Can a mirror will be changed?

John Dickinson assesses whether a proprietary estoppel solution can replace the need for a binding contract

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'Under the doctrine of mutual wills, there is a need for a legally binding contract as opposed to a mere moral obligation not to depart from the terms of the original will.'

HHJ Matthews, sitting as a judge of the High Court, handed down judgment on 11 August 2017 in the Chancery Division of the Bristol District Registry in the case of *Legg v Burton* [2017]. The claimants established a constructive trust under the doctrine of mutual wills, under which the estate of their deceased mother was held for the claimants, rather than being held under her last will for various grandchildren and others.

Importance of the judgment

The judgment contains an important development, by which proprietary estoppel can be used as a route around the problem presented by the controversial decision in *Healey v Brown* [2002]. In *Healey* a claim for mutual wills for a gift of land was held to fail because, without a contract in writing in compliance with s2 of the Law of Property (Miscellaneous Provisions) Act 1989, it was held that there could be no binding contract on which to base the constructive trust for the mutual wills.

In *Legg*, the deceased, Mrs Clark, and her husband made wills in mirror terms in 2000, under which they each left their estate to the survivor and in default to their two daughters, the claimants. The claimants gave evidence of an agreement in 2000, under which the deceased and Mr Clark made mutual promises to each other not to change their wills. Mr Clark died in 2001 without having changed his will. The deceased subsequently made three wills in 2004. She fell out with the claimants in the period from 2010 onwards. From 2011 to 2014, she made ten further wills. All of the 2004 wills and the wills made from 2011 to 2014 departed from the terms of the 2000 will in various different ways. The defendants were two of the deceased's grandchildren and one of their partners, who between them took the residuary estate under the final will of 2014. The bulk of the value of the residuary estate was the family home. The defendants denied that there had been any agreement between the deceased and Mr Clark in 2000 as alleged by the claimants, and pointed to various conduct of the deceased after 2000 that was said to be inconsistent with there being such an agreement. In addition, the defendants referred to the terms of the 2000 mirror wills, under which the gift to each spouse provided that the trustees should:

> ... pay [the] residuary estate to [the Deceased/Mr Clark] absolutely and beneficially and without any sort of trust obligation.

The defendants asserted that this term in each of the wills clearly distinguished the 2000 wills from being mutual wills. HHJ Matthews rejected this submission, holding that if there is a mutual wills trust then it arises outside the will and as a consequence such words in the will could not affect the operation of the mutual wills trust. In addition he held that such words were a standard form clause that should not be regarded as negativing the possibility of mutual wills.

Case law

The judgment refers to cases on mutual wills including *Re Cleaver*

deceased [1981], *Re Dale deceased* [1994], *Goodchild v Goodchild* [1997], *Walters v Olins* [2008], *Lewis v Cotton* [2001], *Charles v Fraser* [2010] and *Fry v Densham-Smith* [2011]. HHJ Matthews deduced from those authorities the following propositions:

> In order to succeed in a claim that a will falls within the equitable doctrine of mutual wills, and is accordingly binding on the estate of the testator despite a subsequent change in that will, the claimant must prove, on the balance of probabilities, that the testator made a legally binding agreement with the other testator that both would make their wills in a particular form (not necessarily the same) and that they would not revoke them or (depending on the terms of the agreement) change them without notice to the other or others sufficient to enable that other or others to change their own wills as well, that they made their wills in that particular form and that they did not revoke them (or change them without such notice), and the first of the testators to die did so, not having revoked (or changed) his or her own will.

The court considered that, under the doctrine of mutual wills, there is a need for a legally binding contract as opposed to a mere moral obligation not to depart from the terms of the original will. The case includes an analysis of whether an oral agreement for mutual wills is sufficient if the subject matter of the mutual wills is an interest in land within the meaning of s2 of the Law of Property (Miscellaneous Provisions) Act 1989. The court discussed the decision in *Healey*, in which a claim for mutual wills for a gift of land was held to fail because there could be no binding contract on which to base the constructive trust for the mutual wills if the contract was not in writing so as to comply with s2. The reasoning in *Healey* was that the exception for constructive trusts in s2(5) did not apply, because under the doctrine of mutual wills the constructive trust arose as a result of there being a valid contract and there could be no such contract without complying with s2. HHJ Matthews pointed out that in *Olins* Norris J held that the gift in this case was of residue and not land, so he could distinguish *Healey*. HHJ Matthews set out in his judgment that he considered that it was rather capricious and even unprincipled that the success of a mutual wills claim would turn on whether a gift of land in a will is drafted as a gift of a particular interest in land or as a gift of residue, which may contain the same land. HHJ Matthews postulates that:

> ... the necessary equitable obligation to bind the conscience of the second testator, and so call into existence the constructive trust of mutual wills, might arise from a proprietary estoppel rather than from a contract.

He held that such a proprietary estoppel arises as:

> ... the second testator might make a promise, intended to be relied upon, to deal in future with her own beneficial property in a certain way, on which the

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> first testator relied to his detriment by making his will as (informally) agreed, and then dying, so putting it out of his power to alter his will in future...

as typified in *Thorner v Major* [2009].

As HHJ Matthews explained:

> It is of the essence of proprietary estoppel in such a case that a promise, intended to be acted upon by the promisee, and in fact acted upon to the detriment of the promisee, to leave the residue of an estate in a particular way can be enforced in equity, although the will itself has subsequently been revoked or altered, or indeed never made at all. *Thorner v Major* itself is an example. The fact is that, in this context at least, there is no contract for the disposal of an interest in land that cannot be replicated in its effect in equity by a proprietary estoppel. So, for practical purposes, if you need a contract to achieve an object, a proprietary estoppel should equally serve your purpose. And a proprietary estoppel of land does not require writing: see eg *Yaxley v Gotts* [2000] Ch 162, CA. On that basis the distinction drawn in *Olins v Walters* would be unnecessary.

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HHJ Matthews has developed the law by demonstrating how a proprietary estoppel can circumvent any perceived problem raised by s2 of the 1989 Act. The inference of this is that *Healey* was wrongly decided, a position that accords with the views of the editors of *Williams, Mortimer & Sunnocks on Executors, Administrators and Probate* (20th ed) paras 10-25.

The court heard evidence that in 2000 the deceased and Mr Clark had invited the claimants to be present when they executed their wills before the solicitor who had drafted the mirror wills. Mr Clark had asked the solicitor if the wills were 'set in stone' and the solicitor explained that a party was always free to change the terms of their will. The solicitor said that he was aware that the deceased and Mr Clark never wanted to change their wills again and that their trust in one another not to make any future changes was enough. After the execution of the wills the deceased and Mr Clark both referred to their promises to each other not to change their wills.

HHJ Matthews considered submissions made on the fallibility of memory, referring to the decision of Leggatt J in *Blue v Ashley* [2017], and he analysed the evidence in terms of its inherent probability and the plausibility of the claimants' case.

HHJ Matthews reviewed the law as to the ability to rely upon extrinsic evidence to establish a mutual wills trust. He referred to the case law setting out the need to find clear and satisfactory evidence of an agreement if a mutual wills trust was to be established. He found that the deceased and Mr Clark had made agreements both before execution and also just after execution of the wills to the effect that the wills were irrevocable and their daughters, the claimants, were to benefit from the gift of the house.

When does a constructive trust under the doctrine of mutual wills take effect?

HHJ Matthews referred to the controversy in the case law as to when and how a constructive trust produced under the doctrine of mutual wills takes effect. He rejected the hypothesis that there is some kind of 'floating trust' as from the death of the first testator, instead finding that on the agreements made the constructive trust arose on the death of the deceased. HHJ Matthews considered that, in a mutual wills case, the constructive trust would generally arise on the death of the second testator, unless the agreement made between them had some term providing to the contrary. He considered whether that trust satisfied the so-called 'three certainties' rule, being:

- the intention to make a gift;
- over what property; and
- to whom.

HHJ Matthews explained that the 'three certainties' rule is not a rule about trust law but rather a rule about property law, and that trusts being part of property law must follow that rule. Paragraphs 69 and 70 of the judgment contain a useful analysis as to how the rule is complied with here for the mutual wills trust, particularly as to the certainty of the subject matter of the trust. ■

Blue v Ashley
[2017] EWHC 1928 (Comm)
Charles v Fraser
[2010] WTLR 1489
Re Cleaver deceased
[1981] 1 WLR 939
Re Dale deceased
[1994] Ch 31
Fry v Densham-Smith
[2011] WTLR 387
Goodchild & anor v Goodchild
[1997] EWCA Civ 1611
Healey v Brown
[2002] WTLR 849
Legg & anor v Burton & ors
[2017] EWHC 2088 (Ch)
(to be reported in a future issue of *Wills and Trusts Law Reports*)
Lewis v Cotton
[2001] WTLR 1117
Thorner v Major
[2009] WTLR 713
Walters v Olins
[2008] WTLR 1449
Yaxley v Gotts & anor
[2000] Ch 162