The Mutual Wills Doctrine and Damages Where a Mutual Will Agreement is Breached

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One of the fascinating aspects of estate litigation is the cross-section of various legal issues: tax law, family law, property law, and in the case of mutual wills, contract law.

A mutual Will is a joint will to which the mutual Wills doctrine applies. It is viewed as an agreement signed by two testators wherein they both agree not to subsequently alter it. Unlike many contract disputes, however, a breach of the agreement may not be realized by the beneficiaries of the mutual Will until the second testator dies – which could be years after the breach and after the disposal of assets dealt with in the mutual Will. This can make for complicated, but extremely interesting, estate litigation.

Below I set out a review of the Mutual Wills doctrine, the test for establishing the existence of a mutual Will, the availability of damages in cases involving the breach of a mutual Will agreement, and a review of some of the applicable case law.

THE MUTUAL WILLS DOCTRINE AND CONSTRUCTIVE TRUSTS: LEGAL PRINCIPLES

The doctrine of mutual wills was described as follows in Snell’s Equity, 13th ed.:

Where two persons make an arrangement as to the disposal of their property and execute mutual wills in pursuance thereof, the one who predeceases the other without having departed from the arrangement has performed his part of the bargain and dies with the implied promise of the survivor that it shall hold good. Usually the parties give each other a life interest with remainders over to the same person but they may give each other an absolute interest with a substantial gift in the event of the other’s prior death. The principle applies even where they agree to make wills leaving their property to third parties and not to each other. The arrangement will not be presumed from the
simultaneous execution of virtually identical wills but must be proved by independent
evidence of an agreement not merely to make identical wills but to dispose of the
property in a particular way. It must amount to a contract at law.[1]

As explained in Oosterhoff on Trusts,[2] the mutual will doctrine originated in Dufour v. Pereira[3]. In
that case, the married couple made a joint Will that contained evidence that they had agreed not to
subsequently alter it. The Will left the surviving spouse a life estate, with the remainder to certain
beneficiaries. The husband died without breaching the agreement, but the wife later made a new Will
that varied from the joint Will. After the wife died, the intended beneficiaries of the joint will sought to
impress a trust upon the wife’s estate. In the decision, Lord Camden said the following of the
agreement:

> It is a contract between the parties which cannot be rescinded, but by the consent of
> both. The first dies, carries his part into execution. Will the Court afterwards permit the
> other to break the contract? Certainly not.

Lord Camden additionally found:

> The instrument itself is the evidence of the agreement: and he that dies first does by his
death carry the agreement on his part into execution. If the other refuses, he is guilty of
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 in his power, he is
made a trustee for the performance, and transmits that trust to those who claim under
him.

In his article, Mutual Wills[4], Professor Oosterhoff explains how a constructive trust will arise in
circumstances where a surviving spouse, having previously made a Will to which the mutual wills
doctrine applies, alters that Will once their spouse predeceases them:

> A will is, by its nature, ambulatory or revocable. Hence, a testator who has made an
agreement to which the mutual wills doctrine applies can revoke it and make a new
will...However, the constructive trust will attach to the property and be binding on the
persons who are entitled to the testator’s estate under a new will made by the testator
or on his or her intestacy.

In Birmingham v. Renfrew[5] (Australia H.C., 1937), the court found that extrinsic evidence was sufficient
to show that a mutual Will agreement existed between husband and wife, and that such agreement
constituted a binding contract. The court held that the surviving husband was bound by the
agreement and that while he could make a further testamentary document, it stated:

> ...the doctrines of equity attach the obligation to the property. The effect is, I think,
that the survivor becomes a constructive trustee and the terms of the trust are those
of the will which he undertook would be his last will.[6]

...
I do not see any difficulty in modern equity attaching to the assets a constructive trust which allowed the survivor to enjoy the property subject to a fiduciary duty which, so to speak, crystallized on his death and disabled him only from voluntary dispositions \textit{inter vivos}.

Thus, during the life time of the surviving testator, the constructive trustee, he or she can presumptively deal with the property received from the first to die as absolute owner, subject to the terms of the agreement. However, the survivor will not be allowed to defeat the agreement by making excessive \textit{inter vivos} dispositions of the property.\footnote{10}

In explaining the trust that arises over the property disposed of in the mutual Will, Professor Oosterhoff states in \textit{Oosterhoff on Trusts}, "The best explanation may be that equity imposes a constructive trust in order to perfect the parties' intentions and protect the detrimental reliance of the party that died first."\footnote{10}

In terms of \textit{when} a constructive trust arises, the court found in \textit{University of Manitoba v. Sanderson Estate}\footnote{9} that, "...the obligation created by an agreement not to revoke mutual wills binds not only that portion of the survivor's estate which may have come from the estate of the first to die, but also his or her own property." In \textit{Waters' Law of Trusts}, 4\textsuperscript{th} ed., Professor Waters commented on this statement as follows: "This suggests that the death of the first to die is, itself, sufficient; from that point, it becomes the case that the first-deceased has relied irrevocably on the agreement."\footnote{10} In other words, the constructive trust arises on the death of the first of the spouses to die.

\section*{The Legal Test and Evidence in the Jurisprudence of Existing Mutual Wills}

So how does one demonstrate that the Will in question was one to which the mutual Wills doctrine applies? \textit{Re Gillespie} sets out the test courts will apply in determining whether mutual Wills exist:

1. The joint wills or mutual wills were made pursuant to a definitive agreement or contract not only to make such will or wills but that the survivor shall not revoke;

2. Such an agreement is found with preciseness and certainty, from all of the evidence; and

3. The survivor has taken advantage of the provisions of the joint or mutual will.

As set out in \textit{Edell v. Sitzer},

"The most fundamental prerequisite for an application of the doctrine is that there be an agreement between the individuals who made the wills. It has been repeatedly insisted in the cases that: (a) the agreement must satisfy the requirements for a binding contract and not be "just some loose understanding or sense of moral obligation" (Goodchild, Re (1995), [1996] 1 All E.R. 670 (Eng. Ch. Div.), at page 681). It must be proven by clear and satisfactory evidence; and (c) it must include an agreement not to revoke the wills.\footnote{12}

The existence of mutual wills is not itself determinative of an agreement but is one piece of evidence which may be taken into consideration when determining whether any such agreement existed.\footnote{13} When examining extrinsic evidence, it is important that such evidence relate to the
understanding of the parties at the time of the making of the allegedly mutual wills.[14]

In Re Gillespie, a significant factor considered in the court's finding of an agreement between the testators was that they had signed a joint Will:

Since the same document was signed by both testators each was fully aware of its contents and was aware that the other was a signing party. It expresses a common desire that the property of both follow a common plan of distribution: having in mind these facts and the words contained in the joint will the only possible inference is that the document was the result of an agreement subscribed to by both testators that the survivor should during his or her lifetime enjoy the use of the real and personal property of the one first dying and that the ultimate distribution of the property of both of the parties, that of the one first dying and that of the survivor, should be as was set out in the remainder provisions in the joint will.

Such an agreement by necessary implication embodied an agreement that the disposition settled upon should not be revoked as revocation by either party would completely frustrate the scheme upon which they had agreed. [15]

Other factors considered as evidence of a binding agreement include family dynamics. In the recent decision of Rammage v. Estate of Roussel, the long-term supportive relationship between the spouses and the blended family dynamics (each testator had children from a previous marriage) were considered as evidence that the testators intended to enter into a binding agreement. As stated by Reid J., "It is completely logical that both Ruth and Alf wanted to provide for each and for their respective children with some certainty."[16]

In Hall v. McLaughlin[17], the instructions provided by the testators to the drafting solicitor were also considered as evidence that the mutual Will was a binding agreement.

**DAMAGES FOR BREACH OF THE MUTUAL WILL: THE LEGAL PRINCIPLES**

One problem with cases involving the breach of a mutual Will agreement is that the breach may not be recognized until after the second of the testators has died, and in such circumstances, he or she may have disposed of part or all of the property subject to the agreement during his or her lifetime. In such circumstances, how do the wronged beneficiaries obtain damages for the loss of their inheritance? Thankfully, as set out below, such beneficiaries do have recourse in these cases.

*Breaches of Constructive Trust*

As stated previously, equity imposes a constructive trust over property subject to the mutual will agreement. This is to perfect the parties' intentions and to protect the detrimental reliance of the testator that died first (having died with a will drafted on certain terms and an expectation of an agreed upon estate distribution).

Accordingly, if the terms of the mutual will agreement are breached by the surviving testator, the constructive trust will send the property forward to the intended beneficiaries in order to perfect the intentions of the parties when the mutual trust agreement was entered into. [18] The intended
beneficiaries under the mutual will agreement may bring a claim against the surviving testator (the constructive trustee) personally (or against their estate) and may also bring an equitable proprietary claim.[19]

**Tracing Assets**

Where the surviving testator breaches the mutual will agreement by making a new Will, the beneficiaries under the mutual Will can trace the property dealt with in the new Will for damages. In *Bikur Cholim Jewish Volunteer Services v. Langston*, the court quoted from *Oosterhoff on Trusts* (6th ed.) at p. 678 as follows:

> The traditional view is that when an express trustee or other fiduciary wrongfully misappropriates trust property and transfers the property to a third person, the beneficiary is entitled to follow the property and show that it still held on constructive trust, so long as the third person is not a *bona fide* purchaser for value of the legal estate without notice (which is a defence that the third party must establish).

Alternatively, if the beneficiary can show what proceeds the trustee received for the property, then the beneficiary can show that these traceable proceeds are held by the trustee on trust for the beneficiary.[20]

In *Waxman v. Waxman*, Sanderson J. described the tracing of assets as the process by which the wronged beneficiary “will be able to ascertain what has happened to the trust fund, how it or a portion of it has moved from person to person or from one asset into another, what property/value now represents the traceable proceeds and to try to recover it or them”. [21] The law surrounding tracing orders and the tracing of assets is succinctly summarized in this case:

> The tracing remedy and the constructive trust declaration are extensions of the finding of trusteeship: the wronged party may “trace” the gain into a mixed fund and/or by-products of the gain in altered form.[22]

...  

Tracing orders and declarations of constructive trust are common restitutionary orders where defaulting fiduciaries are required to account to their beneficiaries to ensure that they cannot profit from their gains.[23]

The court's willingness to require a defaulting fiduciary to account for gain will not be foiled by the complexity of following the property or its derivation, into a mixed fund in the hands of the defaulting party or even the hands of a third party.[24]

A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds everyone who takes the property or its traceable proceeds except a *bona fide* purchaser for value without notice.[25]

In *Bikur Cholim Jewish Volunteer Services v. Langston*, the court found that misappropriated estate funds could be traced to the trustee's matrimonial property. In this case, the Deceased passed away and left an estate worth approximately $24 million. One of three named executors never probated the
Will and operated the estate from 1996 to 2004 as if the assets of the estate were his own to the detriment of nine charities named beneficiaries in the Will. In a motion brought by the executor to have a Certificate of Pending Litigation removed from the title of the house purchased in his wife's name, the court found that all of the money in the home could be traced to the estate funds illegally transferred by the executor. Greer J. held that, “Since the money came from (the executor) in his capacity as a fiduciary, the constructive trust or express trust flows from him and the money can be traced from him to the house purchase and renovation.”[28] Justice Greer found that the Estate Trustee During Litigation (“ETDL”) and charities involved in the matter had shown a legitimate reason for seeking the proprietary remedy in tracing the funds into the home and found a constructive trust with respect to it in the circumstances. Justice Greer ordered that the legal title of the home was vested in the name of the ETDL so that he could sell it and hold the proceeds in trust for the Estate pending the resolution of litigation.[29]

Misappropriated funds can also be traced to personal property and a constructive trust can be raised with respect to that personal property. In Miller v. Miller, it was found that the defendant daughter (Verity) had breached fiduciary duties owed to her plaintiff mother (Diane) by misusing her signing authority on Diane’s financial account. The account was funded with trust funds belonging to Diane and Verity had been made a signing authority simply to assist her mother with paying bills. Within two months of being made a signatory, Verity withdrew all funds in the account and used them entirely for her benefit. One purchase made was a $43,000.00 GMC truck purchased in the name of Verity’s husband, Cory. With regards to the truck the court found:

[110] On the facts as I have found them, Verity paid for the purchase of the GMC truck, using money that entirely belonged to Diane, without her knowledge or consent, thereby breaching her fiduciary duty. Diane is entitled, therefore, to a declaration that title to the truck was taken subject to a constructive trust in Diane’s favour, whereby Diane was and is the beneficial owner of the truck. Cory Veltman was not a bona fide purchaser for value without notice of the breach of trust. On the contrary, according to the evidence of Verity, he knew that the money for the purchase of the truck came from the joint bank account where Diane’s trust money was deposited, and therefore knew or ought to have known that Diane’s money was being used to purchase the truck. He knew or ought to have known that purchasing an expensive truck for himself was contrary to the best interests of Diane. He derives his title from Verity, who withdrew the money from the joint account and actually paid for the truck. Thus, Diane’s claims against the trust money can be traced into the product of the breach of trust, which is the GMC truck itself.[30]

In this case, Verity had also misappropriated Diane’s trust funds which were directly traceable to the purchase of a house. As that house had been subsequently sold, the court, using the same analysis as above, found that Diane had a direct beneficial interest in the proceeds of sale of the house, which were being held in trust. Accordingly, the court ordered the house sale proceeds to be paid directly to Diane.[31]

Misappropriated funds can also be traced into the payment of debt. As explained by Professor Oosterhoff:
It is usually assumed that the tracing trail ends when the value being traced is used to pay a debt. In this case, it appears that there are no proceeds. It is arguable, however, that when value is used to pay a debt, the proceeds should be understood to be whatever it was (if anything) that the debtor acquired earlier when the debt was incurred.[32]

TRANSFERS OF TRUST PROPERTY TO THIRD PARTIES AND "KNOWING RECEIPT"

Where misappropriated trust property is transferred to a third party, the intended beneficiaries will also have personal and proprietary remedies available to them. As set out in Oosterhoff on Trusts (7th ed.):

If a trustee transfers trust property to a third party in breach of trust, the trustee will be personally liable to the trust and may, if he or she received value, hold the proceeds of the transfer in trust for the beneficiaries...As far as the transferee is concerned, we must also distinguish personal claims from proprietary claims.

If the transferee is a bona fide purchaser of a legal interest in the property for value, without notice of the trust interest, then there is no personal liability, and the proprietary interest of the beneficiaries is eliminated. This is classically said to be based on jurisdictional grounds. The court of Chancery had no jurisdiction over one holding legal title, who had acquired it in these circumstances; his conscience was clean, and he could not be restrained in enjoying his legal rights.

If the transferee cannot establish the defence of bona fide purchase (the burden of which is on him), the equitable interest of the beneficiaries survives. This means that a proprietary claim can be established to the property received by the third party.

If, however, the third party no longer has the property, the question arises whether he or she is personally liable...The tradition of equity is that personal liability for the receipt of trust property depends on wrongdoing, which is why the claim to make a third party recipient liable is called a claim in “knowing receipt”. In order for the third party to be liable, it must be the case that he or she was aware of the trust, or ought to have been aware of it.[33]

The law surrounding “knowing receipt” is set out in Citadel General Assurance Co. v. Lloyds Bank Canada[34]. The court in that case found that a claim in “knowing receipt” requires two elements to be established on the part of the third party: the receipt and the degree of knowledge in relation to the breach of trust.[35] With respect to the “receipt” element, the third party must have received the property in their personal capacity and not as an agent of the trustees (such as a bank on behalf of a client).[36] In terms of the degree of knowledge, the court found that only constructive knowledge is required; that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry will suffice as the basis for restitutioinary liability. The Court summarized:
More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient’s enrichment unjust.

[37]

Professor Waters elaborates on the degree of knowledge required in a claim for “Knowing Receipt”:

The relevant level of knowledge or carelessness need not be in place at the moment of receipt. The defendant may receive innocently, but if he later becomes aware that the transfer to him was a breach of trust, he will be personally liable should he not restore any property which he still holds at the time he acquires knowledge.[38]

Thus, if the beneficiary can establish that the third party had knowledge of the mutual Will agreement at the time of the receipt of property, that the third party later gained this knowledge, or otherwise should have had this knowledge either at the time or at a later time, then this may be sufficient to establish “knowing receipt” and the beneficiary would then have a claim against the third party personally.

CONCLUSION

The above is just a cursory review of what is a very complicated area of law. I hope that it assists you in understanding the mutual wills doctrine, identifying where the doctrine arises and some of the available remedies where a mutual wills agreement is breached.

Thank you for reading.

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[3] (1769), 1 Dick. 419, 21 E.R. 332


[7] Supra note 4 at p. 142
[8] Supra note 2 at pp. 893-94.


[15] Supra note 11, at para 9

[16] Supra note 13, at para 56


[18] Supra note 2, at pp. 892-93


[22] Ibid, at para 6

[23] Supra note 21 at para 12, citing M. Ellis, Fiduciary Duties in Canada, (Toronto: Carswell, 2000) at p. 20-6.2 [Jan 2000]

[24] Supra note 21, at para 13

[25] Supra note 21, at para 49


[27] Supra note 20

[28] Supra note 20, at para 33

[29] Supra note 21 at paras 35-36

[31] Ibid, at para 111
[32] Supra note 2, at p. 1242


[35] Ibid, at para 31

[37] Supra note 32, at para 49
[38] Supra note 10, at p. 521

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