Browne Jacobson

Mutual wills – case update 2023

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There is often discussion of 'mutual wills' in the private client world, but it is extremely rare to see two prominent cases involving them reach the courts in such a short space of time. But between March and July of this year, that is precisely what we have seen.

What is a mutual will?

Firstly, an important point; the phrase 'mutual will' should not be confused with 'mirror will'. Mirror wills are common, and (as the name suggests) mirror one another. They are often used by married couples where, for instance, they both wish to leave everything to each other, or to their children in the event the testator's spouse dies before them.

Mutual wills on the other hand are a very different animal. They are, in effect, a contract with the other person making a will. In that agreement you both agree you will not change (or revoke) your will at a later date, in return for the other person agreeing the same.

That binding nature of mutual wills flies in the face of the more usual situation, where a person is free to revoke their will as they choose, often by making a new one.

But what happens where one party to a pair of mutual wills makes a new will, or revokes their will at a later date? Or for that matter, what happens if a dispute arises at a later date as to whether or not the wills in question were actually intended to be truly mutual?

The principles

After a five day trial at the tail end of 2022, the court published it's judgment in Naidoo v Barton in March 2023. The judgment includes comment on the following important legal principles as to the creation of mutual wills:

1. The "contract" must be one that is enforceable at law i.e. it must comply with the usual rules for enforceability of contracts;
2. The wills **do not** need to *expressly* say that the testators must not revoke their will - the agreement can be implied from evidence;
3. The wills must be intended to be mutually binding **on one another** i.e. there must be an agreement from both parties not to change their will, not just from one person to the other;
4. The binding agreement can be contained outside of the terms of the will; and
5. The burden of proof must be discharged by the person claiming the wills are 'mutual'.

In the facts of the case the court had little hesitation in holding the will in question to be 'mutual' in nature, especially given it (and the corresponding will of the other party) was expressed on its face to be mutual.

(In an interesting twist though, the court elected to set aside the will in question on the basis of undue influence by one of the Defendants, referencing as it did so the fact that the making of a mutual will is unusual, and therefore calls for a good explanation).

Court of Appeal

July 2023 saw the judgment of the Court of Appeal in the case of *McLean v McLean*.

The wills in that case were made by a solicitor, and his file note of his meeting with his two clients was quoted heavily in the judgment. The pertinent part of his note said:

“Clients said that they would like to appoint each other as their sole executor and trustee and for the surviving spouse to receive everything on the first spouse’s death.

On the second spouse’s death, clients would like the residuary estate to be divided equally between the 4 children.

I raised the issue that if Mr McLean were to pass away first, then there was no guarantee that Mrs McLean would not change her will and leave her entire estate to Brett [their son]*. Mr McLean explained that he trusts his wife implicitly. They have been married for 45 years and there is no way that she would do this.”*

At first glance that might seem like an agreement between the husband and wife, or at least something akin to an agreement; at least it suggests an understanding that Mr McLean was making his will to try and ensure his estate (ultimately) passed to his four children equally, and not only to Brett (his only child with Mrs McLean). Indeed, the solicitor who prepared the wills said in evidence that he recalled Mrs McLean saying during the meeting that she would not change her Will so as to disinherit any of the four children.

But, after careful analysis, the judge in the trial had decided this was not enough to create mutual wills. This was for two principal reasons:

1. The mere “trust” Mr McLean was expressing in his wife was not enough to demonstrate a legally enforceable agreement between them. In fact, this was expressly different to an agreement. Mr McLean was in effect told by his solicitor this was not an agreement, and he replied to say he trusted his wife regardless.
2. Even if Mrs McLean’s assurances did amount to an agreement on her part, there was no evidence at all that Mr McLean had done likewise and agreed not to revoke his will at a later date. As a result, there would have been no “mutual” element to the agreement.

The Court of Appeal had little trouble in upholding the decision of the trial judge, re-affirming that;

“What is required to establish mutual wills is a clear agreement……Expectation, or trust, is not enough. The evidence in this case established only trust”.

Key takeaways

Mutual wills can, in the right circumstances, be extremely useful. But great care needs to be taken to ensure that an intention to create legally binding mutual wills is effectively carried out, and also to ensure that any ambiguity over intention is avoided, so that expensive disputes in the future can hopefully be avoided.

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