Mutual wills – some constructive thoughts

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Mutual wills arise where two parties (usually husband and wife) make wills, pursuant to a binding agreement, in similar form in each other's favour on terms that the survivor will not revoke his (or her) will after the death of the other. Normally, revocation would give rise to a claim for breach of the agreement but when one party has died, if the survivor revokes, the deceased can no longer maintain an action for breach of contract. Instead, a constructive trust is imposed in equity on the survivor from the moment of the first testator's death for the benefit of those entitled under the deceased's estate in order to prevent an equitable fraud: *Gray v Perpetual Trustee Co Ltd* [1928] AC 391. The fraud here involves going back on the mutual agreement and seeking to take the benefit of the property inconsistently with the understanding that it was to be dealt with in a particular way for the benefit of a third party. A good example is to be found in *Charles v Fraser* [2010] EWHC 2154 (Ch) where two sisters had made an irrevocable agreement that the first sister to die would inherit the estate of the other and the cumulative estates would subsequently pass to various individuals in various shares on the death of the survivor. The surviving sister made a later will leaving the vast majority of her estate to a different beneficiary. Her estate, however, was held to be subject to the mutual wills so that the beneficiary under her later will held the estate on trust in accordance with the terms of the mutual wills. The principle applies even where the survivor stands to gain no personal benefit from the other's will: *Re Dale* [1994] Ch 31.

The need for a mutual agreement

The doctrine operates on the basis that each testator provides consideration for the other's promise by making his (or her) will in the agreed terms and not altering it to the date of death. In other words, there must be a binding agreement between the two testators for the doctrine to apply: *Re Goodchild* [1997] 1 WLR 1216, at 1229. The object is to give the survivor enjoyment of the property inherited during his (or her) lifetime but, at the same time, prevent him (or her) from disposing of it to anyone except the mutually agreed beneficiary: *Re Cleaver* [1981] 1 WLR 939. In effect, equity imposes a "floating obligation" during the survivor's lifetime which prevents him from making any disposition (for example, a gift or inter vivos settlement) of the property which defeats the parties' mutual intentions. The decision in *Birch v Curtis* [2002] 2 FLR 847, however, makes clear that the requisite agreement not to revoke will not be construed from the mere fact that the testators contemporaneously executed similar wills. The parties in this case had failed to agree not to revoke their respective wills and no such agreement could be implied as a matter of law. The evidence suggested that, at most, A regarded B as owing some moral obligation to the claimants. The fact that both testators knew that A was dying was not sufficient to raise the requisite implication of non-revocation.

The Healey decision

The decision in *Healey v Brown* [2002] 4 WLUK 529 has confirmed that s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 applies to a contract made between testators making mutual wills. The parties, Mr and Mrs Brown, were the joint owners of a leasehold flat in London. In 1996, they executed mutual (non-revocable) wills in identical form by which each left his (or her) share in the flat (and other property) to the survivor, or to Mrs Brown's niece, the claimant, in the event that neither of them was the survivor. The remainder of the estate was left to Mr Brown's son, the defendant. In 1997, Mrs Brown died (having made no change to her will) and her husband, as the surviving joint owner, became the sole owner of the flat by operation of law. He then transferred the flat from his sole name into the joint names of himself and the defendant. Two years later, he died (with no alteration to his will) and sole title to the flat vested in the defendant by the doctrine of survivorship. The claimant's contention was that the flat was held by the defendant on a constructive trust for her absolutely since the transfer of the property by Mr Brown into the joint names of himself and the defendant after the death of his wife constituted a breach of the parties' agreement arising from the execution of mutual wills and, hence, a fraud on Mrs Brown.

Mr David Donaldson QC (sitting as a deputy High Court judge) had no difficulty in finding that the parties (husband and wife) had made a mutually binding agreement that was capable of bringing the doctrine of mutual wills into operation. The difficulty, however, was the absence of a single document signed by both of them required by virtue of s.2(1) of the 1989 Act. In this connection, it was apparent that an agreement embodied in mutual (non-revocable) wills containing a bequest of land constituted a "contract for the . . . disposition of an interest in land" within the meaning of s.2(1). In the words of the deputy judge: "an undertaking not to revoke a testamentary disposition is the same in effect as a promise to make that disposition". Even assuming that the mutual wills doctrine envisaged two contracts in operation (i.e., one made by each testator), this did not resolve the problem since (1) the document containing all the terms must have been signed by both parties (and Mr Brown's will clearly was not) and (2) Mr Brown's will did not contain (or incorporate by reference) all the terms (as required by s.2(1)).
The way out of this problem was to be found in the application of constructive trust theory. In the first place, s.2(5) of the 1989 Act expressly provides that s.2 does not affect the creation or operation of resulting, implied or constructive trusts. More importantly, however, the deputy judge recognised that some types of constructive trust (i.e., those based upon the defendant's failure to give effect to a common intention upon which the claimant had relied to his detriment) did not depend upon proof of a binding contract: see, *Yaxley v Gotts* [2000] Ch 162 and *Lloyds Bank plc v Rosset* [1991] 1 AC 107. The point here is that equity enforces the agreement not because it constitutes a legally binding contract but because it would be unconscionable for the defendant to disregard the claimant's expectations arising from the agreement and upon which the claimant has acted to his (or her) detriment. Applying this reasoning to the facts before him, the deputy judge concluded:

> "On the faith of [the agreement] . . . (deprived of legal contractual character only by section 2 of the 1989 Act) that the flat would be left to her niece, Mrs Brown on her death passed to her husband the entirety of her estate, including her undivided share in the flat. In doing so she performed wholly her side of the bargain as the first to die . . . It would

> in my opinion be entirely inequitable now to frustrate Mrs Brown's expectation and it was unconscionable for Mr Brown to seek to do so by his actions after her death in seeking to pass the flat to [the defendant]."

The effect, however, of applying this reasoning was to hold the defendant a constructive trustee of the flat for himself and the claimant in equal shares since, on the facts, the flat was not wholly owned by the claimant because a half undivided share was already vested in the defendant before his wife's death. In this connection, the deputy judge followed the reasoning of Morritt LJ in *Re Goodchild*, mentioned earlier, to the effect that no constructive trust could be imposed "in the case of mutual wills in regard to property already owned both legally and beneficially by the second testator to die": at 1231. In essence, this precludes the constructive trust mechanism from applying to any property not acquired by the survivor from the first (deceased) testator.

Should s.2(1) apply to mutual wills?

Several commentators have questioned the correctness of the *Healey* decision in applying the 1989 Act to a contract between testators to make mutual wills involving a bequest of land. First, it can give rise to odd results. If the parties agree to leave the "entirety of their estate", then the agreement will fall outside s.2(1) even though the estate may (ultimately) actually include land. If, on the other hand, the agreement relates specifically to land, then s.2(1) will apply. The problem here is that the decision focuses on the form rather than the substance of what has been agreed. One obvious way, therefore, of avoiding the *Healey* problem is to make sure that the agreement not to revoke is contained in a joint will.

Apart from the decision in *Healey*, there is also a suggestion in *Taylor v Dickens* [1998] 1 FLR 806, at first instance, that *all* agreements for mutual wills where land is involved must comply with s.2(1) regardless of whether other property (other than land) is included in the residuary estate. This, of course, would render *all* mutual wills involving land potentially void at law unless each mutual will was signed by both parties to the agreement or the mutual wills were in absolutely identical terms and formally exchanged.

Moreover, it seems that the relevant date for determining whether the contract involves a disposition of an interest in land is at the date when the contract is made. If that is right, then it leads to the somewhat bizarre result that the contract would be void at law (in the absence of compliance with s.2(1)), even though the parties no longer owned the land at the time of their respective deaths. Conversely, it seems, if the wills simply refer to the parties' residuary estate in general terms and they own no land at the time of the agreement, s.2(1) will presumably not bite notwithstanding that they acquire land subsequently which passes on their deaths. Interestingly, in *Re Walters (Deceased), Olins v Walters* [2007] EWHC 3060 (Ch); affirmed [2009] Ch 212, (CA), Norris J rejected an argument that the parties' agreement was void under s.2(1) because it related to a house acquired by the survivor under his wife's will. His Lordship distinguished *Healey* on the ground that, in the case before him, the mutual will had made no mention of the house (by way of specific devise), but devolved under the deceased's residuary estate.

Some difficulties with the constructive trust

As mentioned earlier, equity imposes a constructive trust during the survivor's lifetime which prevents him from making any disposition of the property which defeats the parties' mutual intentions. The terms of the trust may, however, exceptionally allow the survivor to convert the property (for example, by a sale) so long as this is not inconsistent with the mutual wills. Any uncertainty regarding the expenditure or disposal of the trust property is usually answered on an ad hoc basis by an application to the court to determine the legality of particular dispositions. In these circumstances, only the balance remaining forms the subject-matter of the floating trust on the survivor's death- something which may not have been contemplated by the parties at the time of making their mutual wills.

If the survivor is treated as a trustee of all the property that he not only inherits under the will from the first to die, but also all the property he already owns or subsequently acquires during his lifetime before his own death, the consequences of the trust may be particularly draconian, especially if, after the death of the first to die, he forms new relationships (or acquires a new family) who may become financially dependent on his resources. Conversely, the ultimate beneficiary's circumstances may also change dramatically (if he, for example, acquires an unexpected windfall) so as to render the terms of the mutual wills no longer necessary or appropriate. Another potential difficulty relates to enforcement – if the ultimate beneficiary is not aware of his rights under the wills or the existence of any dispositions which go beyond the agreement of the parties, how will he prevent the survivor from acting in breach of his fiduciary duty under the floating trust?

Alternative mechanisms

Although much space is devoted in the textbooks on equity and trusts to a discussion of mutual wills, the reality is that such wills are seldom used in practice. Not surprisingly, mutual wills are seen by most probate practitioners as having a number of inherent flaws and practical difficulties which make their use highly unattractive in the vast majority of cases. The inherent irrevocability of mutual wills is, of course, what distinguishes this form of devolution from so-called identical or mirror wills where there is no contract not to revoke. Not surprisingly, it is this feature, in particular, which renders the use of mutual wills so unattractive in the majority of cases.

A number of alternative mechanisms are, therefore, usually seen as far more preferable to mutual wills, in particular, a bequest of the property directly to the ultimate beneficiary during the parties' lifetime, the use of some form of trust, the creation of joint life interests with remainder to the ultimate beneficiary, a charge over the property in favour of the ultimate beneficiary and, most significantly, the use of mirror or identical wills where there is no agreement not to revoke. Indeed, in many ways, the practice of using an alternative mechanism of devolution reflects the sentiments of Mummery LJ in *Olins v Walters* [2008] EWCA Civ 782, at [3], that the doctrine of mutual wills "continues to be a source of contention for families of those who have invoked it" and "the likelihood is that in future fewer people will opt for such an arrangement and even more will be warned against the risks involved."

Conclusion

As we have seen, the legal theory underlying mutual wills lies both in contract and trust law. Thus, each party is contractually bound not to revoke his will during the lifetime of the other. To this extent, the doctrine is based on a contractual arrangement between the parties. However, on the death of the first to die, a constructive trust arises which is underpinned by the contract in the sense that it is the contract which defines the subject-matter of the trust and the survivor's duties and responsibilities in relation to it during his lifetime. Although there may be a perceived problem with certainty of subject-matter, this, it is submitted, is resolved by the notion that the trust is suspensory (or floating) in nature so that it only crystallises on the survivor's death.

However, the use of the constructive trust as a mechanism for underpinning the doctrine of mutual wills has also given rise to problems. There are difficulties, for example, in determining exactly what property is subject to the trust. As we have seen, the surviving testator has the right to dispose of the property for his own benefit in limited circumstances which runs contrary to the notion that the property is held for the benefit of the agreed beneficiary of the mutual wills. A related problem, as we have seen, is associated with enforcement of the mutual wills if the ultimate beneficiary is not aware of his rights under the wills. Although sending copies of the mutual wills to the ultimate beneficiary (or making the ultimate beneficiary an executor of both wills so as to, at least, alert him to how the property is to be distributed on the death of the survivor), may address some of the issues, it does not answer the more fundamental problem of keeping track of the property, especially if the survivor sells the assets or changes their identity over time.

Despite, however, its potential difficulties, the acceptance of the constructive trust as the appropriate mechanism for enforcement of the survivor's obligations paves the way, it is submitted, for rejecting the difficulties surrounding formality introduced by the *Healey* ruling. As we have seen, the decision places too much emphasis on form rather than substance and fails to acknowledge that the parties' agreement is enforced against the survivor not by virtue of contract, but by reason of the equitable obligations attaching to the property by reason of a constructive trust which, of course, is exempt from the requirements of writing imposed by s.53(1) of the Law of Property Act 1925 by virtue of s.53(2). If this is correct, then the current problems associated with the use of separate wills for each testator where the subject-matter is land would be entirely avoided. The formalities associated with s.2(1) of the 1989 Act would have no application and the parties' agreement would be valid regardless whether contained in separate or joint wills.