

COMMERCIAL CPD SEMINARS

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Ground Floor Auditorium, Monash University Law Chambers
555 Lonsdale Street, Melbourne VIC 3000

Session One

WILLS AND ESTATES – PRESENT ISSUES AND PRACTICAL TIPS

Mutual Wills



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Introduction

“Mutual wills” are often confused with “mirror wills” commonly made by married couples. The difference between the two is that the equitable doctrine of mutual wills requires the parties to enter into a contract to make wills in a certain form, usually in substantially similar terms in favour of the same ultimate beneficiaries, and to have agreed that the wills they have made are not to be revoked.

The contract needs to be a legally binding agreement, the consideration for which is the making of the will in the agreed form and not revoking it without notice. Typically such an agreement will provide that on the death of the first to die all of the property shall be enjoyed by the survivor and after the survivor’s death by the ultimate beneficiaries.

A neat summary of key propositions regarding mutual wills was provided by Gummow and Hayne JJ in the case of *Barns v Barns* (2003) 214 CLR 169 at 199:

“The propositions are: (i) it is the disposition of the property by the first party under a will in the agreed form and upon the faith of the survivor carrying out the obligation of the contract which attracts the intervention of equity in favour of the survivor; (ii) that intervention is by the imposition of a trust of a particular character; (iii) the subject matter is the “property passing [to the survivor] under the will of the first party dying”; (iv) that which passes to the survivor is identified after due administration by the legal personal representative whereupon “the dispositions of the will become operative”; (v) there is a “floating obligation” over that property which has passed to the survivor; it is suspended during the lifetime of the survivor and “crystallises” into a trust upon the assets of the survivor at death.” [Footnotes omitted.]

If both wills made under the mutual wills agreement are left unrevoked during the joint lives of each party (including the survivor) there should be no difficulty. However, while the survivor may always make a different will containing provisions inconsistent with the agreement, if they die having done so it will be a breach of the agreement and their equitable obligations. The relief in such a case is the imposition of a constructive trust requiring the personal representatives of the survivor to hold the property for the persons entitled to the property as beneficiaries under the agreement.

As can be ascertained from the above paragraphs, a number of issues can arise with mutual wills, some of which I will briefly address, being: (i) proof of a legally binding agreement; (ii) the application of the Statute of Frauds; (iii) the effect of revocation of the will by one party before either party dies; (iv) the effect of revocation after the death of the first party; (v) the effect of a mutual wills agreement on a testator’s family maintenance claim.

Legally binding agreement

In any dispute involving mutual wills this is typically the most difficult issue for the court to determine. Equity will not intervene where the arrangement does not satisfy the requirements to make the agreement legally binding. More than an agreement or arrangement to make “mirror wills” is required. In particular, there must be clear and satisfactory evidence to show that the parties have agreed not to revoke the wills. As Latham CJ said in *Birmingham v Renfrew* (1937) 57 CLR 666 at 674:

“Those who undertake to establish an agreement assume a heavy burden of proof. It is easy to allege such an agreement after the parties have both died, and a court should be careful to scrutinize the evidence of interested parties on such questions.”

The Statute of Frauds

In the recent case of *Flocas v Carlson* [2015] VSC 221, McMillan J considered an argument that a mutual wills agreement was unenforceable under the Statute of Frauds as it concerned land and concluded that the Statute did apply, so the plaintiff needed to establish an exception to the Statute in order to enforce the agreement. Her Honour went on to find that the exceptions of equitable fraud and part performance applied (for the reason that the first party to die had performed his part of the agreement by dying leaving his will unrevoked), but the argument that the wills themselves were a sufficient memorandum failed.

Revocation by a party during joint lifetimes

A party to a mutual wills agreement who revokes their will during the life of the other party without notice will be in breach. The question arises of the relief available to the survivor who discovers the revocation after the death of the first to die? The survivor can sue for damages or equitable relief (the imposition of a trust giving effect to the agreement), but it is necessary for prejudice to be established. That is, having received notice of the revocation the survivor could alter their will without regard to the agreement, so they may have suffered no loss. But, as occurred in the case of *Bigg v Queensland Trustees Ltd* (1990) 2 Qd.R. 11, the survivor was found to have suffered prejudice by continuing to make investments in his wife’s name in the belief the mutual wills still stood and equitable relief was granted.

Revocation by survivor after the death of the first party

This is the situation referred to in the introduction and is the more common scenario.

Further to the propositions set out by Gummow and Hayne JJ in *Barns*, may be added one which Dixon J identified in *Birmingham v Renfrew* (1937) 57 CLR 666 at 689, that the purpose of a mutual wills agreement must often be to enable the survivor during their life to deal as absolute owner with the property passing under the will of the first party to die. That is, they may convert

it and expend the proceeds if they choose, but when they die they are to bequeath what is left in the manner agreed. This was not unqualified, though, as *inter vivos* gifts and settlements calculated to defeat the intention of the agreement could not be made by the survivor.

Testators family maintenance claims

The case of *Barns* dealt with the question of whether a mutual wills agreement could defeat a testators family maintenance claim. The majority of the High Court held that the property the subject of a mutual wills agreement (where the agreement is to leave property under the will) is part of the estate of the testator at the time of death, so is subject to the potential operation of an order for provision. Therefore, the claim could be brought against the estate.