Law Society of Ontario | Barreau de l'Ontario

TAB 2

Practice Gems: Administration of Estates 2020

Administration of Estates with Mutual Wills and Mutual Will Agreements

Sandra Monardo
Goddard Gamage LLP

September 21, 2020

cpd

Administration of Estates with Mutual Wills and Mutual Will Agreements

Written by Sandra Monardo, Goddard Gamage LLP[1]

Introduction

This paper and presentation cover the very narrow topic of administering estates with mutual wills and mutual will agreements after the surviving spouse dies. After defining mutual wills and the mutual will agreements, the paper provides a short list of considerations unique to such administrations.

What are they?

Mutual wills are two wills, each of which is executed by one individual [2], who together have agreed to a particular estate plan. Mutual wills are typically used by spouses in blended families who leave their estate (or a life interest in their estate) to each other and include very similar provisions regarding the disposition of the estate on the death of the surviving spouse. It is an estate planning tool chosen out of fear that the surviving spouse will cut out the intended beneficiaries of the predeceased spouse, usually the children from a previous marriage.

The doctrine of mutual wills provides that where individuals have each made a will pursuant to an agreement on the disposition of their property and an agreement not to revoke, alter or replace their wills, on the death of the first of them, the surviving spouse is bound by that agreement. As a result, the doctrine of mutual wills takes effect on the death of the first spouse. If the surviving spouse revokes or changes the will made pursuant to the agreement, a constructive trust is imposed on the property or estate of the surviving spouse for the benefit of those who were intended to benefit under the agreement. [3]

---

[1] Sandra Monardo is a partner of Goddard Gamage LLP; special thank you to Katherine Holden, summer law student, and Brittany Miller, associate, for their assistance in researching this topic, and to several estate solicitors who shared their experience.

[2] Distinguished from joint wills which is one document executed by two parties.

[3] *Edell v. Sitzer*, [2001] O.J. No. 2909 at para. 57; aff'd 2004 CarswellOnt 2241 (Ont. C.A); leave to appeal refused (2005) CarswellOnt 96 (S.C.C.).

The most fundamental prerequisite for the application of the doctrine of mutual wills is the existence of an actual agreement between the individuals who made the wills to be bound by the terms.[4] Executing mirror wills is not sufficient to trigger the doctrine as they are not binding on the testators. To be a mutual will agreement, three elements must be satisfied[5]:

> 1. there must be a legal contract that is binding and not 'just some loose understanding or senses of moral obligation';
>
> 2. the existence of the agreement must be proven by clear and satisfactory evidence;
>
> The standards for proving a mutual will agreement are high. There must be clear and unambiguous evidence of an intention to create a mutual will[6] because the doctrine restricts the surviving spouse's testamentary freedom. The agreement to be bound by mutual wills can be either written or oral so long as the elements can be proven.
>
> 3. it must include an agreement not to revoke the wills, change or replace the agreed upon scheme of disposition of their property.

Further to the third element, the surviving spouse can make a new will so long as the new will incorporates the agreed-to terms or scheme in the mutual wills. Once a spouse dies or loses testamentary capacity, at which point the mutual wills can no longer be modified by said spouse, the agreement becomes binding and irrevocable.[7]

If the surviving spouse does not abide by the agreement, equity will intervene and impose a constructive trust on the property of the surviving spouse. Justice Cullity in *Edell v. Sitzer* explained that the underlining theory of the doctrine of mutual wills is based on fraud. If the surviving spouse does not honour the agreement, such as dealing with the assets to defeat the agreement or changing his or her will, he or she is guilty of fraud on the predeceased spouse and becomes a trustee of the assets of the estate for the intended beneficiaries.[8]

Mutual wills and mutual will agreements are not common estate-planning tools. They restrict testamentary freedom and are inflexible to the changing circumstances of life such as remarriage

---

[4] *Gillespie, Re,* 1968 CanLII 281 (ON CA), referencing *Pratt et al. v. Johnson* [1959] S.C.R. 102; *Edell v. Sitzer, supra* at para. 58; *Hall v. McLaughlin Estate,* 2006 CanLII 23932 (ON SC).
[5] *Edell v. Sitzer* at paras. 58, 64 and 65; *Brynelsen Estate v. Verdeck*, 2002 BCCA 187 at para. 29.
[6] *Hall v. McLaughlin Estate,* 2006 CanLII 23932 (ON SC).
[7] *Ibid* at paras. 6 and 95; *Canadian Estate Administration Guide* at para. ¶6110 (Toronto: LexisNexis Canada).
[8] *Edell v. Sitzer, supra,* at paras. 61-62.

of the surviving spouse, subsequent dependents or the declining health of the surviving spouse requiring funds for care. The spouses are further discouraged by the added expense of independent legal advice and drafting of an additional document. Most spouses opt for alternative estate planning tools to achieve their main goal of protecting their estate for their children which include granting a life interest in assets, establishing an alter ego trust, a spousal trust, a residence trust or discretionary trust or, entering into other agreements such as a marriage contract or a cohabitation agreement.[9]

CONSIDERATIONS IN THE ADMINISTRATION OF MUTUAL WILLS

The following is a list of steps to consider when advising an estate trustee for the administration of an estate subject to mutual wills and a mutual will agreement. The list is not exhaustive and does not include steps that would be common in most administrations.[10] For this paper, it is assumed that the mutual will and the written mutual will agreement before you are valid, enforceable, and not revoked by mutual conduct prior to the death of either spouse. These documents will bind the estate trustee and govern the administration including giving directions and should be referred to regularly.

1. Identifying mutual wills and a mutual will agreement

The will is likely to expressly state that it is a mutual will, have wording to the effect that it is irrevocable either in relation to the entire will or certain provisions of it and reference an agreement to be bound, not to revoke or to uphold the division of the property on death.

Sample wording in identifying a mutual will is:

> I DECLARE that my wife [husband] and I have **agreed** with one another to execute wills of even date and in similar terms and in consideration thereof we have agreed that such respective wills **shall not hereafter be revoked or altered** either during our joint lives or by the survivor after the death of one of us AND I FURTHER DECLARE that the provisions of this my will are made in **consideration of such agreement**.

[9] For more detailed considerations, see Edgar-Chana, Ambie, "Dealing with the Complex Family in Estate Planning", *21st Estates and Trusts Summit (Day 2)* (Toronto: Law Society of Ontario).

[10] For a thorough checklist on administrations of estates, Gandhi, Jag, "An Estate Administration Checklist for Solicitors Advising Estate Trustees During the Estate Administration", *Practice Gems: The Administration of Estates 2017* (Toronto: Law Society of Ontario).

I declare that this will is made on the understanding that my wife [husband] will prepare and execute a will in substantially identical terms on the same date as myself and that her/his **will cannot be revoked or varied save with my written consent** during my lifetime and after my deal only with the written consent of my executor. [emphasis added]

Crucially, the existence of mutual wills is not in itself evidence of an agreement to be bound. It is but one factor to consider in determining whether an agreement exists.

Sample wording in a mutual will is:

MUTUAL WILL CONTRACT[11]

B E T W E E N:

[Spouse A]

– and –

[Spouse B]

WHEREAS the parties to this Agreement have agreed to make Wills and to not revoke the Wills once made;

AND WHEREAS the parties wish that the survivor of them shall enjoy full ownership of their assets for so long as he or she is alive, but to preserve the manner in which such assets shall be disposed of upon the death of the survivor;

NOW THEREFORE THE PARTIES DO HEREBY AGREE AS FOLLOWS:

1. The parties shall each make a Will executed [date].

2. Neither party shall amend or revoke his or her Will during the lifetime of the other party except with the written consent of such other party.

3. Neither party shall revoke or amend his or her Will following the death of the other party except with the written consent of all beneficiaries under the survivor's Will.

4. In the event that a party revokes or amends his or her Will in a manner which contravenes the terms of this Agreement, the other party (or his or her estate) or the beneficiaries of the Will who are detrimentally affected by such change or revocation, shall have the right to enforce the terms of this Agreement by way of trust principles or otherwise. Each party acknowledges that although the potential third parties are not privy to this contract, they shall nevertheless have all rights, equitable or otherwise, which may provide a remedy for the situation.

5. Each party acknowledges that he or she has read and understands the terms of this Agreement. Both parties have denied the opportunity to seek independent legal advice in respect of the same as they both understand and are desirous of implementing the provisions hereof. Moreover, each party wishes to avoid more complex structures to accomplish this objective, such as creating life interests in their assets, trusts for their assets, or a Marriage Contract.

[11] Prepared for illustration purposes only using a precedent from Build-A-Will software https://www.doprocess.com/products/will-builder/.

> **IN CONSIDERATION** of entering into the mutual covenants herein and the sum of $2.00, the adequacy and receipt of which is hereby acknowledged, the parties hereby agree to be bound by the terms of this Agreement as evidenced by their respective signatures below.

In some cases, the will is attached as a schedule to the agreement, which is preferred.
It is important to consider if the mutual will agreement is consistent with the mutual will. If the written agreement cannot be found, you can conduct a search of the Superior Court of Justice, place an advertisement in the *Ontario Reports* or making queries with the drafting solicitor.

The mutual will agreement can be incorporated in the mutual wills directly. As noted above, caselaw indicates that a mutual will agreement does not have to be in writing and can be established based on conduct or an oral agreement. This, of course, makes it harder to identify whether the document before you is in fact a mutual will. Much of the caselaw on this issue is focused on whether there was an oral agreement for mutual wills where there is no written agreement between the testators.[12] In these circumstances, and for the purposes of administering the will, an application for directions may be necessary in order to determine whether an oral agreement was reached, and whether the testamentary document is a mutual will or simply a mirror will.

Also, the surviving spouse may have made a new will which may not be identified as relating to a mutual will, but the division of the estate contained therein is consistent with the intent of the original mutual wills. Queries should be made of the estate trustee for knowledge of a subsequent will. As above, inquiries may need to be made with the drafting solicitor or anyone with knowledge for the relevant documents.

[12] Due to its limited scope, this paper does not outline the caselaw analysing whether a mutual will agreement was established. Consider *Dufour v. Pereira* (1769), 1 Dick. 419, 21 E.R. 332; *Trotman v. Thompson,* 2006 CanLII 4953 (Ont. S.C.); *Powell v. Glover*, 2008 ABQB 532 (CanLII); *Rammage v. Estate of Roussel*, 2016 ONSC 1857; *Edell v. Sitzer*, *supra*; *Brynelsen Estate* v *Verdeck and O'Hara,* 2002 BCCA 187; *Hall v. McLaughlin Estate*, *supra*; *University of Manitoba v. Sanderson Estate* (1998), 47 B.C.L.R. (3d) 25 (BCCA); *Brewster v. Lenzi,* 2010 BCSC 1488; *Lavoie v. Trudell*, 2016 ONSC 4141; *Gefen v. Gaertner,*2019 ONSC 6015 additional reasons at *Gefen v. Gefen,* 2019 ONSC 6020; Nelson *v. Trottier,* 2019 ONSC 1657 (CanLII).

2. Foreseeing claims against the estate

Litigation is a possibility in any estate administration. Outlined below, mutual wills and/or mutual will agreements provide fodder for lawsuits. Consider at the outset with the estate trustee the actual possibility of claims against the estate in the form of dependant's relief claims, equalization claim by a later spouse and constructive trust claims by the intended beneficiaries. Also, consider who would enforce the mutual wills and mutual will agreement if there is a breach.

Most litigation stems from claims by the intended beneficiaries of the predeceased spouse against the surviving spouse or his or her estate for use of the assets during his or her life or for breaching the agreement.

Mutual wills may not take into consideration life changing circumstances. Queries should be made as to whether there is any unnamed beneficiary who may have a financial interest in the estate. Furthermore, particular attention should be given to whether the surviving spouse remarried after the death of the first spouse with whom he or she made the mutual wills and mutual will agreement, whether they had subsequent children, and/or whether they made a new will or codicil.

Some claims could arise after the death of the first spouse. For example, John and Jane made mutual wills and John has a child ("Jake") from a previous marriage. If Jake's inheritance, upon his father's death, can only be realized upon the death of the Jane, the second wife, Jake may have grounds to challenge Jane, the surviving spouse. This scenario and more examples of possible litigation are explored in more detail below.

3. Higher probability of renouncing

Before administration commences, the estate trustee has the option to renounce the role. Like other administrations, this is canvassed with the estate trustee at the initial meetings after

reviewing the liabilities and responsibilities that come with the role. It is my view that the estate trustee of mutual wills is more likely more than other estate trustees to renounce. As discussed, the administration of mutual wills may be more susceptible to litigation. This can prove to be daunting and may discourage the estate trustee from assuming the role.

Conflict of interest is yet another reason for the estate trustee to renounce the role. For example, if the estate trustee acted as the former attorney for property for the surviving spouse and handled assets in a manner contrary to the terms of the mutual wills or the mutual will agreement, such as by disposing or depleting particular assets, gifting assets and/or gifting assets to preferred beneficiaries, they may be personally named as parties to litigation initiated by the intended beneficiaries.

4. Determining the assets

The terms of the agreement may set out what property is covered by it and, of course, the beneficiaries who take under it. The agreement may also set out the limits on the ability of the surviving spouse to make use of the property during his or her lifetime.

Usually spouses give each other either a life interest with remainders over to the same beneficiaries or an absolute interest with a substitutional gift in the event of the other's prior death.[13] So begin by determining whether the mutual will granted a life interest in the assets to the surviving spouse or an absolute interest allowing the surviving spouse to deal with the assets as he or she wished while alive.

For example, the mutual will of the surviving spouse in the 2019 decision of *Nelson v. Trottier* stated:

> In the event my husband…predeceases me I instruct my Trustees to identify any assets I inherited from my husband, including but not limited to investments, bank accounts, registered retirement

[13] McGhee, John, *Snell's Equity* (London: Sweet & Maxwell) at 219-220; *Edell v. Sitzer, supra* at para. 57.

> funds, registered retirement income funds and any assets which we jointly held upon his death and any successor assets, and to pay these assets equally among my husband's children,…

Regarding the assets, the mutual will agreement states:

> 2. The Husband and Wife agree that the terms of our Will include all property presently owned as well as after acquired property.

Particular to this case, the spouses also signed an acknowledgment and direction to the solicitors stating that their intention was to give the surviving spouse all the property absolutely and that the surviving spouse may deal with the properties as absolute owner while alive, including the ability to make gifts from the property with the expectation that the surviving spouse will not defeat the agreement by disposing of substantial portions of the assets by gifts or otherwise. Justice Pattillo accepted the acknowledgment and direction as forming part of the mutual will agreement. [14]

When does the trust arise

In terms of which assets are captured, and when, the courts have taken as their starting point the wording of the mutual wills. The court in *Hall v. McLaughlin Estate* found that, in general, a constructive trust will be impressed upon the assets subject to the agreement. It also stated that the agreement crystalizes on the incapacity or death of the first spouse, since the mutual wills can no longer be altered on consent. The capable spouse or the surviving spouse becomes a trustee of the assets.

There is differing opinion in the caselaw about when the trust materializes and over what assets it is enforceable. In discussing when a constructive trust arises, Professor Oosterhoff states:

> The date of the constructive trust arises depends in the first instance on the terms of the agreement. However, the agreement is usually silent on the point, so resort must be had to basic principles and precedent. There are three possibilities: the date of the agreement, the date of the first to die, and the death of the survivor.[15]

[14] 2019 ONSC 1657 (CanLII) at paras. 13, 14, 16 and 35.
[15] *Ibid.* at para. 31 citing Oosterhoff, A., *Mutual Wills* (2008), 27 ETPJ 135 at pp. 145-146.

In *Birmingham v. Renfrew,* the surviving spouse obtained an absolute interest in the assets of the first spouse who died under the mutual wills. The court held that the trust arose on the death of the first spouse.[16] In *Edell v. Sitzer*, Justice Cullity determined that the constructive trust arose over the estate of the surviving spouse on his or her death. The wills gave each spouse absolute interest in the assets on death of the first spouse.

In *Hall v. McLaughlin Estate*[17]*,* the spouses made mutual wills where the assets of the first spouse to die were left to the surviving spouse. On the death of the surviving spouse, they agreed that the estate of the surviving spouse would be divided 50% to the wife's children and 50% to the husband's children from prior marriages. The Court found that the constructive trust arose on the death of the surviving spouse, thereby requiring half the estate to be paid to the children of the spouse who predeceased.

A similar result occurred in the 2016 decision of *Rammage v. Roussel*[18]. The Court found the existence of an oral mutual will agreement between the spouses. They made wills which gave their respective estates to each other and for an equal division amongst her two children and his two children on the death of the surviving spouse. The surviving spouse changed her will, leaving her estate to her two children only. The Court imposed a constructive trust on half the estate of the surviving spouse on her death, to be paid to the two children of the spouse who predeceased.

In *Nelson v Trottier*, after reviewing the authorities, Justice Pattillo concluded that it is not clear when a constructive trust will arise in respect of a mutual will agreement. [19] Some cases support that where the surviving spouse is left a life interest in the assets with a remainder to another, then a constructive trust arises when the first spouse dies. Other cases hold that where the surviving spouse receives the assets of the first party to die as an outright gift that the constructive trust arises at the time of the first spouse's death. His Honour determined that a

[16] (1937), 57 C.L.R. 666 (Aust. H.C.).
[17] *Supra* note 6.
[18] 2016 ONSC 1857.
[19] *Supra*, note 14 at paras. 42-43.

constructive trust arises in respect of a mutual will agreement when either the surviving spouse dies or earlier, if the surviving spouse breached the agreement. [20] This seems logical where the mutual wills give the surviving spouse the assets of the predeceased spouse absolutely.

The case involved an application by the children of the deceased husband against the surviving spouse, who was still alive, for a declaration that her donation of $200,000, of the $4 million estate, to the husband's university in his honour and that failing to respond to inquiries about his estate were breaches of their mutual wills and the mutual will agreement. Justice Pattillo concluded that the surviving spouse did not breach the mutual will agreement requiring a constructive trust to be imposed as there was no evidence she altered her will. His Honour did not consider the $200,000 gift to be "substantial" based on the $4 million value of the assets and accepted her reasoning for making it. Further His Honour did not consider the surviving spouse's failure to respond to requests for information concerning the deceased's spouse's assets a breach of the mutual will agreement. Given that the surviving spouse received the assets absolutely and could deal with them as her own, apart from a breach of the mutual will agreement, and because the children were not beneficiaries of the deceased's spouse's estate, thereby not having a financial interest, the surviving spouse had no obligation to provide the children with the information. [21]

Where the mutual wills confer an absolute interest on the surviving spouse, it can be inferred that the agreement allows for the complete disposition of the assets by the surviving spouse in his or her lifetime. So, in this situation, the trust crystalizes on the death of the surviving spouse.[22] However, where the surviving spouse takes a life interest only, he or she is bound not to dispose of all his or her own assets that are subject to the agreement[23] and the trust would arise on the first spouse's death.

---

[20] *Ibid* at paras. 41 and 47.
[21] *Ibid* at paras. 51-52 and 58.
[22] *Birmingham v Renfrew, supra.*
[23] Waters, D., Gillen, M., Smith, L., *Waters' Law of Trusts in Canada,* (Toronto: Carswell) at 520; *Birmingham v. Renfrew* (1937), 57 CLR 666 (Aust. H.C.).

What assets are covered by the trust

In the 1968 decision in *Gillespie, Re*, the wills stated that "all property…at the time of the deceased of either of us shall be held by the survivor during his or her life…and upon the decease of the survivor, that the said property shall be the property of [third party beneficiary]". The Ontario Court of Appeal held that property acquired by the surviving spouse after the death of the first spouse would not be subject to the constructive trust.[25]

It should be assumed that assets acquired after the first death will be included unless they are specifically excluded in the wording of the mutual wills and mutual will agreement. In *Grisor, Re*[26]*,* the joint wills were written with similar wording to the terms in *Gillespie, Re,* giving the surviving spouse a life interest in the assets of the predeceased spouse and stipulating that the real property should not be encumbered or sold. Before the wife died, the husband purchased real property and registered it in his name alone and sold it after she died. After his death, a constructive trust was sought on the proceeds of sale of the real property on the basis that he sold it in contravention of the agreement. The Court concluded that the real property was never part of the wife's estate, her death did not give him a life interest and he was not a trustee of the real property.

In the 2008 decision of *University of Manitoba v Sanderson Estate,* the British Columbia Court of Appeal found that the obligation created by an agreement not to revoke mutual wills binds both that portion of the surviving spouse's estate which came from the first to die, but also his or her own property. It also covered assets acquired after the agreement.[27] In *Powell v. Glover,* the Court found that the constructive trust applied to all property up to the date of death of the first spouse, rather than limited to the property owned by the parties at the time the mutual wills were made. The wills expressly provided that each spouse had an equitable interest in the estate

[25] 1968 CanLII 281 (ON CA).
[26] 1979 CanLII 1743 (ON SC).
[27] 1998 CarswellBC 121 (BCCA) at para. 58.

of the other. It held that the surviving spouse can dispose of assets during his or her lifetime provided that they are not disposed of in breach of the agreement.[28]

By 2012, in their review of caselaw, Mary McGregor and E. Llana Nakonechny concluded that there is no definitive principle which can be extracted from the cases as to what property is bound by the constructive trust.[29]

5. Keeping beneficiaries informed

In blended families, there is a higher likelihood of discord between the beneficiaries and higher likelihood of anxiety and uneasiness from the children of the spouse who predeceased. More even than in other administrations, when there are mutual wills and mutual will agreements involved, it is imperative to make sure all are kept informed.

MINEFIELD FOR LITIGATION

In canvassing several estate practitioners, one of the main reasons that they do not recommend mutual wills and that there clients opt against them is the added risk of possible proceedings against or by the estate of the surviving spouse. At the initial meeting with the estate trustee, as noted above, it is recommended that you apprise his or her of the types of claims that can arise against the estate and consider the likelihood of them arising in the administration. This recommendation is not to be interpreted as encouraging or seeking out litigation.

The following are some types of litigation that may arise in estates involving mutual wills and mutual will agreements:

- applications to determine whether an oral mutual will agreement exists between the testators
- challenges to the mutual will and/or a mutual will agreement between the testators

[28] 2008 ABQB 532 (CanLII) at paras. 24 and 25.

[29] MacGregor, Mary and Nakonechny, E. Llana, "Mutual Wills, Contracts to Make Wills and Independent Legal Advice", *Kissing Cousins: Joint Issues in Family Law and Trusts and Estates Law 2012* (Toronto: Ontario Bar Association).

- applications for directions by the estate including interpreting the documents or determining what assets are subject to the mutual wills and mutual will agreement
- proceedings to enforce mutual wills and the mutual will agreement through constructive trust claims by the intended beneficiaries of the first spouse against the surviving spouse for breaching or perverting the contractual obligations in the mutual wills or mutual will agreement in his or her use of the assets while alive.[30] Some examples are:
    - making large gifts to third parties or preferring certain beneficiaries over others during his or her lifetime
    - disposing of the relevant assets in a way which would defeat a trust for the intended beneficiary such as via *inter vivos* gifts
    - disposing of an asset over which the mutual will grants only a life interest to the surviving spouse
- if the surviving spouse remarries or has more children, applications by the later spouse or later children to set aside the mutual will agreement to enforce the surviving spouse's financial obligations to them such as under the *Family Law Act* or dependant's relief
- negligence claims against the drafting solicitor.

As seen in *Nelson v. Trottier*, above, litigation involving mutual wills and mutual will agreements does not need to wait until the death of the surviving spouse. The beneficiaries of mutual wills can challenge the actions of the surviving spouse while alive. Proceedings can be brought between the deaths of the first spouse and second spouse against the surviving spouse for breach of the mutual wills and mutual will agreement either for disposing of assets contrary to the mutual wills and for an accounting.

Summary

There are additional considerations in administering an estate that is subject to a mutual will and a mutual will agreement. And there are some questions of law that are not yet settled. While such estates are not as popular now, the use of mutual wills and mutual will agreements may increase as more blended families are created.

[30] Consider *Hall v. McLaughlin Estate, supra*; *Birmingham v. Renfrew* (1937), 57 C.L.R. 666, [1937] H.C.A. 52 (Australia H.C.); *Nelson v. Trottier, supra*; *Gillespie, Re, supra*.