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Mutual Wills – A Review

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MUTUAL WILLS - A REVIEW

Paul Trudelle – Hull and Hull LLP

A will is revocable in all circumstances. However, in the presence of a mutual agreement to dispose of property by a will in a certain manner, the courts will hold the parties to that agreement. Where one party has performed his or her part of the bargain, the other party will not be allowed to resile from that agreement, and equity will intervene to protect the interests of those entitled to benefit from the agreement. In this paper, I shall address the concept of "mutual wills", and discuss the circumstances in which a court will find that there is a binding agreement not to revoke the will. I shall address the nature of such an agreement, the evidence that will be considered, and the remedy that will be imposed.

REVOCABILITY OF WILLS

A starting point is the notion that wills are, by their nature, revocable, even when expressed to be irrevocable, or where the testator covenants not to revoke it. It is said that in no circumstances will equity grant an injunction to restrain the testator from revoking his or her will.[1]

In certain cases, the will will be revoked by conduct. For example, if the survivor remarries, the prior will is revoked by operation of s. 16 of the *Succession Law Reform Act*.

However, that is not to say that a testator cannot enter into such agreements to not revoke a will. The testator (and his or her estate) will be held to such bargains. Where there is a breach of such an agreement, the testator's estate may be liable in damages. Trust remedies can ensure that such agreements are carried out.

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[1] *Feeney's Canadian Law of Wills*, para. 1.36

THE DOCTRINE

The doctrine of "mutual wills" is a long-standing one. The doctrine was recently reviewed extensively in the Ontario Superior Court of Justice decision of *Hall v. McLaughlin.*[2]

There, the deceased, Emily, died, leaving her estate of approximately $325,000 to her second husband, John. When John died, his estate, worth approximately $700,000, was distributed to his beneficiaries pursuant to a further will that he subsequently made.

Emily's daughters, who received nothing from their mother's estate, or from John's estate, took issue with the fact that John's estate pass entirely to his beneficiaries, and not to them. They asserted that Emily and John had made a contract to the effect that when the first partner died, he or she would leave his or her entire estate to the survivor, and that when the last partner died, he or she would benefit the families of both partners. Wills prepared at the time of the marriage of Emily and John reflected this.

However, subsequently John made a new will that did not benefit Emily's children whatsoever. Emily's children took issue with this, and litigation resulted.

Before addressing the evidence, the court set out the "succinct" statement of the doctrine of mutual wills as found in *Snell's Equity*, 13th ed., as follows:

> 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. Usually the parties give each other a life interest with remainders over to the same person but they may give each other an absolute interest with a substitutional gift in the event of the other's prior death. The principle applies even where they agree to make wills leaving their property to third parties and no part to each other. The arrangement will not be presumed from the simultaneous execution of virtually identical wills but must be proved by independent evidence of an

[2] (2006) CanLII 23932 (Ont. S.C.J.) per Pierce J.

> 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. Until the first death, either may withdraw from the arrangement; and any material lateration by one party of his will without the agreement of the other party will prevent it from being binding....

Elswhere, in *Re Gillespie*[3], the test was set out even more succinctly. The court will require that:

1. the joint wills or mutual wills were made pursuant to a definitive agreement or contract not only to make such will or wills but that the survivor shall not revoke;
2. such an agreement is found with preciseness and certainty, from all of the evidence; and
3. the survivor has taken advantage of the provisions of the joint or mutual will.

In *Gillespie*, the Court of Appeal considered a "joint" will: one document signed by both parties. In such a case, the court will be more likely to infer an agreement not to subsequently revoke it.

Gillespie has been criticized by many authors.[4]

The doctrine of mutual wills was also reviewed at length in Ontario by Justice Cullity in *Edell v. Sitzer*[5]. There, Justice Cullity observed that the "most fundamental prerequisite for an application of the doctrine is that there be an agreement between the individuals who made the wills."[6]

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[3] [1969] 1 O.R. 585 at 587 (Ontario Court of Appeal)
[4] See M.M. Litman's Annotation to Re Grisor, (1979), 5 E.T.R. 296; T.G. Youdan, "The Mutual Wills Doctrine", (1979) 29 University of Toronto Law Journal 390.
[5] (2001) 55 O.R. (3d) 198, 40 E.T.R. (2d) 10 (Ont. S.C.J.), affd. (2004) CanLII 654 (Ont. C.A.), leave to appeal to S.C.C. dismissed [2004] S.C.C.A. No. 372
[6] *Edell*, supra, at para. 58.

In discussing the decision of *Gillespie*, supra, Justice Cullity describes the case as "perhaps the high watermark of judicial willingness to infer an agreement not to revoke from the existence of a joint will"[7]. Contrary to the test set out in *Gillespie*, Justice Cullity notes that it does not matter whether the wills are made pursuant to the agreement not to revoke, or whether there is an agreement not to revoke pre-existing wills. However, I note that the fact situations in the case law usually involve the former circumstances.

Justice Cullity also observes that strictly speaking, it is not necessary for the agreement to require that the wills not be revoked: the doctrine will apply were the parties agree that they will adhere to an agreed scheme of disposition. Parties can vary their will, as long as the variation is in accordance with the agreed disposition plan.

In the B.C. Court of Appeal decision of *Brynelson Estate v. Verdeck*[8], it is said that the doctrine is rooted in the 1769 decision of *Dufour v. Pereira*[9]. There, the Court refers to a "compact", and that by the death of the first party, his part of the compact is irrevocable, and that therefore in equity, the second part of the compact should be deemed to be equally irrevocable.

As set out in *Brynelson*, the "compact" was revocable by either party during their lifetime, with due notice to the other. However, upon the death of the first testator, and upon the second testator benefiting from the agreement, the compact becomes irrevocable. The compact will also become irrevocable when the first party is unable to alter the will due to an incapacity.[10]

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[7] *Edell*, supra, at para. 73.
[8] [2002] BCCA 187 (CanLII)
[9] (1769), 1 Dick.419, 21 E.R. 332
[10] See *Hall*, supra at para. 92.

ESTABLISHING A MUTUAL WILL

As stated in *Hall*, there is little dispute as to the doctrine of mutual wills. However, the real issue arises out of the evidence required to prove that such an arrangement existed between the parties.

Extrinsic evidence is looked to in order to determine whether there is a contractual agreement not to revoke the wills without the other person's consent. The existence of mirror wills is but one circumstance to be considered when determining whether the testator's made an agreement.[11]

In order to establish that there is an agreement between the testators not to vary or revoke their will, "precision and certainty" was required of the evidence to show a definite agreement between the parties.[12]

In applying the doctrine of mutual wills, the court in *Hall* reviewed the family relationships, and the preparation of the wills in extensive detail. The court concluded that there was a binding agreement that the survivor of the husband and wife would divide their estate.

The evidence, as found by the judge, was that Emily and John met while in their teens. They were separated, and each married someone else, having two children each. The lovers later reunited, and married, at the age of 80 and 78, respectively. John was close to his own children, and to Emily's as well. John's children were not very close to Emily. Subsequently, it was revealed that one of Emily's children was fathered by John.

As to the making of the wills, there was evidence from one of the daughters, which evidence was not challenged, to the effect that Emily and John told her that they were preparing "identical wills" that would take care of both sets of children. This evidence

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[11] *Re Gillesie* (1969), 1 O.R. 585 (Ont. C.A.)
[12] *Lynch Estate v. Lynch Estate* [1993] A.J. No. 187 (Alta. Q.B.)

was supported by a granddaughter. Other evidence showed that John instructed his lawyer to prepare wills that would see to their estates going to the survivor, or if there was a "joint disaster in which we both die", half the estate was to go to John's children, and half was to go to Emily's children. Subsequent to Emily's death, John repeatedly advised Emily's children that Emily's money would go to them. This led the court to conclude that "there is clear and satisfactory evidence that Emily and John McLaughlin intended to enter into an agreement and did enter into a binding agreement that the survivor of them would divide his or her estate into two equal shares, to be divided among their beneficiaries".[13]

In *Edell v. Sitzer*, supra, Justice Cullity stated that the agreement must be proven upon "clear and satisfactory evidence". The agreement must be more than "just some loose understanding or sense of moral obligation."

Edell was applied in the recent decision of *Cassin v. Cassin.*[14] There, a mother and a father prepared mirror wills in 1996 in which they left there estates to each other, and in the event that one predeceased, to their three children equally. In 2005, the mother and father instructed their solicitor to prepare new wills, which maintained the disposition to the three children equally. Before the new wills could be prepared, the husband died. One child, who was estranged from his parents, did not attend the funeral of his father, which had a profound effect on the mother. She changed her will so as to reduce that son's share from 1/3 to 1/9. After the mother died, the son challenged the will. He also asserted that the doctrine of "mutual wills" applied, and that the mother was precluded from reducing his share.

The trial judge rejected this later submission. The son suggested that the existence of mirror wills supported the conclusion that there was an agreement that the mother and father would not revoke their wills. Relying on *Edell*, the court held that there must be some agreement in place apart from the wills themselves in order to enable a court to

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[13] *Hall*, supra, para. 96.
[14] [2007] CanLII 4863 (Ont. S.C.) per D. Brown J.

conclude that mutual wills were put in place. The son also referred to the fact that in 2005, the mother and father instructed their solicitor to prepare new wills containing the same terms as the 1996 wills. The court held that the actions in 2005 could not support an allegation that there was any agreement not to revoke wills prepared in 1996.

In order to impose a remedy, the court will require the finding of a legal and binding obligation. The court will not enforce an "honourable engagement".[15]

It is clear that the mere existence of mirror wills will not suffice. For example, in *Brynelson*, supra, Robert married Lillian. It was Robert's second marriage, and Robert had children by his first marriage. Robert prepared a will leaving his estate to Lillian, or to his children if she predeceased. Lillian made a contemporaneous will leaving her estate to Robert, or to Robert's children if he predeceased. Robert died, and his estate passed to Lillian. Lillian subsequently made a new will, benefiting Robert's daughters (which would appear to confirm the purport of the "mutual wills"). To complicate matters, Lillian remarried, marrying John. John died and Lillian received a life interest in his estate. Lillian then died, without a will. However, in an unsigned note, she indicated that "the stocks from [Robert's] estate to be transferred to [Robert's children]" (again, seeming to confirm the intent of the mutual wills). Robert's daughters claimed entitlement to Lillian's estate, including shares that Lillian received on Robert's death.

The trial judge found a mutual agreement as to the disposal of their property in accordance with the wills that they prepared after their marriage. The trial judge noted the existence of the "mutual wills", the closeness of Lillian to Robert's children, the fact that Lillian executed a new will after Robert's death that was faithful to the distribution set out in the prior mirror wills, the fact that Lillian maintained the stocks that she received from Robert's estate in Robert's last name, notwithstanding her taking on a new last name when she married John, the unsigned note referring to the stocks passing to

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[15] *Brynelson*, supra at para. 20, quoting from *Dufour*, supra. The court in *Dufour* indicated that if the parties wanted to make the agreement binding, they could have entered into an express agreement to this effect. As they did not, there was uncertainty as to whether the parties wanted the "honourable engagement" to be binding. As the agreement was not "certain and defined", it was not enforceable.

Robert's children, and discussions Lillian had with a good friend and with a housekeeper which appeared to confirm the agreement between Lillian and Robert.

However, despite all of this evidence, after reciting the doctrine of mutual wills at length, the B.C. Court of Appeal held that the critical time period was the time at which the allegedly mutual wills were executed. At that time, Lillian was not so close to Robert's children. The Court of Appeal asked, rhetorically, whether, at the time, Robert or Lillian would consider themselves bound by an agreement to leave their estates to Robert's children, even if either was to subsequently remarry and have other children. The Court of Appeal felt that both Robert and Lillian, at the time, would have not considered themselves so bound. It therefore held that there was no agreement enforceable in equity.

Thus, when considering extrinsic evidence, this evidence should relate to the understanding of the parties as at the time of the making of the allegedly mutual wills. As in *Brynelson*, subsequent acts and statements might confirm a common intent, but they will not necessarily confirm the existence of an enforceable agreement not to revoke the wills.

Further, statements of intent made at the time may not amount to the binding agreement required in order to support the application of the doctrine. As stated in *Edell*, supra, "Evidence of statements of the testamentary intentions of spouses at a particular time does not, by itself, give rise to any inference with respect to an agreement that such intentions will not change in the future."[16]

The court will also require that the evidence concerning an agreement be corroborated as required by s. 13 of the *Evidence Act.*

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[16] *Edell*, supra, para. 73.

MIRROR WILLS

As seen above, "mutual wills" are a breed apart, and distinguished from mirror wills, sometimes referred to as reciprocal wills or joint wills[17]. We often see "mirror wills", whereby wills are made by spouses that benefit the other, or if one should predecease a third party. However, as indicated, much more is required to elevate these wills to the status of "mutual wills", whereby there is an agreement not to revoke or vary a certain testamentary plan of distribution.

As stated in *Doherty v. Berry Estate*[18], "If every clearly drawn 'husband and wife' will was considered to be a mutual will, the law would be in chaos and the court would be full of applicants desiring to impinge upon very clear wills with the hope of upsetting them and setting up varying trusts."

As a drafting solicitor, one should, firstly, determine the intention of the parties, and, secondly, accurately document those intentions. If in fact the clients intend mutual wills as opposed to mirror wills, an express agreement to this effect should be prepared. Independent legal advice should be obtained. The scope of the property to be governed should be specified, and the rights of the survivor to use that property during the survivor's lifetime should be considered.

TERMINATING THE AGREEMENT

Termination of the agreement can be established by clear conduct that shows that the contract is no longer enforceable.

As indicated in the case law cited in *Brynelson*, supra, due notice of the termination of the agreement to the other party is required. Obviously, termination by one party after the

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[17] A "joint will" typically refers to a single document that contains the wills of two people. They are exceedingly rare.
[18] (1999), 34 E.T.R. (2d) 226 (Alta. Q.B.)

death of the other is not permitted, and in such a case, the court will impose an appropriate remedy.

Termination of the agreement gives rise to a significant issue for the drafting solicitor where there is a joint retainer. The solicitor who acted for both testators in preparing the wills cannot make changes to one party's will without notifying the other and obtaining their consent to act.[19]

REMEDIES WHERE THE AGREEMENT IS BREACHED

While the surviving party can revoke his or her will, the courts will not allow the party to renege from the agreement with respect to their wills and the disposition of their property.

The proceeding is not a typical will challenge, but is an action in damages, or for a declaration of a constructive trust. In *Hall*, having found that there was a binding agreement that the survivor of Emily and John would divide his or her estate into two equal shares, to be divided among their beneficiaries, the court declared that one half of the net value of the estate of John was held in trust for the benefit of Emily's two children.[20]

It has been observed that enforcement of the doctrine of mutual wills is anomalous to the proposition that third party volunteers cannot enforce contractual rights made for their benefit. In all cases, it is beneficiaries to A's estate that are attempting to enforce contractual rights as between A and B. In *Edell*, Cullity J. observes that in light of the recent developments in the law of constructive trusts, the doctrine is not so anomalous.

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[19] See Suzana Popovic-Montag, "Joint Retainers for Mutual or Mirror Wills: the Ontario Solution(?)" (2006) 4:3 *Trust Quarterly Review* 24

[20] To complicate matters, almost all of John's estate had already been distributed before judgment was obtained. To remedy this, the court granted an order for the tracing of the proceeds of John's estate, and granted an injunction preventing John's heirs from dissipating any assets attributable to John's estate pending satisfaction of the judgment.

A neat question arises as to when the rights under the constructive trust arise. If mutual wills are found that benefit beneficiary A, what happens if beneficiary A dies before the survivor? Again, the agreement between the parties might provide an answer, and the original wills themselves might assist.

The question of remedy raises the question of what rights does the survivor have with respect to the property while she is alive, and what property does the constructive trust apply to.[21] For example, consider mutual wills that provide that the assets of a husband and wife are to pass to the survivor, or if one should predecease, to C. On the death of the wife, is the husband entitled to consume or dispose of the assets he received from his wife? On the husband's death, what assets are considered to be held in trust for C? Does it apply to all of his assets, or only the assets he received from his wife? The decision in *Edell v. Sitzer* suggested that the answer to these questions "should depend upon the terms of the agreement as disclosed in the evidence."[22] Ambiguity on these terms may reduce the likelihood that the court will make a finding of mutual wills, as the agreement may not have sufficient precision to be binding.

That is not to say that these terms necessarily need to be present. The court will imply a certain power to deal with the property during the lifetime of the survivor. The court refers to a "floating obligation" that descends upon the assets of the survivor upon his or her death. The right to deal with the property during the lifetime of the survivor is not, however, unqualified: inter vivos gifts intended to defeat the intention of the agreement are not permitted.[23]

In *Re Grisor*[24], the court found that the constructive trust is only imposed over the property that the surviving party to the agreement in fact received from the predeceased

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[21] See T.G. Youdan, "The Mutual Wills Doctrine", (1979) 29 University of Toronto Law Journal 390.
[22] *Edell*, supra, para. 64.
[23] *Edell*, supra, para. 68
[24] (1979), 5 E.T.R. 296 (Ont. S.C.) per Maloney J.

party, and that the finding of mutual wills does not affect the surviving party's ability to freely deal with property that the predeceased party never had an interest in.

CONCLUSION

The decision of *Hall v. McLaughlin* is an excellent review of the doctrine of mutual wills, and serves to illustrate how the court will deal with the issue. The doctrine and its application raise a number of issues for both the litigator and the planner, and both need to have a good working knowledge of the principals involved.