

TAB 3

Mutual Wills: A Primer

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MUTUAL WILLS: A PRIMER

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The purpose of this paper is to review the principles related to the enforceability of mutual wills, to consider the case law, and to provide guidelines for practitioners who are asked to draft mutual wills.

Mutual wills are distinguished from joint wills, the latter being one document executed by two parties. Mutual wills are two wills, one executed by each of two individuals who have agreed to a specific estate plan. Usually the parties leave their estate (or a life interest in their estate) to the other and have identical or nearly identical provisions regarding the disposition of their estates on the death of the survivor. In essence, no matter which individual dies first, the distribution of the remaining estate of the survivor is agreed upon by the parties in advance.

The Doctrine of Mutual Wills

The mutual wills doctrine is clear and unequivocal:

Where two persons make an arrangement as to the disposal of their property and execute mutual wills in pursuance thereof, the one who predeceases the other without having departed from the arrangement has performed his part of the bargain and dies with the implied promise of the survivor that it shall hold good ...

The arrangement will not be presumed from the simultaneous execution of virtually identical wills but must be proved by independent evidence of an agreement not merely to make identical wills but to dispose of the property in a particular way. It must amount to a contract at law.

Once one of the parties dies, the arrangement becomes irrevocable, at least if the survivor accepts the benefits conferred on him by the other's will ...

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any material alteration by one party of his will without the agreement of the other party will prevent it from being binding¹ ...

“The intervention of equity to prevent fraud is at the heart of the constructive trust ... the survivor will not be allowed to resile from the agreement after the first party’s death. In these circumstances, a constructive trust may be imposed on the survivor’s estate to protect those entitled to benefit by the agreement.”²

By way of example, A and B agree to execute identical or virtually identical wills (the “First Will”) in which they leave their estate outright to each other³, and on the death of the survivor, to the same specified beneficiaries in specific amounts or proportions. If A dies first, and B, after receiving A’s estate, changes his Will to provide for a different distribution than in the First Will, B will have breached the agreement he made with A. In these circumstances, the Court will enforce the terms of the agreement made between A and B and declare that B’s estate is to be held in trust for the beneficiaries of the First Will rather than the beneficiaries of B’s subsequently executed will.

Obviously, not all identical or virtually identical wills fall under the mutual wills doctrine.⁴ Spouses often execute what are commonly referred to as “mirror wills” expecting that the surviving spouse will not alter the terms. Unless there is evidence of a specific agreement between the spouses not to alter their estate plans, the surviving spouse is free to change his or her will at any time.

Revocation

It is common but not essential that parties executing mutual wills agree not to revoke their wills. Where there is no such prohibition against revocation contained in the wills, but the Court finds clear and unequivocal evidence that the parties entered into a binding contract, the Court will apply the mutual wills doctrine and impose a trust on the survivor’s assets.

Where the wills or another document indicate an agreement was made and specifically forbids revocation, the Court will almost always impose a constructive trust. However, circumstances may arise where the Court finds that there has been a breach of the agreement, yet will refuse to find that the survivor's estate must be distributed strictly in accordance with the will of the first to die.

Consider the situation where the survivor ("B") suffers unforeseen medical problems after A's death and must incur significant expenses. Assume A and B had a combined estate valued at \$800,000.00 and had left three specific charitable bequests totalling \$300,000.00 (\$100,000.00 each) with the residue to be divided between five individuals (\$100,000.00 each). If B had to spend \$250,000.00 on medical expenses and care, on his death each residuary beneficiary would receive half of what he or she would have been entitled to if the full estate had remained intact, yet the legatees would receive their full bequest.

It might seem appropriate and certainly consistent with the estate plan of the parties if B revoked his mutual will and reduced the specific bequests to \$70,000.00 each (\$210,000.00), leaving \$340,000.00 to be divided among the residuary beneficiaries (about \$70,000.00 each). Even if there was a provision prohibiting B from revoking his mutual will, it is quite possible that a Court could find that the new will complied with the scheme of the estate plan under the mutual wills and not impose a constructive trust.⁵

Conduct as Evidence of Revocation

It is possible that the conduct of the parties themselves may be taken as proof that they have revoked their agreement. In University of Manitoba v. Sanderson Estate (1998), 20 E.T.R. (2d) 148 (B.C.C.A.), MS and KS executed mutual wills. Each will contained a clause stating

that they had agreed not to revoke or alter their wills. They also entered into a separate agreement under seal (the “Agreement”) confirming their intention. The wills provided a life interest (and right to encroach on capital) in favour of the surviving spouse, with the residue to go to the University of Manitoba.

When KS died in 1985 (fifteen years after the wills and agreement were signed) most of the assets she and MS owned were held jointly, and so passed by right of survivorship to MS, not pursuant to KS’s will. MS executed a new will that same year providing for a different disposition of his estate than as set out in the Agreement.

On MS’s death, the University sought a declaration that the executor of MS’s estate held all of MS’s assets in trust for the school. The trial judge found that “... there was a revocation of the Agreement by conduct of the parties inconsistent with the Agreement.” “[It] could be inferred from the parties’ purchase of jointly held assets ...”⁶

The trial decision was reversed on appeal. The appellate court noted there was a clause in the wills and the Agreement that the wills could only be revoked on the written consent of the parties. Anything less, such as the alleged conduct of the parties, was insufficient to revoke the contract. Further, such conduct if it were to be relied upon, must be clear and unequivocal. The justice writing for the Court declared that:

The creation of a right of survivorship in their assets is not necessarily inconsistent with the operation of the mutual wills... Short of clear evidence that they were revoked prior to Mrs. Sanderson’s death, I must conclude that the agreement not to revoke the mutual wills was still in force at the time of Mrs. Sanderson’s death ...⁷

Evidence of The Agreement

For the mutual wills doctrine to apply, there must be an agreement, equivalent to a legally binding contract, which restricts the survivor from dealing freely with his or her property or from revoking or altering his or her estate plan. “The agreement must satisfy the requirements for a binding contract and not be just some loose undertaking or sense of moral obligation.”⁸

If there is a statement in the will or in some other document which evidences the existence of an agreement to invoke the mutual wills doctrine, this will usually suffice. If not, the Courts are left to examine each unique situation and review the nature and extent of the evidence available.

The Courts have struggled with the nature and extent of the evidence required to prove an agreement existed such as to invoke the mutual wills doctrine. As neither of the parties to the mutual wills are usually available to testify, and in the absence of evidence in writing of the agreement (either in the will or in another document) the individual seeking to impose a constructive trust on the survivor’s estate will usually rely on hearsay evidence or other conduct which he claims provides proof of the agreement.

This raises issues regarding the admissibility of hearsay evidence and the requirements of section 13 of the Evidence Act.⁹ The section states:

In an action by or against heirs, next of kin, executors, administrators, or assigns of the deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

The interested party seeking to impose a constructive trust on the survivor’s estate cannot rely solely on his or her own testimony of the parties’ intentions. There must be independent,

corroborated evidence either from another witness or from the particular facts or circumstances.¹⁰

The Courts have found that there must be “...clear and satisfactory evidence ...[that the parties] intended to enter into an agreement ...”¹¹ The agreement must be “... found with preciseness and certainty from all of the evidence;”¹² and the estate against which the constructive trust claim is sought must be that the survivor and not the estate of the first to die.¹³

In Edell v. Sitzer, Justice Cullity examined in detail the history of the mutual wills doctrine and the type of evidence necessary to find that the parties intended to and did enter into a binding agreement.

In this case, Paul and Geraldine entered into identical wills in 1984 which provided each was to have a life interest in the other’s estate, and on the death of the survivor, his or her estate was to be distributed equally between their two children, J and M. Paul, a successful businessman, subsequently did an estate freeze which provided greater benefits to M than to J. M had worked with Paul in the business for many years. J felt slighted and her relationship with Paul deteriorated.

After Geraldine died in 1993, Paul modified his will but again provided for an equal distribution between M and J. However, further changes within the business resulted in additional benefits for M and the relationship between Paul and J broke down completely. Paul again changed his will and business agreements, the result of which was to ensure that M would receive all of his assets on his death.

J commenced a claim (while Paul was still alive) seeking a declaration that Paul held part of his assets in trust for J and her issue pursuant to the mutual wills doctrine and the 1984 and 1993 wills, or failing that pursuant to a constructive trust or other equitable obligation.

Justice Cullity reviewed the evidence and found no proof of an agreement between Paul and Geraldine not to revoke their wills. His Honour accepted Paul's testimony that he was the one who managed the family assets and would never have entered into an agreement with Geraldine which would have prevented him from disposing of or reorganizing his business or other assets as he saw fit. Paul testified that he and his wife had never discussed such an arrangement, and that Geraldine would never have asked or expected him to enter into such an agreement.

His Honour concluded:

The fact that two people hope and wish that it will be possible to achieve a particular result does not, by itself, mean that, once achieved, the result can never be departed from without the consent of each. Even if I were to disregard the evidence of Paul that he had no intention of entering into an agreement that would restrict his ability to deal with his property in the future, I do not believe I would be justified in attributing to Geraldine a reasonable understanding to the contrary.¹⁴

The Court of Appeal upheld the result. The panel concluded that Justice Cullity "...made no error in his analysis of the standard or legal requirements for the doctrine of mutual wills to apply," namely, evidence to establish that "...Paul and Geraldine had entered into an irrevocable agreement or made promises or representations to the effect that each of their children would receive assets of equal value upon the death of their parents."¹⁵ Justice Cullity had to assess conflicting evidence and the credibility of the witnesses. His finding that there was insufficient evidence to support the existence of mutual wills was justified.

The recent Ontario decision in Hall v. McLaughlin Estate¹⁶ highlights the point that each case will be determined on its own unique facts and circumstances.

John and Emily knew each other in their teens but were separated when John left to serve in World War II. Each subsequently married others and each had two children. Even though they lived in different provinces after John returned, John and Emily remained in close contact, and Emily would take her children and spend summers with John and his family in Ontario. After the death of their spouses, John and Emily married at the ages of 78 and 80, respectively. In 1992, shortly after the marriage, they instructed their lawyer to prepare identical wills which provided that on the death of the first, his or her estate would pass to the surviving spouse, and in the event of a joint disaster, 50% of the estate was to be divided between Emily's two children, and 50% of the estate was to be divided among John's children and grandchildren ("John's Issue"). Emily developed Alzheimers and by 1997 lacked testamentary capacity. The only changes to the wills before that time were identical codicils which merely altered the executor of their wills.

Subsequent to Emily's loss of capacity, John executed two further wills, each of which stated that if John's Issue renounced in writing any claim to Emily's estate pursuant to her 1992 will, John's estate was to be divided among John's Issue. However, the wills also provided that if one of John's Issue failed to so renounce, he or she would forfeit all rights and not share in John's estate at all.

Emily died eleven months before John, and John's estate (which included Emily's assets which passed to him under her 1992 will) were distributed among John's Issue. Emily's children

sought a declaration that John and Emily had executed mutual wills in 1992 and that the Court should impose a constructive trust on one-half of John's estate for their benefit.

Justice Pierce reviewed the authorities and confirmed that to apply the mutual wills doctrine and impose a trust, she must find clear, compelling and corroborated evidence of the parties' agreement.

Emily's children and grandchildren testified that they had a number of conversations with John after Emily became incapable, in which John told them that Emily's children would be looked after, were in the wills, and that their mother's money was safely secured for them. They also testified that John had made these statements in the presence of John's step-sister, who had no financial interest in either estate.

These conversations continued after Emily's death. Just before he died John said to one of Emily's daughters that his "...accountant was pressing him to deal with a large sum of money."¹⁷

Only one of John's sons testified. He had no discussions with his father about any of his wills, and did not know of the existence of the 1992 wills until after John's death. Surprisingly, the defendants (John's Issue) did not cross-examine any of the plaintiffs' witnesses, nor did they call upon John's solicitor, accountant or step-sister to give evidence. It was also relevant to Her Honour that John disclosed to Emily's oldest daughter a few years before his death that he was her biological father and would always make sure she was looked after.

Justice Pierce acknowledged that much of the evidence at trial was hearsay, and put forward by interested parties. However, she found the clauses in John's later wills requiring that

his issue renounce any claim to Emily's estate, and the remarks of John's step-sister to Emily's children (especially as the defendants did not call upon the step-sister to refute the statements attributed to her) to be corroborative of the plaintiffs' testimony, and the existence of an agreement between Emily and John.

“Once Emily lost her testamentary capacity, Johnnie was legally bound to the agreement he had earlier made, that the survivor would divide his or her estate equally between the two families.”¹⁸

Unhappily, Johnnie's efforts to identify and protect Emily's estate for her children failed in the execution because, at his death, Emily's estate was co-mingled with his. ... So his intention that his beneficiaries renounce any claims to her estate was defeated.”¹⁹

Justice Pierce ordered that Emily's daughters were entitled to a declaration that one-half of John's estate was held in trust for their benefit. As the estate had been almost fully distributed, a tracing order was also granted.

This decision illustrates that each case will turn on its unique facts. A plain reading of the 1992 wills which speaks only of the 50/50 division in the event of a joint disaster, would not necessarily lead one to believe that an agreement had been entered into between John and Emily not to revoke or alter their wills. However, John's subsequent words and action (including the in terrorem clause in his subsequent wills) provided the clear, corroborative evidence necessary to invoke the mutual wills doctrine.

A Practitioner's Perspective

Solicitors drafting wills should be cognizant of the expectations of individuals who jointly retain counsel to prepare identical wills. While specific protocols are now in place to deal with situations where one of the individuals seeks to revise his or her will, the issue should be

discussed at the outset. Clients should be informed that the other (usually a spouse) is free to revoke his or her will at any time and provide for an entirely different disposition of their estate.

In situations such as second marriages, marriages entered into later in life, or where the parties appear to have very distinct plans about the ultimate disposition of their estates, mutual wills should be discussed. The parties should be made aware that they can enter into a contractual arrangement for the disposition of their estates on the death of the survivor, knowing that it will be enforced unless the parties mutually agree to end the arrangement while they are still capable.

Ideally, this is accomplished by including a clause in each will acknowledging that the parties have agreed not to revoke their wills or to alter the scheme set out in the wills to dispose of their estates. In addition, as in University of Manitoba v. Sanderson Estate²⁰, the parties should also execute a separate agreement confirming their intent, with the draft mutual wills appended as schedules.

As with any contract, it is imperative to ensure that the factors which create a binding agreement are met. Some, such as issues of capacity, understanding of the documents, and undue influence are always necessary prerequisites when simply executing wills. However, consideration, financial disclosure and independent legal advice may also be important factors.

Where each will confers a benefit on the other that is generally sufficient to show value received or consideration.

Financial disclosure is usually provided to the lawyer preparing the wills by completion of an estate questionnaire. However, in the preparation and execution of mutual wills it can be

critical. If one of the parties has few assets or significant debt it is imperative that this information be disclosed to the other party. It may affect whether the party with the greater assets wishes to enter into the agreement. If the parties have been married before and have children from that marriage, and each set of children is to receive half of the combined estates after the last party dies, the wealthier party may be transferring up to one-half of his pre-marriage assets to the other party's children.

As is evident, in these instances the agreement not to revoke is akin to a domestic agreement. Accordingly, in addition to financial disclosure, each party should have independent legal advice. While the latter may not be necessary in certain circumstances, as in the preparation and execution of the wills and agreement in University of Manitoba v. Sanderson Estate²¹, it is preferred practice.

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- 1 Snell's Equity, 13th edition, Sweet and Maxwell, London (date unknown) at pp. 219-220, as cited in Hall v. McLaughlin Estate (2006), 25 E.T.R. (3d) 198 (Ont. S.C.J.) at pages 200 - 201.
- 2 Hall v. McLaughlin Estate, supra, at page 202
- 3 It is not essential that the survivor obtain a benefit from the will of the first to die for the mutual wills doctrine to apply. There must only be evidence of an agreement not to revoke the wills, or an agreement not to alter the estate plan.
- Edell v. Sitzer (2001) 40 E.T.R. (2d) 10, at page 27, affirmed (2004), 9 E.T.R. (3d) 1, (Ont. C.A.)
- 4 ... an agreement to make mutual wills cannot be inferred from the similarity of the documents." Re Gillespie [1969] 1 O.R. 585 (Ont. C.A.) at page 587. Please note that while this case deals with a joint will executed by a husband and wife and not mutual wills it enunciates the principles related to the mutual wills doctrine.
- 5 Edell v. Sitzer, supra, at page 27
- 6 University of Manitoba v. Sanderson Estate, (1998), 20 E.T.R. (2d) 148 (B.C.C.A.), at page 155
- 7 University of Manitoba v. Sanderson Estate, supra, at page 156
- 8 Edell v. Sitzer, supra, at page 26
- 9 Evidence Act, R.S.O. 1990, chapter E.23, s. 13
- 10 Lynch Estate v. Lynch Estate, [1993] A.J. No. 187 (Alta. Q.B.) at pages 4 and 5 of 24; see also: Trotman v. Thompson [2006] O.J. 681, 146 A.C.W.S. (3d), 201, Lissaman, J.; Huculak v. Smetaniuk Estate (2005), 14 E.T.R. (3d) 275, (B.C.S.C.)
- 11 Hall v. McLaughlin Estate, supra, at page 212
- 12 Lynch Estate v. Lynch Estate, supra, at page 10 of 24
- 13 Lynch Estate v. Lynch Estate, supra
- 14 Edell v. Sitzer, supra, at page 32
- 15 Edell v. Sitzer, Court of Appeal decision (2004), 9 E.T.R. (3d) 1 at page 4
- 16 Hall v. McLaughlin Estate, supra, see note 1
- 17 Hall v. McLaughlin Estate, supra, at page 209
- 18 Hall v. McLaughlin Estate, supra, at page 212
- 19 Hall v. McLaughlin Estate, supra, at page 212
- 20 University of Manitoba v. Sanderson Estate, supra, see note 6
- 21 University of Manitoba v. Sanderson Estate, supra, see note 6