MUTUAL WILLS AND BEQUESTS OF LAND

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In *Charles v. Fraser* [2010] EWHC 2154 mutual wills were defined as "*wills made by two or more persons, usually in substantially the same terms and conferring reciprocal benefits, following an agreement between them to make such wills and not to revoke them without notice to the other*". Four months later the Court of Appeal in *Fry v. Densham-Smith* [2011] WTLR 387 added that a mutual wills agreement will usually bind the estate of the last testator if two "controlling conditions" are established. Namely: (1) a prior agreement between the testators to make mutual wills, intending their agreement to become irrevocable on the death of the first to die, and (2) the making of mutual wills pursuant to that agreement.

Where those conditions are satisfied the result is that, upon the death of the first testator, equity imposes a constructive trust so that the survivor (or survivors) hold the property which was the subject of the agreement as trustees. The property affected may accordingly include property that the survivor has inherited but also property that he already owned but had agreed to bequeath to an identified beneficiary under the terms of the mutual wills compact. It is well settled that the agreement to make mutual wills can be incorporated in the wills or proved by extraneous evidence and, according to the Judge in *Charles v. Fraser*, the agreement "*may be oral or in writing*". There is, however, a caveat to this in relation to land.

The agreement to make mutual wills must be a "definite agreement" and in *Re Dale* [1994] Ch. 31 Morritt J. expressed that requirement in terms that "*there must be a contract at law"*, a formulation that was subsequently adopted in the Court of Appeal by Leggatt L.J. in *Re Goodchild* [1997] 1 WLR 1216. By virtue of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 a contract for the disposition of an interest in land must, of course, be in writing and signed by the parties.

In *Healey v. Brown* [2002] EWHC 1405 David Donaldson QC, sitting as a Deputy High Court Judge, held that those twin requirements meant that a disappointed beneficiary's claim to land under the doctrine of mutual wills failed for want of compliance with section 2 (the execution of two wills handed to the same solicitor being insufficient to amount to exchange of contracts). By applying conventional constructive trust principles the judge was, however, prepared to find that a trust could be implied (and so the same result could be achieved) but only in relation to property inherited by the survivor as a result of the oral mutual wills agreement. Land that the survivor did not inherit (i.e. because he owned it already) was unaffected despite his promise to leave it to a named beneficiary.

Healey v. Brown has never been expressly overruled but the results that it could produce are manifestly unfair. The last surviving testator is allowed, during his lifetime, to enjoy the benefit of land that he has only inherited because of a promise that he declines to keep whilst remaining free to dispose of his own estate as he pleases.

The problems are well illustrated by the pleaded facts of a recent County Court case (issued in the High Court but regrettably transferred and ultimately compromised). The testators (for simplicity "T1" and "T2") each owned their own flats. They agreed to make wills leaving the flats to one another on terms that the survivor would leave the flats to named beneficiaries (including T1's daughter, "C", who was intended to inherit a half share interest in both flats). T1 died and T2 inherited T1's flat whilst retaining his own. T2 then immediately changed his will to leave his entire estate (and so both flats) to his own daughter. As a result, C issued proceedings claiming an interest in both flats as a beneficiary under a constructive trust imposed under the doctrine of mutual wills.

If the court was bound to follow *Healey v. Brown* then C's claim to a half share in T1's flat could still succeed but, T2 argued, the claim to an interest in T2's flat failed because there was no section 2 compliant written contract.

The purpose of this article is to explain why *Healey v. Brown* was wrongly decided and, with all due deference to the reasoning of the Judge in *Healey*, is bound to be overruled. Until then, there are also reasonable bases for contending that *Healey v. Brown* should not be followed and can be distinguished in most circumstances.

Why Healey v. Brown is wrong

There are at least three reasons why *Healey v. Brown* is fundamentally wrong in not extending the imposition of a constructive trust to all of the land of the survivor (rather than simply inherited land).

First, the cornerstone of the Judge's reasoning, drawing on *Re Goodchild,* was that the doctrine of mutual wills was "anchored in contract". However, if one reviews the authorities to find the genesis of that requirement it is plain that the condition that there should be a contract at law is a requirement that there should be a distinct agreement against revocation of the mutual wills rather than a mere common understanding as to the wills' contents. That was the issue with which the Court of Appeal were concerned in *Re Goodchild*. Moreover, the authorities referred to in support of the requirement for a contract in both *Re Dale* and *Re Goodchild* were *Re Cleaver* [1981] 2 All ER 1018 (the first modern English authority on mutual wills) and the Privy Council decision in *Gray v. Perpetual Trustee Co. Ltd.* [1928] AC 391. Neither of those decisions established that there should be an enforceable contract for a mutual wills claim to succeed. What they decided was that there should be a definite or clear agreement. As the Court of Appeal of New Zealand observed in *Lewis v. Cotton* [2000] 3ITELR 447 *"A formal legal contract is not needed. A contract made without formality is enough"*. That being so, it is regrettable that the authorities have cast the requirement for a definite agreement in terms of a "contract".

Secondly, and allied to the foregoing, is the fact that mutual wills claims are never brought by the dead testator or his estate, they are brought by the intended beneficiaries who were never privy to the mutual wills agreement anyway. A mutual wills claim has never been a claim in contract. As was stated in the leading Australian case of *Birmingham v. Renfrew* (1957) 57 CLR 666: *"It is the constructive trust and not the contract that they are entitled to enforce"*.

This was a point made forcefully in *Olins v. Walters* [2009] Ch 212 (the first Court of Appeal decision on mutual wills after *Healey v. Brown*). There, an appeal had been pursued on the basis that it was vital to know all of the terms of the contract for mutual wills and that, as such, the claim should have failed because of a lack of contractual certainty. Rejecting such claims, Mummery L.J. stressed that arguments based upon contractual principles *"do not accurately reflect the fundamental principles of mutual wills"*. This was because: "*The case for the existence of mutual wills does not involve making a contractual claim for specific performance or other relief. The claimant in a mutual wills case is not even a party to the contract and does not have to establish that he was"*. Mutual wills claims were not contractual claims but rather: *"Mutual wills provide an instance of a trust arising by operation of law to give effect to an express intention of the two testators"*.

That last point is significant because it stresses that mutual wills are not "anchored" in contract. Rather, they are anchored in equity and, more specifically, implied or constructive trusts. Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989 expressly provides that nothing in section 2 affects the operation of such trusts.

The third point is that the Deputy Judge in *Healey* overlooked the long-standing principle that equity does not allow statutes to be used as an instrument of fraud and so will impose a constructive trust over particular property to prevent the owner retaining exclusive beneficial ownership where this would be unconscionable (again, section 2(5) of the 1989 Act expressly preserves space for this principle to operate).

That this rule has been applied to mutual wills cases from the inception of the doctrine appears clear. Indeed, it is noteworthy that in *Healey* the judge drew on *Birmingham v. Renfrew* and indicated that the only reason why the New South Wales equivalent of the Statute of Frauds 1677 was not held to apply in that case was because the gift had involved the entirety of the testator's residuary estate. That is incorrect. In *Birmingham v. Renfrew* the leading judgment was given by Dixon J. and he drew heavily on *Hargrave's Juridical Arguments (1799)* in terms which noted with approval the following passage: *"So anxious do our courts of equity appear to have been in exacting the performance of such [mutual wills] compacts, that even verbal promises have had enforcement; the Statute of Frauds having been refined upon, to prevent the requisition of writing from operating; and entering into such engagements and then refusing to perform them having been classed, as a fraud upon the testator or other party influenced in his conduct by the particular promise"*. The Statute of Frauds was the predecessor provision, and in similar terms, to section 40 of the Law of Property Act 1925 which was in turn replaced by section 2 of the 1989 Act. Put shortly, from the outset of the doctrine the courts refused to allow non-compliance with any formal requirement for a written "contract" to defeat a claim.

Indeed, it is not without irony that it was Morritt J. in *Re Dale* (where, as noted above, reference was made to the need for a contract) who noted that the origin of the doctrine of mutual wills is the decision of Lord Camden L.C. in *Dufour v. Pereira* ((1769) 1 Dick. 419) before specifically drawing on the following passage of Lord Camden's judgment:

"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 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. This court is never deceived by the form of instruments. The actions of men here are stripped of their legal clothing, and appear in their first naked simplicity. Good faith and conscience are the rules, by which every transaction is judged in this court; and there is not an instance to be found since the jurisdiction was established, where one man has ever been released from his engagement, after the other has performed his part."

As the current editors of Underhill and Hayton observe, the first (and apparently only) case to depart from this principle is *Healey v. Brown* but in doing so the judge evidently overlooked these principles and the fact that, at its heart, the very purpose of the doctrine is directed at preventing fraud.

Healey v. Brown was wrong when it was decided but, even if there was room to argue otherwise, it can no longer stand following the Court of Appeal's reasoning in *Olins v. Walters* (as explained above).

Distinguishing Healey v. Brown

The present editors of Lewin on Trusts acknowledge the decision in *Healey v. Brown* but hedge their bets somewhat by expressing the view that the law is "*not settled*". Similarly, the editors of Williams, Mortimer & Sunnucks "*respectfully suggest that [Healey v. Brown] may well be wrong*" such that "*another court may decide that s. 2 does not prevent the doctrine operating*".

In *Olins v. Walters* at first instance Norris J. distinguished *Healey v. Brown* (applying *Birmingham v. Renfrew*) on the basis that section 2 has no application to a promise to make a gift of residue even if the residuary estate includes land. By the time the matter got to the Court of Appeal it appears that reliance upon section 2 had been abandoned but in *Shovelar v. Lane* [2012] 1 WLR 637 the Court of Appeal, on similar facts, dismissed reliance upon section 2 as a "*bad point*".

There is yet another basis upon which *Healey v. Brown* may be distinguished and confined to its own peculiar facts.

It is in the nature of a mutual wills compact that neither testator is free to revoke his will without notice to the other. However, it will almost always be implicit that each testator can revoke the agreement during the lifetime of his co-testator(s) if he *does* give notice. This is so for the simple reason that there is nothing inequitable about resiling from the arrangement at a time when neither testator has yet taken a benefit from the mutual wills (and at a time when the other remains alive and so free to change his or her own will). Where there is an implied term permitting revocation of the will on notice, it has been suggested that *"there is not even a conditional commitment when the agreement is made to make a testamentary gift of the property [i.e. the land]; either is free to resile from the agreement. Although T2 ceases to be free to resile from it on T1's death, if neither has previously done so, the character of the agreement is not thereby changed. Hence the agreement appears to be outside the 1989 Act"* (see Lewin at para. 10-043).

Healey v. Brown was a very unusual case because the wills contained an express declaration against revocation (*"that this be may last will...and that I shall not amend or revoke my will after the death of my husband [or wife] ...if it is then unamended and unrevoked"*) prompting the editors of Lewin to suggest that there was no scope, in that case, to argue that the agreement was only an agreement not to revoke *without notice*. If that is correct, *Healey v. Brown* may yet be distinguished in the vast majority of cases. That stated, it would be deeply unfortunate if the only mutual wills compacts to fall foul of *Healey v. Brown* were those where the wills seek to exclude revocation. It would be far better to recognise that section 2 and its statutory forebears have never operated to prevent the operation of the doctrine of mutual wills or, at least in view of the reasoning of the Court of Appeal in *Olins v. Walters*, that section 2 does not now do so.

Of course, whether section 2 applies or not, it is plainly bad practice not to reduce the agreement for mutual wills to a written form executed by the parties. Indeed, the wisdom of making mutual wills at all may be doubtful as there are usually better ways to address any “testamentary predicaments” faced by prospective testators.

In the final analysis, those contemplating mutual wills would be well advised to heed the advice of the Swiss theologian Johann Kasper Lavater:

“*Say not you know another entirely, till you have divided an inheritance with him.”*