



Mutual, Mirror and Joint Wills – a Case of Smoke and Mirrors ?

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A Tale of Two Sisters

Charles v Fraser [2010] EWHC 2154 (Ch)
Deputy High Court Judge Jonathan Gaunt QC



Mabel and Ethel

Born 1912 and 1914

Both widowed in their 60s and had no children

In mid-1980s they bought a house and lived in it together

January 1991 they made wills in same terms

Appointed each other as executrices and left whole estate to each other

Provisions if one sister did not survive the other – residue to be divided into 40 shares divisible in specified proportions to named beneficiaries



The issue

Issue

On Mabel's death, could Ethel alter her will ?

Relevant matters

- a. Neither will recorded that it was made pursuant to any agreement
- b. Neither will contained any statement that the survivor's will could not be revoked or altered



The result

Findings

The sisters had made an agreement to leave their estate to the other and the survivor would leave their conjoined estate to the named beneficiaries in the specified shares

Relevant matters

- a. Evidence – approach “warily and with appropriate scepticism”
- b. Inherent improbability of a testator being prepared to give up possibility of changing his/her will in the future

Financial stake in the outcome

WS drafted by lawyers



Ingredients of a mutual will

1. Will made by two (or more) persons in substantially same terms
2. following **an agreement to make such wills and not revoke them without the consent of the other**
3. Must be a contract between the testators that both wills will be irrevocable and remain unaltered
4. A **common intention, expectation or desire is not enough**
5. Distinguish **mirror** and **joint** will
6. Mere execution of reciprocal wills does **not** imply any agreement for mutual will
7. The agreement may be incorporated in the will or proved by extraneous evidence to civil standard of proof – but on **clear and satisfactory evidence** (Re Cleaver) [1981] 1 WLR 939



Means of enforcing the agreement

1. Enforced in equity by imposing a constructive trust on the property subject to the agreement
2. If the survivor's will is altered, the will is formally valid but the PRs hold the relevant estate on trust to give effect to the testator's agreement



Consumer warnings !

Olins v Walters [2009] Ch. 212 CA

”As recent cases have shown this equitable doctrine Continues to be a source of contention for the families of those who have invoked it. The likelihood is that in future even fewer people will opt for such an agreement and even more will be warned against the risks involved” per Mummery LJ

”A family apparently united around the grandparents is now divided on the question whether they made a mutual wills contract”



The view from Gibraltar

English Law (Application) Act, s.2. Simple really – the common law of England applies in Gibraltar.

No cases on mutual wills – well almost. (*Metcalf v Biggie and ors*)

So what's it like to practise law in a jurisdiction whose law is derived from another jurisdiction? – complicated...at times

Allen and Wood v Panorama (2021/GSC/11)

Supreme Court Act ss 12 & 15



Brexit (Brussels I Regulation)



Tensions and questions

1. Policy of upholding contracts v testamentary freedom
2. Testators' careful thought and expressed desire at the time they make their mutual will v changing circumstances (often relationships) that they did not or could not foresee
3. If the testamentary provision amounts to the disposition of an interest in land, does it have to be in writing and satisfy the requirements of LP(MP) Act 1989 s.2 ?

Healey v Brown [2002] EWHC 1405 Ch. David Donaldson QC
But CA called this a bad point in Shovelaar v Lane [2012] 1 WLR 637
Theobald at 1-013 n.55 suggests Healey was wrongly decided
See also Legg v Burton [2017] EWHC 2088 (Ch)



More tensions and questions

4. Relationship between mutual wills, constructive trusts and proprietary estoppel – despite some apparent common features, it is agreement rather than expectation + change of position that would render it unconscionable for the survivor to resile from the arrangement. Mutual wills doctrine is stricter, as the agreement must be proved: Theobald on Wills 8-074
5. The constructive trust is shaped by the terms of the agreement. That is all very well, but if (as often) it fixes on the net estate of the first testator to die, how is the survivor who takes that property to deal with it ?

There could be 3 answers (at least):

- (i) Survivor is not free to deal with it
- (ii) Survivor free to deal with it freely – ‘floating’ trust
- (iii) What about property acquired by the survivor after the death of the first testator ?

There are no clear answers, and every possible answer creates difficulty: Snell’s Equity 33rd ed at 24-036

In *Olins v Walters* the CA upheld the trial J’s refusal to cross that bridge before it has been reached

See also HHJ Paul Matthews in *Legg* at 70



The future

Law Commission Paper No. 231 – Consultation 13.7.2017

- Stakeholders unanimously hostile – would not encourage clients to make mutual wills
- Mutual wills rare in practice – one practitioner specialising in private client work said he had only seen one in 30+ years of practice



The future – options for reform

- Abolition – testamentary freedom and incoherence of distinguishing other forms of constructive trust militated against
- Statutory footing – potential increase in popularity pointed against !
- Modest reform – allowing a claim for financial provision under I(PFD)A 1975. Parallel with donations mortis causa
- Note issue with ECHR Art 1

THANK YOU !