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Barristers and Solicitors

The Importance of Documenting Instructions When Preparing Mirror Wills

Drafting solicitors should be well aware of the impact of the execution of mirror wills versus that of mutual wills. While the differences may at times seem subtle, the legal effect of entering into a mutual will agreement goes far beyond that of executing a mirror will.

As the name suggests, mirror wills are last wills and testaments, typically prepared for married or common law spouses, that contain provisions that mirror one another. Both wills typically name the other testator (or the same adult child) as estate trustee and provide for the same distribution of assets upon the death of the surviving spouse (sometimes with the residue of the predeceasing spouse's estate being subject to the surviving spouse's life interest).

Mutual wills are a form of mirror wills executed in circumstances where both testators agree not to revoke the will. Such agreement may be referred to within the mutual wills themselves, or outlined within an independent written mutual will agreement. Most frequently, the intention behind the execution of mutual wills is to prevent a surviving spouse from altering the beneficiaries agreed upon by the couple to exclude the predeceasing spouse's family in a blended family scenario or to a new partner after the predeceasing spouse's death. In the absence of an express written agreement, courts may nevertheless evaluate the circumstances of execution of mirror wills and related extrinsic evidence in determining that there was a verbal agreement not to alter the terms of a mirror will (see, for example, *Rammage v Roussel Estate*, 2016 ONSC 1857 ([CanLII](#))).

The presence of a prior mutual will or mutual will agreement may not in itself render a subsequent will invalid. Typically, however, the assets disposed of differently under the mutual will and a subsequent will are subject to a constructive trust in favour of the beneficiary under the mutual will. Similarly, if the surviving spouse remarries and the mutual will is revoked as a consequence, the mutual will agreement may remain enforceable against the surviving spouse.

In a mirror will situation, the drafting solicitor's file may become important evidence in determining whether a mutual will agreement existed. Accordingly, especially when assisting clients whose instructions are to prepare mirror wills or mutual wills, it is important to carefully document their related instructions, including whether there is any mutual intention that the surviving spouse be prevented from disposing of assets in a manner inconsistent with the terms of the wills being prepared.