TECHNICAL ADVICE

FROM THE IPW TECHNICAL PANEL

Mutual Wills

Where do Mutual Wills come from

The doctrine of Mutual Wills emerged from the 1769 decision in Dufour v Pereira and the Court of Chanceries attempt to remedy the inequitable, or unconscionable, revocation of a Will in certain circumstances. Initially defined in that case as 'a contract between the parties, which cannot be rescinded, but by the consent of both', the law in this area has developed ever since.

Over the last two decades or so, a reasonably paced *rush* of cases brings the subject to our necessary attention again.

To properly understand Mutual Wills and their potential application, one needs to examine the contractual arrangements between the two parties, as well as the potential enforcement of Mutual Wills - in the absence of a contract - based on proprietary estoppel.

But why does the doctrine of Mutual Wills matter?

Views taken about Mutual Wills need to be observed through a wide angled lens. Too often a conversation on the subject centres around the seemingly simple question; ''Should I recommend Mutual Wills?'' To which the answer tends to be, ''Probably not'' But this is too narrow an approach.

As a professional advisor looking to facilitate the intended, future distribution of the Testators estate and to help protect the estate from potential challenges later, we need to ask, not only, should Mutual Will be considered within our advice? but whether Mutual Wills might be created in unexpected circumstances and is there anything we should do to avoid this happening.

What are Mutual Wills?

The doctrine, or rules, pertaining to Mutual Wills requires three aspects to be satisfied (in order that the doctrine applies, that is)

1. That two or more people make an agreement on how certain assets, or all assets owned on death must be disposed of and execute Wills pursuant to the agreement.
2. There must be a 'definite agreement' (Gray v Perpetual Trustee Co Ltd [1928]) and that the agreement must be 'binding' on the surviving party. Interestingly, in the case of Cleaver v Insley [1981], Nourse J stated that the fact that two people are making Wills at the same time as each other does not, by itself, invoke the doctrine, but it is a relevant factor for the Courts to consider. It has also been held that such an agreement can be made verbally.
3. That the binding event occurs. This aspect is satisfied at the date of death of the first to die, if the Mutual Will has not, itself, been revoked, since Mutual Will are, themselves, revocable by either party, during the lifetime of them both. Notice of revocation must be served.

HHJ Matthews in Fry v Densham-Smith [2010] stated that 'In order to succeed in a claim that a Will falls within the equitable doctrine of Mutual Wills, and is accordingly binding on the estate of the testator, despite a subsequent change in that Will, the claimant must prove, **on the balance of probabilities**, that the Testator made a legally binding agreement with the other Testator, that both would make their Wills in a particular form (not necessarily the same) and that they would not revoke them…'

With these qualifying rules in mind, it is clear to see why a draftsman who seeks to make Wills subject to the doctrine, may include a clause stating: 'This Will is subject to the doctrine of Mutual Wills' (or s similar style) and will draft a separate 'Mutual Will Agreement', laying out which aspects of the Will are subject to the doctrine.

Enforceability of Mutual Wills

Mutual Wills are enforceable in equity and, where deemed as such, the property is treated as being held on a *constructive trust* for the beneficiaries entitled under the Mutual Will. In fact, even if the surviving party were to alter their Will, in contravene of the original Mutual Will, the new beneficiaries are bound to perform the equitable obligations adopted from the earlier Mutual Will.

The *rigidity* of Mutual Wills was eloquently summarised by Lord Camden in the case of Dufour, mentioned above.

'He that dies first, does by his death, carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a Trustee for the performance and transmits that Trust to those that claim under him'

Issues arising from Mutual Wills

A question arises about what property is bound by a Mutual Will and how, in practise, it applies.

If the Mutual Will applies to part or all, of the residuary estate of the Testator, what rights does the surviving Testator have in connection to that property, and that of his or her own property, some of which may be acquired after the first Testator dies? Clearly, questions arise, in the absence of a life interest Trust and where the question is not, therefore settled, but it is clear in Law that the property is held in a constructive Trust and therefore that the surviving Testator can enjoy the benefit of the applicable assets, but is disqualified from making gifts inter vivos, if such gifting would otherwise defeat the object of the agreement.

One can only imagine how difficult resulting arguments could get, when considering what is subject to such restrictions, and what is not.

A further question arises in situations where the survivor remarries.

Although, this point is not tested as commonly as one might suppose, Carnwarth J, in the the case of Re Goodchild [1997] stated that the floating constructive Trust would not have been ''destroyed by remarriage of the second Testator after the death of the first'. Thus the future rights held by the new spouse or civil partner are potentially at odds with the enforceable rights of the original Mutual Wills

And the courts are not shy in applying the doctrine of Mutual Wills

There have been some very interesting cases, in more recent times, where the doctrine of Mutual Wills has been applied.

Not all Mirror Wills are Mutual Wills. However, could Mirrored Wills, made in a manner where it is clear, from additional evidence that the Testators intended to be bound by the terms, or some of the terms, after the death of the first Testator, be deemed to be Mutual Wills?

In Re Oldham [1925] it was held that the evidence must be 'clear and satisfactory'. However, in law, one must be satisfied on the basis of the balance of probabilities only. And in the case of Fry v Denham-Smith [2010] the judge found that the doctrine of Mutual Wills applied to the eventual distribution of the estate, following the surviving spouse's death, in the absence of any written evidence (no Mutual Will agreement was found nor was any Last Will and Testament or Will instructions, of the first spouse, to die found either). It was the verbal evidence, only, that persuaded the judge.

A similar conclusion to Oldham, above, was reached in the case of Charles v Fraser [2010], where, in the absence of written evidence, several reliable witnesses, well known to the Testators, provided verbal evidence as to the intent to create Mutual Wills and to be bound by them.

In the recent case of Legg v Burton and Burton [2017] much of interest is to be found.

The equitable principle of *proprietary estoppel* was successfully deployed to remedy a situation, where it was otherwise argued that a *written* enforceable contract was necessary, in connection to an interest in Land, as opposed to verbal statements. (Sect 2 Law of Property (Miscellaneous Provisions) Act 1989). In the case, there was a specific gift of land in the Will, and the land did not fall to the residuary estate. The requirement, under Sect 2, therefore applied, but would not have done so, had it fallen into the residuary estate. HHJ Matthews, considered this position as capricious and went on to assert the application of proprietary estoppel.

'…the necessary equitable obligation to bind the conscience of the second Testator, and so call into existence the constructive Trust of Mutual Wills, might arise from a proprietary estoppel rather than from a contract.'

The assertion that because the estate was passing to the survivor 'absolutely and beneficially and without any sort of trust or obligation', meant that there was clear intent for the Will not to be subject to the doctrine of Mutual Wills, was also rejected. If a Mutual Wills Trust arises, it arises and operates outside of the Will and therefore no terms in the Will can have effect on it. In any case, it was held that such wording was a standard form and did not negate the possibility of the doctrine applying as the wording did not provide clear intent to do so.

And so it was, that once again verbal evidence was successfully provided in determining that Mirror Wills, made in a manner that was meant to "Set in Stone" the Testators collective wishes, were subject to the doctrine of Mutual Wills.

Final thoughts

So, the question arises, ought one Testator bind another when the future circumstances *facing* the survivor are unknown? Might not the creation of Mutual Wills cause greater dispute than would otherwise be the case?

And is there a better, more flexible way of dealing with the same issues?

But we must also consider carefully whether the doctrine of Mutual Wills may apply in unwanted or unexpected situations. Drafting Wills that are '*not* subject to the doctrine of Mutual Wills' seems a simple solution and it is perhaps not unsurprising, that we see many Wills drafted this way.

I would counsel extreme caution in situations where Mutual Wills are being considered. There is normally a different, more suitable approach; the use of Trusts, for example, to provide similar outcomes with far less of the resulting controversy or concern.

Such carefully considered planning, *can* be *mutually* beneficial, without the need for any doctrine at all!