Mutual wills: Alsatian or lioness?

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The 18th century concept of mutual wills may be returning with a modern perspective.

> "[S]ome things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian."[1]

Mutual wills are a much maligned estate planning device. Perhaps it is so because they are a difficult creature to corral, shrouded in equivocal legal language, leaving the black letter lawyer grasping for certainty and precision. Mutual wills do not have any particular form and they do not require any particular formality. They are, therefore, viewed with scepticism and, by some lawyers, derision. However, the English High Court decision of *Legg v Burton* (*Legg*),[2] provides a thoroughly modern perspective on the equitable doctrine, first established in the 18th century in the decision of *Dufour v Pereira*,[3] which was then adopted into Australian law in *Birmingham v Renfrew.*[4] There are a number of aspects that make *Legg* worthy of note for the modern willmaker and they will be explored in this article.

As with many mutual will cases, the facts are reasonably benign. On 25 July 2000, in the office of their solicitor, Mr and Mrs Clark executed uncomplicated wills with mirror terms. They gifted their modest estates[5] to each other, in the alternative in equal shares to their two daughters. Unexpectedly, 10 months later, Mr Clark died. Life takes its course and its vicissitudes corroded the once good relations between Mrs Clark and her daughters, resulting in them drifting apart and Mrs Clark forming close relationships with her grandsons and their partners.[6] In the years following her husband's death and up to the time of her own death on 8 February 2016, Mrs Clark executes some 13 wills, the last of which is dated 12 December 2014. Probate of that will is granted to Mrs Clark's executors, her two grandsons and one of their partners. Under the probated will, the two grandsons receive the lion's share of the estate.

Mrs Clark's two daughters, Ann Legg and Lynn Burton, brought a claim against the executors and successfully obtained a declaration that the executors hold the estate on trust, not on the terms of the probated will, but for them in accordance with the terms of the 2000 will.[7]

The law

Citing reliance on a number of authorities,[8] the court deduced these propositions as to how one characterises a mutual will:

- it is a legally binding agreement between two testators that they would make their wills in a particular way (not necessarily the same way as each other);
- the testators agree that they would not revoke or change their individual will without notice to the other party sufficient to enable the other party to change their own;
- it is not a requisite that the agreement be in writing;
- if proved to be a mutual will, it binds the estate of the testator, despite any subsequent changes; and
- proof is on the balance of probabilities.

Proof

As with any successful litigation, much depends on the quality of the evidence. Here, the star witnesses were dead, there was no written agreement, no reference to mutuality in the will (in fact, the will appeared to indicate the contrary) and no evidence from the solicitor who drew the will. The court had nothing more than the oral testimony of the self-interested daughters, and executors, and the fact that the wills mirrored each other and were executed simultaneously.

When assessing the reliability of the testimony, the court took us through a useful discourse as to those matters it must take into account on the fallibility of human memory[9] and the many different ways it is shaped, including the impact of preparing witness statements for litigation. The court stepped us through aspects of a decision[10] which explored the psychological research "into the nature of memory and unreliability of eyewitness testimony"[11] before analysing the quality of the oral testimony of each of the witnesses.

Agreement not to revoke

As to the oral testimony, the court heard one daughter was present at the solicitor's office where their father asked the solicitor "whether everything was 'set in stone'",[12] referring to the inability of Mr and Mrs Clark to change their wills after these wills were signed, and the solicitor replied to the effect that it was. Then, later at home, the daughters expressed concern to their father that this detail was not stated in the will.[13] Their father was dismissive of the concern expressing his preference for simplicity, and their mother, listening to this conversation, shouted from the kitchen, "I bloody won't change it …".[13]

On assessing the probity of this evidence, the court referenced the Australian decision of *Birmingham v Renfrew*,[14] citing caution as to the evidence of "interested parties", noting particularly that "[T]he mere fact that two persons make what may be called corresponding wills" is insufficient evidence to establish a binding agreement not to revoke. What is needed is "clear and satisfactory evidence".[15]

Given the simplicity of Mr and Mrs Clark's affairs and their unsophisticated nature, the court found:[16]

> "Absent other evidence to the contrary, in my judgment this evidence would establish two agreements between Mr and Mrs Clark. The first is an agreement at some time before the execution of the will, and the second is one just afterwards. Each was to the effect that the wills they were to make, or had just made, were irrevocable. Their daughters were to benefit from the gift of the house."

Legally binding

There is a distinction between a "legally binding agreement" and a "morally binding agreement". A legally binding agreement is one that satisfies the requirements of the law to bind the parties. A morally binding agreement is merely one that is for the conscience of the parties. In the context of mutual wills, this distinction is critical. On this point, the court determined:[17]

> "The use of the phrase 'legally binding agreement' in the authorities demonstrates that there is a crucial difference between an obligation which is legally binding, and which will be enforced by the court, and an obligation binding in honour only. The latter may be called a moral obligation, or — as in some of the authorities — an 'honourable engagement' see eg *Lord Walpole v Lord Orford* (1797) 3 Ves Jun 402, 419; *Re Cleaver deceased* [1981] 1 WLR 939, 947G."

Standard of proof

This is where the discourse of the judgment intrigues and casts the tools of assessment of evidence into a thoroughly modern context. The standard of proof in civil matters is on the balance of probabilities. It is a lower standard than that which is used for criminal matters, which must be beyond a reasonable doubt. But within these standards, there are matters of weight which assist a court in coming to a determination about whether to accept or reject the evidence.

Citing Latham CJ in *Birmingham v Renfrew*, the court said that: "Those who undertake to establish such an agreement [ie of mutual wills] assume a heavy burden of proof".[18]

The court explained that what was then being referred to was the civil standard with a degree of weight. That weight being a matter of "where a thing is inherently improbable, it takes more cogent evidence to persuade a court to find that the balance of probabilities does indeed lie in that direction".[19]

In the context of mutual wills, the jurisprudence was once typically of the view that it is "inherently improbable that a testator should be prepared to give up the possibility of changing his or her will in the future, whatever the change of circumstances".[20] The court observed that "it is well known that textbooks say that making mutual wills is not sensible, and that private client lawyers do not often advise them. After all, they take away some of the testator's ability to adapt his or her will to changing circumstances".[20] However, the court admonished this view for failing to see testators as individuals,[21] noting that elderly people are more likely to be attracted to the security of a mutual will.[22] Supporting this proposition, the court identified a crucial myth about the idea of us having testamentary freedom,[23] explaining that "contrary to popular mythology freedom of testation only existed in Victorian times between 1891-1938".[24] To this extent, it cited family provision legislation and taxation laws (in particular, inheritance duty) as impeding testamentary freedom. In a significant break from the jurisprudence, the court did not support the proposition of "inherent probability",[25] thereby removing a significant weight on the test of balance of probabilities.

Binding the estate

In finding that Mr and Mrs Clark expressly promised each other not to revoke their 2000 wills, the court determined that Mr and Mrs Clark had created mutual wills.[26] This finding was surprising given that the wills expressly stated that the gifts in Mr and Mrs Clark's wills were given without imposing any trusts or conditions, and the only "real" evidence available was from the daughters, who were interested beneficiaries. The court accepted the daughters' evidence as truthful and straightforward.

Accordingly, the court found that the executors of the 2014 will held the estate on trust for the daughters. Given the passage of years and the number of ways the estate can morph and change over time, it led the court into a discourse as to the type of trust. While not coming to any particular conclusion on this aspect, the court emphasised that the "'three certainties' rule is not a rule about trust law at all. Instead it is a rule about property law, and, trusts being part of property law, they follow that rule too".[27] Accordingly, how the remaining assets are dealt with is a matter of construction.

And so on the death of her husband, "[I]n equity at least, the clock of [Mrs Clark's] testamentary freedom had stopped … thereafter she no longer retained the unilateral right to dispose of her assets that she had once enjoyed".

Conclusion

It is not unusual for testators to be less than clear about their testamentary affairs with family members. We are all prone to make statements that we do not necessarily intend to honour or indeed believe that others will rely on. *Legg* identifies how a simple conversation can stop the clock on your testamentary freedom. It should be noted that it is not only death that stops this clock, but also loss of capacity (ie inability to change the will).

Legg also reminds us that mutual wills are a powerful estate planning tool. Mutual wills did not restrict how Mrs Clark could spend her and Mr Clark's estates. She could change the form of investment or use up income or capital for any purpose (so long as it was not designed to defeat the agreement she made with Mr Clark), but she simply could not change the ultimate beneficiaries of her estate. This could appeal to many couples in first and blended marriages who wish to give each other the financial freedom, but also want to protect the ultimate beneficiaries.

For beneficiaries who are disappointed by the unexpected terms of a will of a deceased willmaker who died last of the couple, such as their parent, step parent or relative, it may pay to examine the terms of the will of the first deceased, and the context surrounding the will making process, to assure themselves that no binding promise had been made which the will breaches.

Importantly, *Legg* has changed the prism through which we view the value of mutual wills in a modern society. So, while the mutual wills creature might once have been seen as "as an Alsatian walking through the park", it can to some, now, look like a "lioness".

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References

1 *Legg v Burton* [2017] EWHC 2088 (Ch) at [29] (*Legg*).
2 [2017] EWHC 2088 (Ch).
3 [1769] EngR 63.
4 *Birmingham v Renfrew* [1937] HCA 52.
5 Net value of 213,000 pounds: *Legg* at [2].
6 *Legg* at [16]-[18].
7 *Legg* at [3] and [72].
8 *Legg* at [21]-[27].
9 *Legg* at [44].
10 *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) per Leggatt J at [16]-[20].
11 *Legg* at [45], citing *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [16]-[20].
12 *Legg* at [15] and [35]-[36].
13 *Legg* at [37].
14 *Legg* at [40], citing (1937) 57 CLR 666 per Latham J at 674-675.
15 *Legg* at [41], citing *Re Cleaver* [1981] 1 WLRE 939 per Nourse J at 949, citing *Birmingham v Renfrew.*
16 *Legg* at [53].
17 *Legg* at [20].
18 *Legg* at [28], citing (1937) 57 CLR 666 at 674.
19 *Legg* at [28].
20 *Legg* at [61].
21 *Legg* at [62].
22 *Legg* at [63].
23 *Legg* at [64].
24 *Legg* at [64].
25 *Legg* at [65].
26 *Legg* at [67].
27 *Legg* at [68].

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