohibit a sale of an expectancy. Dailey v. Springfield, 144 Ga. 395, 87 S.E. 479 (1915); Boynton v. Hubbard, 7 Mass. 112 (1810). The courts reasoned that if they were to give effect to such agreements, the ancestor would have no control over the expectant heir since the latter need not fear disinhering. Thus, instead of living virtuously in order to influence his ancestor, the expectant heir "may indulge in prodigality, idleness, and vice." Id. at 122. Also, if the sale of an expectancy were sustained without the ancestor's knowledge, it would be a fraud on him, for the gift intended for his heir would go to a stranger. Stevens v. Stevens, 181 Mich. 438, 148 N.W. 225 (1914).

¹⁸ E.g., Hoagland v. Hoagland, 113 Ohio St. 228, 148 N.E. 585 (1925) (overruling McGee v. Sigmund, supra note 17); Smith v. Smith, 57 Ohio St. 27, 48 N.E. 28 (1897); see Higgins v. St. Joseph Loan & Trust Co., 98 Ind. App. 674, 186 N.E. 910 (1933).

¹⁹ See Kreiser's Appeal, 69 Pa. 194 (1871).

²⁰ See Lawrence v. Ashba, 115 Ind. App. 485, 59 N.E.2d 568 (1945); Dixon v. Dameron's Adm'r, 256 Ky. 722, 77 S.W.2d 6 (1934); Succession of Dambly, 191 La. 500, 186 So. 7 (1938); Lowe v. Fickling, 207 S.C. 442, 36 S.E.2d 293 (1945); GARDNER, WILLS § 3 (2d ed. 1916).

²¹ One court has suggested that a consent agreement gives rise to "a legally implied promise" that the testator will refrain from changing or revoking his will. Gaines v. California Trust Co., 48 Cal. App. 2d 709, 711, 121 P.2d 28, 29 (Dist. Ct. App. 1941) (dictum).
It seems rather anomalous, however, to suggest that a testator who had sufficient knowledge of estate planning to obtain his spouse's consent would intend to create an irrevocable will without expressly providing for its irrevocability. Although he would thus prevent his spouse from electing against his will, he would also bind himself to a plan of testamentary disposition that could become obsolete either because of a change in the nature or value of his property, or because of the death or other change in the status of a beneficiary. Thus, the mere fact that the testator has obtained his spouse's consent to the terms of his will would not seem to be sufficient evidence that he intended the will to be irrevocable.

Instead of creating an irrevocable will, a consent agreement

22. The term "irrevocable will" is a misnomer. Once it is determined that an instrument is irrevocable, it cannot be a will. PAGE, WILLS § 50 (1901). An "irrevocable will" is nothing more than a contract. Ward v. Ward, 96 Utah 263, 85 P.2d 635 (1938).

23. The numerous advantages of a will aside from its revocability, such as the retention of control over or power to alienate and to encumber the assets of the testator, would be lost if the instrument were construed to be a contract. See 1 PAGE, WILLS § 6.1 (Bowe & Parker rev. 1960).

If the consent were obtained simultaneously with the will's execution, other factors would seem to indicate that the testator did not intend to create an irrevocable will. First, such a finding would be inconsistent with the use of testamentary language, such as "will," "devise," or "bequest" because an essential characteristic of a will is its revocability. McDonald v. Polansky, 48 N.M. 518, 153 P.2d 670 (1944); Lewis' Estate, 139 Pa. Super. 83, 11 A.2d 667 (1940); see Dwight v. Dwight, 64 R.I. 294, 12 A.2d 227 (1940). Some courts have held that an irrevocability clause in an instrument that purports to be a will does not prevent its revocation. O'Hara v. O'Hara, 185 Md. 321, 44 A.2d 813 (1945); Wilks v. Burns, 60 Md. 64 (1882); Selley v. Lecso, 28 N.J. Super. 593, 101 A.2d 26 (Ch. 1953). Furthermore, finding a testator-intention to create an irrevocable will renders execution in accordance with the statutory formalities for the execution of a will superfluous; there is no need for witnesses, for example, if the parties intended to create only a contract. There would be a need for the statutory formalities, however, if the instrument were construed to be partly a will and partly a contract. See In the Matter of the Estate of Wyss, 112 Cal. App. 487, 297 Pac. 100 (Dist. Ct. App. 1931); SCHOULER, WILLS § 270 (2d ed. 1892). This construction would, however, be rather unusual because a contract and a will are not normally executed on the same instrument. Also, such a construction may be of doubtful validity when the testator and consenting spouse have children; if the consent were given in exchange for certain provisions in the will for the children, the entire instrument could be irrevocable because the children would be third-party beneficiaries to the consent agreement.

If the consent were obtained after the will's execution, there may be a more reasonable basis for holding that the will is irrevocable. The testator may then have intended it to be revocable at the time of its execution, but subsequently converted it into a contract through the consent clause. Courts have demanded a high standard of proof, however, to show that a will was incorporated into a contract. E.g., Rolls v. Allen, 204 Cal. 604, 269 Pac. 450 (1928).
could be construed to bind the consenting spouse as long as the testator does not change or revoke his will. Although a consent clause generally does not contain any limitation concerning the binding effect of the consenting spouse's agreement, it would not seem reasonable to conclude that she ever intends her consent to be irrevocable. The agreement is executed with reference to the testator's existing property and may be wholly inappropriate if the status and amount of that property substantially changes. Furthermore, there would not seem to be a valid contract binding the consenting spouse under such a construction. Forbearance may, under some circumstances, constitute valid consideration, but holding the consenting spouse bound as long as the testator does not revoke his will seems to overlook the fact that he has not given up the right to revoke his will. This power to revoke the will without incurring liability would seem to make the contract illusory.

A consent agreement could also be construed as a unilateral contract. The consent would operate as an offer to the testator—if he does not change or revoke his will, the consenting spouse will be bound at his death. Thus, the testator could change or revoke his will without incurring liability because he is, in effect, rejecting the offer. Similarly, the consenting spouse could revoke her consent prior to the testator's death in the same manner that an offer is terminated.

Considering a consent to the terms of a will as an offer for a unilateral contract appears to be the only contract theory upon which such an agreement can be sustained. Such a construction may arguably render the consent agreement ineffectual. Since at common law the death of the offeree would terminate the offer, the testator's death would seem to terminate the consent. This

25. See, e.g., BELSHEIM, MODERN LEGAL FORMS § 10182 (1957); 3 JONES, LEGAL FORMS 1074-75 (10th ed. 1962).
26. RESTATEMENT, CONTRACTS § 75 (1932); 1 WILLISTON, CONTRACTS § 113 (3d ed. 1957).
28. This construction would also seem to be in conflict with the standard of fairness demanded of contracts between husband and wife. If the consent agreement became disadvantageous to the testator, he could merely revoke his will, but the consenting spouse would be bound even though the agreement became disadvantageous by virtue of an increase in the testator's property.
argument, however, ignores the fact that the death of the testator
with the terms of the will unaltered is the very act that the parties
intended to constitute an acceptance; therefore, the death of the
testator would consummate the contract and bind the consenting
spouse.31 Furthermore, construing the consent agreement as a uni-
lateral contract is consistent with the standard of fairness required
of contracts between husband and wife; since each of the parties
is free to revoke his part of the agreement, they can avoid the in-
equities that might result from a substantial change in the testator's
property after the consent has been given.

Construing the consent agreement as a unilateral contract does
not substantially lessen its usefulness as an estate planning tool.
Although the testator has no assurance during his lifetime that the
consenting spouse will not revoke the consent, the right to elect
against his testamentary plan will be barred after his death if no
earlier revocation has occurred. Moreover, a number of factors in-
dicate that revocation of the consent during the testator's life would
be infrequent. Ignorance of a change in the testator's property,
recognition that a testator could partially defeat the spouse's
statutory rights by inter vivos gifts, and simply the moral obliga-
tion to comply with the testator's plan of testamentary disposition
all make the possibility of a spouse withdrawing her consent im-
probable.

C. Effect of the Agreement After the Testator's Death

Although lack of mutuality of obligation would seem to indicate
that a consent agreement has no effect during the testator's lif-
te time, his death eliminates the lack of mutuality because he can
then no longer change or revoke his will. The enforceability of
such a contract after the testator's death may be barred, however,
by a lack of consideration or a failure to meet the standard of fair-
ness required of contracts between husband and wife.

1. The Problem of Consideration

If a consenting spouse is to receive less under a will than under
her statutory rights, there would appear to be a lack of considera-
tion since she has received nothing that she was not entitled to
receive prior to the execution of the consent agreement. The most
obvious case of the consenting spouse receiving no benefit in ex-
change for the consent is where the will gives her a fractional share
of the testator's estate that is equal to or less than her statutory

fractional share. If the consenting spouse is to receive a fixed amount under the will, however, there would seem to be consideration to support the consent agreement. Since the spouse's statutory share is generally of indeterminate value, the consenting spouse may reasonably consider the fixed amount provided in the will to be worth more than the yet undetermined value of her statutory share.

Although there may be no consideration for the consent because the consenting spouse would derive greater benefits by an election against the will, reliance upon the consent by the testator may constitute sufficient consideration to bind the consenting spouse to the consent agreement. In reliance upon the consent, the testator may have failed to include in his will an alternative plan of testamentary disposition to be effective upon an election against the will. Detrimental reliance by the testator could also consist of a failure to make inter vivos gifts to effectuate the desired plan of distribution of his property. Therefore, allowing

32. For example, if the consenting spouse is to receive one-third of the testator's estate under the will and her statutory share is one-half of the testator's estate, the consenting spouse has received no benefit. In such a case, the consenting spouse's right to share in the testator's estate can be compared, for the purpose of determining the presence of consideration, with the right of one to whom a legal duty is owed. "It has long been supposed that the performance of an already existing legal duty is not a sufficient consideration for a promise, even though it is bargained for by the promisor and is actually given as the agreed exchange for the promise." Corbin, Recent Developments in the Law of Contracts, 50 HARV. L. REV. 449, 456 (1937). The application of this rule to rights that arise out of the marital relation has been made in contracts other than consent agreements. E.g., Rudd v. Rudd, 318 Mo. 935, 2 S.W.2d 585 (1928), where the court held that a contract that purported to impose upon a husband the duty to support his family failed for lack of consideration.

33. But cf. Spratt v. Lawson, 176 Mo. 175, 75 S.W. 642 (1903), where the court valued the statutory share and held that the agreement failed for lack of consideration because an election against the will would have given greater benefits than those to be derived under the will. The consenting spouse was to receive $7,000 under the will, and the court valued the statutory share at more than twice that amount. The reasoning of the court appears to be unsound as to the presence of consideration because of the general rule "that the fairness of an exchange is legally irrelevant." Puller, Basic Contract Law 335 (1947). The court's result, however, seems correct because of the standard of fairness demanded of contracts between husband and wife. See case cited note 36 infra and accompanying text.

34. In the Matter of the Estate of Wyss, 112 Cal. App. 487, 496–97, 297 Pac. 100, 104 (Dist. Ct. App. 1931). Under this theory, the consenting spouse should be able to revoke the consent prior to the testator's death, for the testator would not be prejudiced since he could change or revoke his will.

35. This reliance would seem to be within the so-called "promissory estoppel" section of the Restatement of Contracts:

A promise which the promisor should reasonably expect to in-
the consenting spouse to elect against the will may permit her to share in property that the testator would have disposed of during his lifetime but for his reliance upon her consent. Thus, the requirement of consideration to support a consent agreement would seem to be satisfied either by a provision in the will granting the spouse property differing in kind or measurement from her statutory share or by the detrimental reliance of the testator.

2. The Problem of Fairness

Due to the confidential relationship that exists between husband and wife, the mere presence of consideration is not enough to validate a consent agreement; it must also be "fair." In *Gaines v. California Trust Co.*, a California court held that a consent agreement by which the consenting spouse would have derived greater benefits by an election against the will than by taking under the will did not satisfy the standard of fairness demanded of contracts between husband and wife. The court did not mention detrimental reliance in *Gaines*, but presumably this also would be relevant to the fairness requirement. The testator's reliance could be considered as additional consideration to that received by the consenting spouse under the will. In *Gaines*, the agreement was so inequitable, however, that perhaps the court ignored detrimental reliance because the testator's reliance would not have been sufficient to overcome the inequity.

The *Gaines* court would seem to be correct in concluding that the consent agreement's fairness must be determined at the time of the testator's death. In this respect, a consent agreement can be distinguished from an agreement under which a spouse releases her statutory rights and receives consideration simultaneously with the agreement's execution. In such cases, the agreement's fair-
ness should be determined by a comparison of the benefits received by the releasing spouse to the value of her statutory rights at the time of the agreement's execution.\textsuperscript{38} The fact that the releasing spouse would have obtained greater benefits by an election against the will at the time of the testator's death does not invalidate the agreement for lack of fairness since the consideration was exchanged at the time the agreement was executed. When a spouse releases statutory rights solely in exchange for certain provisions in a will, however, unless the will is rendered irrevocable, the consent agreement is of no effect until the testator's death, and therefore, the amount of the consideration received by the consenting spouse cannot be determined until that time.

D. THE CONSENT AGREEMENT AND PUBLIC POLICY

In a Tennessee case, Shirley v. Shirley,\textsuperscript{39} an executor of a will sought a declaratory judgment concerning the effect of a consent agreement. The trial court and court of appeals held that the consent was ineffectual because the consenting spouse had not been sufficiently informed of the extent of the testator's property prior to the agreement's execution. The Supreme Court of Tennessee affirmed, but on a much broader basis; although a husband and wife clearly have the power to contract in Tennessee,\textsuperscript{40} the court reasoned that this type of an agreement would tend to disturb marital relations and was therefore void "whatever the circumstances or considerations."\textsuperscript{41}

In view of the fairness requirements imposed upon contracts between a husband and wife, a consent agreement would not seem to disturb marital relations as much as alternative methods of estate planning that the testator may be forced to use if consent were not available. Since the agreement's validity is contingent upon a proper disclosure of the testator's property and the consenting spouse's statutory rights in that property,\textsuperscript{42} any friction that might arise from fraud or undue influence is obviated. If no such dis-

\textsuperscript{38} See, e.g., Megginson v. Megginson, 367 Ill. 168, 10 N.E.2d 815 (1937) (antenuptial agreement).
\textsuperscript{39} 181 Tenn. 364, 181 S.W.2d 346 (1944).
\textsuperscript{40} Howell v. Davis, 196 Tenn. 334, 268 S.W.2d 85 (1954); TENN. CODE ANN. § 36-601 (1955).
\textsuperscript{41} 181 Tenn. at 367, 181 S.W.2d at 347.
\textsuperscript{42} Cases cited note 16 supra.
closure has been made, the consenting spouse will probably not fully realize the effect of a consent agreement until the testator's death, and marital disharmony will not arise over unknown rights. If the testator cannot depend upon a consent agreement to prevent a frustration of his plan of testamentary disposition, he may be encouraged to make substantial inter vivos gifts which may greatly disrupt marital harmony.

The court in Shirley also reasoned that the consent agreement was invalid because the election statute was the exclusive means of waiving the right to dissent from a will, and the consent could not operate as an election since election statutes refer to a right of choice after the testator's death. The purpose of this construction is to protect the consenting spouse from improvident contracts. The spouse is prohibited from waiving her right to a share in the testator's estate and receiving in exchange consideration that is insufficient for her support. The Oklahoma Supreme Court has taken a similar position; it has held that a contract that purports to waive the right to dissent from a will is valid only if it provides greater benefits than those to be derived from an election against a will.

Policy considerations would seem to indicate that a consent agreement should be enforced when it meets the requirements of fairness and adequacy of consideration. Although it is clearly within the public interest to protect a person's means of support from improvident agreements, the consenting spouse's rights would seem to be adequately protected in consent agreements by the requirement of disclosure, the necessity for adequate consideration, and in many cases, by the self-interest of the consenting spouse. Furthermore, a consent agreement is advantageous over other methods of preventing a frustration of the testator's plan of testamentary disposition—such as inter vivos gifts, contracts to make a

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43. See, e.g., State ex rel. Mueller v. Probate Court, 226 Minn. 346, 32 N.W.2d 863 (1948).
45. The Tennessee Supreme Court seems to have modified its views on the public policy recognized in Shirley. In a case decided three years later, the court held that a widow had waived her right to dissent from her husband's will because the parties had executed mutual wills. Church of Christ Home for Aged, Inc. v. Nashville Trust Co., 184 Tenn. 629, 202 S.W.2d 178 (1947). The court distinguished Shirley on the ground that the consenting spouse had not been adequately informed.
will having a binding effect prior to the testator's death, or trusts under which the testator serves as trustee—because the testator retains complete control over his property during his lifetime.

II. STATUTES ON CONSENT

Kansas and Minnesota have adopted statutes that deal with the effect of a spouse's consent to the terms of a will. Both

47. If the contract is for specific real property, the testator would, of course, breach the contract by selling the property even though the rights in the property itself under the contract would not be defeated unless the sale is to a bona fide purchaser. See, e.g., Erwin v. Erwin, 17 N.Y. Supp. 442 (Sup. Ct. 1892), aff'd, 139 N.Y. 616, 35 N.E. 204 (1893); McCullom v. Mackrell, 13 S.D. 262, 83 N.W. 255 (1900); SPARKS, op. cit. supra note 14, at 53. If the contract is for a fractional share of the estate, the testator may have the right to sell or to make gifts of his property, but he is subject to a number of restrictions. Sparks, Contract To Devise or Bequeath as an Estate Planning Device, 20 Mo. L. Rev. 1, 6–7 (1955). Aside from the limitations that are imposed upon the testator's use of his property, a contract to make a will that has a binding effect prior to the testator's death is an unwise estate planning device unless the testator "is ready to make a final and irrevocable commitment for the disposition of his property." Id. at 12.

48. Although the testator retains physical control over his assets by creating a trust for which he is the trustee, he is subject to liability for possible breach of trust. See 2 SCOTT, TRUSTS § 201 (2d ed. 1956).

49. KAN. GEN. STAT. ANN. § 59–602 (1949):

Neither spouse shall will away from the other more than half of his property . . . unless the other shall consent thereto in writing executed in the presence of two or more competent witnesses . . . .

50. MINN. STAT. § 525.16 (1961):

The estate, real and personal, shall descend and be distributed as follows:

1. Personal property: To the surviving spouse one-third thereof free from any testamentary disposition thereof to which such survivor shall not have consented in writing . . . ;

2. Real property: To the surviving spouse an undivided one-third of all real property . . . to the disposition whereof by will or otherwise such survivor shall not have consented in writing . . . .


Some states bar dower by jointure executed prior to marriage. E.g., GA. CODE ANN. § 31–110(1) (Supp. 1961); OHIO REV. CODE ANN. § 2103.03 (Page 1954); ORE. REV. STAT. § 113.430 (1961); R.I. GEN. LAWS ANN. § 33–4–32 (1956). Other states expressly permit husband and wife to enter into a contract either before or after marriage that would bar dower. E.g., CONN. GEN. STAT. REV. § 46–12 (Supp. 1961); ILL. REV. STAT. ch. 3, § 24 (1961). The Connecticut and Illinois statutes require consideration to bar dower since both refer to "a contract." See Sacksell v.
statutes have been construed to allow a waiver of the spouse's statutory rights *without* consideration.\textsuperscript{52} Hence, in contrast to those states where a consent agreement must be sustained on contract principles, the fact that the consenting spouse receives less under the will than by an election against the will cannot constitute a basis for disregarding the consent agreement and electing against the will.

Both the Kansas and Minnesota consent statutes are silent as to the revocability of consent.\textsuperscript{53} In Kansas, however, a written consent to a will executed during the testator's lifetime has been construed as having the same effect as an election after the testator's death.\textsuperscript{54} Therefore, the Kansas Supreme Court in *Chilson v. Rodgers*\textsuperscript{55} held that the consent is *irrevocable* once it is delivered to the testator.\textsuperscript{56} The court reasoned that if the legislature had

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\textsuperscript{52} Erickson v. Robertson, 116 Minn. 90, 133 N.W. 164 (1911); see *In re Estate of Patzner*, 173 Kan. 133, 244 P.2d 1183 (1952). In Hanson v. Hanson, 81 Kan. 305, 105 Pac. 444 (1909), a consent agreement was held valid although the consenting spouse took nothing under the will. The New York statute explicitly provides that the consent agreement may be effective without consideration. N.Y. DECE. EST. LAW § 18(9).

\textsuperscript{53} A consent clearly does not make the will irrevocable in either Kansas or Minnesota. The testator's ability to change his will without destroying the consent is unclear, however. A recent New York case held that a consent was ineffective against a will that was changed but remained substantially the same as one to which the consent had been obtained. In the Matter of the Estate of Deffner, 281 App. Div. 798, 119 N.Y.S.2d 443, *aff'd*, 305 N.Y. 783, 113 N.E.2d 300 (1953). The surrogate court had held that the consent was effective except as to a legacy that had not been in the first will. In the Matter of the Estate of Deffner, 202 Misc. 1, 114 N.Y.S.2d 600 (Surr. Ct. 1952). The decision was reversed by applying the familiar rule that a waiver is to be given a narrow construction. The appellate decision has been criticized on the ground that the rule of construction employed by the court had no valid application to the case: "The waiver, logically speaking, refers not to a piece of paper, the particular formal will, but rather to an idea; that is, the diversion of the decedent's property from the spouse to a specified alternate beneficiary." Lieb & Wachtell, *supra* note 51, at 1499.

\textsuperscript{54} Harris, *Administration of Estates*, 8 KAN. L. REV. 185, 188 (1959); see Brooks v. Olson, 170 Kan. 138, 223 P.2d 721 (1950); Aten v. Tobias, 114 Kan. 646, 220 Pac. 196 (1923); Keeler v. Lauer, 73 Kan. 388, 85 Pac. 541 (1906).

\textsuperscript{55} 91 Kan. 426, 137 Pac. 936 (1914).

\textsuperscript{56} The court found that the consenting spouse had been adequately informed as to the extent of the testator's property and her statutory rights. The absence of such disclosure can constitute a basis for electing against the will. In *State ex rel. Minnesota Loan & Trust Co. v. Probate Court*, 129 Minn. 442, 446-47, 152 N.W. 845, 846 (1915), the court stated: There is cast upon the husband, in taking a consent to the making of his will, . . . the affirmative duty of making to his wife a fair disclosure of his property and her rights, so that her consent will be an actual one, based upon an intelligent knowledge of his property and the effect of her consent, as distinguished from one merely formal.
intended a consent to be revocable during the testator's lifetime, it would have so provided through a specific statute, as it had for the execution of the consent and for the revocation of a will.

As a further basis for holding that a consent is irrevocable, the Chilson court argued that fraudulent claims of a revocation would be difficult to meet after the testator's death. Making the consent irrevocable for this reason is unnecessary since the courts have generally recognized a presumption that the consent to the terms of a will is effective. For example, where the consenting spouse has contended that the consent agreement was ineffective, the representative of the testator's estate is not required to show that the consent had been properly obtained. Furthermore, the invalidity of a consent clause must "clearly appear" from the evidence, and the testimony of the consenting spouse is not sufficient evidence to rebut the presumption of validity. A consenting spouse seeking to elect against a will on the ground that the consent had been revoked is arguing that the consent is ineffective; she should therefore be required to overcome the presumption of validity of the agreement by clear evidence of revocation. Because of the quantum of evidence required to overcome this presumption of validity of the consent clause, the Chilson court's fear of fraudulent claims of revocation would seem unwarranted.

In Minnesota, the right of the consenting spouse to revoke her consent during the testator's life is unclear. In Radl v. Radl, these requirements have been set out in a number of cases both in Kansas and in Minnesota. E.g., In re Estate of Patzner, 173 Kan. 133, 244 P.2d 1183 (1952); Woodworth v. Gideon, 136 Kan. 116, 12 P.2d 722 (1932); Radl v. Radl, 72 Minn. 81, 75 N.W. 111 (1898). But see In the Matter of the Estate of Ellis, 168 Kan. 11, 29, 210 P.2d 417, 429 (1949).

The failure to meet these requirements is often alleged after the testator's death to enable the consenting spouse to elect against his will. See, e.g., Menke v. Duwe, 117 Kan. 207, 230 Pac. 1065 (1924); State ex rel. Mueller v. Probate Court, 226 Minn. 346, 32 N.W.2d 863 (1948). The testator should prepare for this contingency by providing his spouse with independent counsel at the time the consent is executed. See Williams v. Sechler, 127 Kan. 314, 273 Pac. 447 (1929). A more common precaution is to have the instrument contain a provision that the consenting spouse is fully informed as to the testator's property, the terms of his will, and her statutory rights. See, e.g., In the Matter of the Estate of Whitney, 171 Cal. 750, 154 Pac. 855 (1916). The value of such a recital is unclear. In at least two cases, the recital seems to have been given no weight. See Williams v. Sechler, 127 Kan. 314, 273 Pac. 447 (1929); Weisner v. Weisner, 89 Kan. 352, 131 Pac. 608 (1913). Because the recital would seem to be a mere formality, it should not, standing alone, be persuasive that a proper disclosure had been made.

59. 72 Minn. 81, 75 N.W. 111 (1898).
NOTES

the only Minnesota case that has dealt with this problem, the court declared that "if the choice is once made, the assent given and statutory rights relinquished, the act cannot be rescinded, no matter what may thereafter occur to make it desirable."\(^60\) Since a will is revocable, the consenting spouse’s statutory rights are not relinquished until the testator’s death. But the court’s reference to events making revocation of the consent desirable would seem to refer to a time prior to the testator’s death, for the value of an estate would not normally increase substantially during the time after the testator’s death in which an election is permitted.\(^61\) The entire statement would seem, in any event, to be based on the statutory effect of the consent because no contract theory would support it. Aside from the objection of lack of mutuality of obligation,\(^62\) contracts between husband and wife that purport to release interests in real property are void in Minnesota.\(^63\) Thus, the consent’s irrevocability must be determined by a construction of the consent statute. The inference of legislative intent that was made by the Kansas court in the *Chilson* case—that a consent is irrevocable once it is delivered to the testator—would therefore seem to be just as applicable in Minnesota; both states have statutes for the consent’s execution and none for its revocation. This holding would also seem to be in accordance with the purpose of the consent statutes of providing greater freedom of testamentary disposition. If the consent were revocable, it would bar an election only if it were in effect at the time of the testator’s death.\(^64\)

The *Chilson* decision is, however, in conflict with the standard of fairness demanded of transactions between husband and wife.\(^65\)

\(^{60}\) Id. at 85, 75 N.W. at 112.

\(^{61}\) MINN. STAT. § 525.212 (1961) provides that a surviving spouse shall take under the will unless it is renounced within six months after the filing of the probate certificate.

\(^{62}\) See Kreiser’s Appeal, 69 Pa. 194 (1871).

\(^{63}\) Simmer v. Simmer, 195 Minn. 1, 261 N.W. 481 (1935); Betcher v. Rinehart, 106 Minn. 380, 118 N.W. 1026 (1908); *In re Rausch*, 35 Minn. 291, 28 N.W. 920 (1886); MINN. STAT. § 519.06 (1961). Kansas has no such rule. See Porter v. Axline, 154 Kan. 87, 114 P.2d 849 (1941).

\(^{64}\) The purpose of a consent statute is not primarily to benefit the consenting spouse since it prevents her election against the will. Rather, the statutes would appear to be a recognition of the frustrating effect that an election against the will has on the testator’s testamentary plan. Further, the statutes seem to recognize the arbitrariness of a statutory share, and also that the consenting spouse will generally be adequately protected by the doctrine of confidential relations and by self-interest.

Other states have also enacted legislation designed to give the testator greater freedom of testamentary disposition. See, e.g., S.D. CODE § 56.0202 (1939). See generally 3 VERNIER, AMERICAN FAMILY LAWS § 190 (1935).

\(^{65}\) See, e.g., Hafner v. Hafner, 237 Minn. 424, 54 N.W.2d 854 (1952), 37 MINN. L. REV. 489 (1953); Knox v. Knox, 222 Minn. 477, 25 N.W.2d 225 (1946); *In re Estate of Malchow*, 143 Minn. 53, 172 N.W. 915 (1919).
A substantial increase in the testator's property after the consent has been given may render the consenting spouse's provision, which was "fair" in relation to the testator's property and the consenting spouse's statutory rights at the time of the consent's execution, highly inequitable. The argument that this is merely a risk the consenting spouse assumes is inappropriate because the testator takes no corresponding risk; if the consent agreement becomes disadvantageous to the testator, it could not prejudice him because he can revoke his will. Moreover, since the consent's validity is not contingent upon consideration, the consenting spouse does not have the protection that is afforded under contract principles. Thus, in view of the inequities that could result from an irrevocable consent, perhaps a stronger inference of legislative intent that it be irrevocable is necessary than was found in Chilson.

CONCLUSION

A spouse's consent to the terms of a will can be an important estate planning tool. It allows the testator to retain control over his property during his lifetime, while avoiding the frustration of his plan of testamentary disposition that an election against his will may produce. In those states that can sustain a consent solely on contract principles, however, its usefulness is limited, for the necessity for consideration and fairness may often make it ineffectual. The only certain method for preventing a failure of consideration or fairness would be self-defeating—giving the surviving spouse greater benefits under the will than she would have by an election against it actually serves to limit the testator's freedom of testamentary disposition.

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66. To illustrate the problem, assume that a testator's only property at the time of the will's execution was a $1,000 bank account. His spouse consented to the will, in which she was a beneficiary of a $300 bequest and their children were beneficiaries of a $700 bequest. Thirty years later, when the testator has real and personal property worth a total of $36,000, she attempts to revoke her consent. In Minnesota, her statutory rights would be worth $12,000 if her husband were to die. See statute cited note 50 supra.

67. See note 33 supra and accompanying text.