



Mutual Wills: How They Are Created and When a Constructive Trust Will be Imposed

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Estate planning often deals with challenging situations, including the needs of blended families with complicated personal relationships. There are several legal tools that can be used to address complex family situations so that, for example, children of a prior marriage and a second spouse are provided for. Trusts are one such tool commonly used to achieve orderly succession of capital, among other reasons. Mutual wills are another tool that can be considered. Mutual wills commit spouses irrevocably to a joint intention at the time they execute their wills.

There are various reasons for using a mutual wills agreement, but usually it is used in a second marriage where one or both spouses have children from prior relationships or charitable interests and want to ensure that all children are provided for fairly, or that certain extended family members are provided for or charitable wishes are carried out. A mutual wills agreement can be a useful tool for spouses who have agreed on how to deal with their property on both of their deaths and are comfortable waiving their right to make changes to their individual estate plans in the future, except as may be agreed upon.

MIRROR WILLS VS. MUTUAL WILLS

It is important to understand the difference between mirror wills and mutual wills. Mirror wills, typically used by spouses, create parallel provisions. For example, each will leaves everything to the other spouse, with a gift over to children upon the surviving spouse's death. Outright distributions are a common structure that spouses use as it gives the surviving spouse maximum control and ownership. However, with an outright distribution, upon the death of the first spouse, there is nothing stopping the surviving spouse from making changes to his or her will if circumstances change or for any other reason, without restriction.

A mutual will is similar to a mirror will in that the spouses' wills often mirror each other, but differs in that upon the first spouse's death, the surviving spouse cannot change his or her will except as may be agreed. The mutual will arrangement is a separate but related agreement between spouses not to

revoke or vary the terms of their wills after the first spouse's death, except as provided for under their agreement.

While case law supports that such an agreement can be made in writing or orally, agreements made orally may be problematic if later disputed, especially since one of the primary witnesses has passed away. Best practice supports that both spouses' intentions, the scope of their property, and each other's rights and obligations are expressly outlined in a separate written agreement, which can deal with a variety of issues, such as: leaving a portion of the value of the estate to be dealt with freely, limitations on gift giving, and how to deal with property acquired by the surviving spouse after the first spouse's death.

In appropriate cases, the drafting lawyer may want to insist on the parties obtaining independent legal advice, particularly where one of the parties is vulnerable, there is an imbalance of power in the relationship, or there is a concern that one spouse may not fully understand the nature of the agreement.

MUTUAL WILLS AND CONSTRUCTIVE TRUSTS

Most mutual wills cases concern the question of whether there is an agreement. The three-part test to establish a mutual wills agreement is set out in *Edell v Sitzer*, 2001 CanLII 27989 (ON SC):

1. There must be an agreement between the individuals who made the will which amounts to a binding contract;
2. It must be proven by clear and satisfactory evidence; and
3. It must include an agreement not to revoke the wills.

Where a mutual will agreement is established, courts generally use the equitable remedy of a constructive trust to remedy a spouse's breach of the agreement and to ensure that the surviving spouse's promise is enforced. In doing so, the court will also ensure that the deceased spouse's wishes are carried out to benefit his or her intended beneficiaries.

The recent case of *Nelson v Trottier*, 2019 ONSC 1657, looked at when a constructive trust will be imposed to protect a beneficiary's interests. In *Nelson v Trottier*, two spouses executed wills simultaneously. Those wills left everything to the survivor of them for their own use absolutely, but on the death of the last spouse to die, the residue was to be divided among the husband's three children and the wife's two biological children. In addition to the wills, the spouses executed an agreement and an acknowledgment and direction. The acknowledgment and direction stipulated that the surviving spouse could not dispose of substantial portions of the assets and defeat the purpose of the agreement.

After the husband died, the wife made a donation in her husband's honour of approximately 5 per cent of his assets (both those owned outright and those owned jointly).

The husband's children claimed that they had a constructive trust over the wife's assets which was imposed when their father died and that the donation made by the wife was in breach of the trust.

A mutual wills agreement was clearly established in this case. The issue before the court was when a constructive trust is established.

The court found that a constructive trust does not arise until either the surviving spouse dies, or earlier, in the event that there has been a breach of the agreement by the surviving spouse. The court then looked at whether the wife was in breach of the mutual wills agreement in making the donation in her husband's honour. The court found that there was no evidence that the wife varied the terms of her will, and that the purpose of the gift was not to defeat the mutual wills agreement. The court did not find the gift substantial in relation to the size of the estate. Because there was no breach, equity did not need to intervene to impose a constructive trust over the wife's assets.

This gives rise to some interesting questions, such as what if the gift had been more significant, such as 25 per cent, or what if the gift had been given to one of the wife's children to the exclusion of the husband's children. We can be sure to see this line of caselaw continue to develop.

While trusts are a reliable tool to ensure orderly succession of capital when the surviving spouse dies, people who want to avoid the administration of a trust, and its restrictions and costs, may wish to consider the use of a mutual wills agreement as a possible option.

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