

MUTUAL WILLS

&

MIRROR WILLS

Guidance Notes for Couples



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Introduction

When I see married couples to prepare their Wills, most arrive with the assumption that they will leave their Estates automatically to each other and then it shall pass in a straightforward way to their children.

What is a simple wish?

The phrase I often hear is “we have simple wishes, our estates pass to each other and then on to the children”.

When I explain that Wills are not in fact ‘joint’ but ‘**individual**’, the couple may ask how they can mutually have their Wills ‘set in stone’ so that everything will pass to the children. The wish is due to the primary concern that on the death of the 1st spouse, the survivor may re-marry or change their Will at a future time with the chance that the children may lose out.

So, the couple say “we want mirrored” wills or “mutual wills” with the intention of binding each other to the fact that their children must ultimately inherit.

Mutual Wills – the truth

It is a fact that most solicitors and advisors (myself included) shy away from drafting ‘Mutual Wills’ for couples.

There are good reasons for that. Firstly, a Will must be ‘revocable’ ie capable of being changed. To depart from this would appear to involve complication. Secondly, there is a better option to address the problem, as will be shown below.

Contrary to some opinions, it is possible to create a “Mutual Will”, using appropriate wording. There is a degree of skill and expertise required from the solicitor in drafting the Wills – an expert will put in the necessary provisions to satisfy the legal requirement for a Mutual Will to be created.

The effect of drafting a Mutual Will is that the Court would construct that a ‘trust’ arises over the estate assets* of the deceased 1st spouse, such that on the surviving spouse’s estate, the value is due from the 2nd spouse’s estate and paid the children.

So, it is possible for couples to have Mutual Wills undertaken.

Are Mutual Wills in fact the best option?

Disadvantages of Mutual Wills

- There can be uncertainty as to what assets are included in the Court's construction of a trust;
- The children would have to be able to prove that the two spouses made a binding legal agreement to create the Mutual Will;
- How can the Trust be enforced if the survivor chooses to gift away the assets?
- Due to the fact that the 2nd spouse has the full use of the 1st spouse's assets, there is no control on the spending of the spouse (of those assets) and the children may struggle to show and prove which part of the Trust's assets still remain to be protected. Complicated!
- As the assets pass from 1st spouse to 2nd spouse (with no other protection during the lifetime of the 2nd spouse), those assets become susceptible to attack (e.g care fees, marriage and divorce of 2nd spouse, or insolvency).
- On the death of the 2nd spouse, the process is cumbersome and complicated with a degree of uncertainty. There is also the possibility of Court action required to prove or establish the constructive trust.

Solution to the Problem of Mutual Wills

The primary solution to the problems with Mutual Wills is for the spouses to put in **Flexible Trusts**** within their Wills.

Flexible Trusts can solve each of the problems above Here are the reasons:

- The Trusts show the extent of the assets that are included within the estate of the 1st spouse;
- The children do not need to prove the binding legal agreement; the arrangements are set out by the spouses in their documentation;
- The 1st spouse can set out within the Trust documents the extent to which they wish the surviving spouse to use the assets;
- Controls and measures can be put in to limit spending of the spouse (if that is required by the 1st spouse); alternatively, if controls are not desired, full use for the 2nd spouse's lifetime can be preserved so that effectively the spouse has as much right to use the assets as if they had been gifted to him/her;

- By loaning the value or providing a life interest within the Trust, the assets can be protected for the children against claims from 3rd parties (such as divorce, care fees or insolvency); and
- The Trust structure provides flexibility for the trust to be administered correctly and fairly and free from undue process or complexity through the Courts.

Conclusion Example heading

For couples seeking advice on preparing their Wills, the principle of “Mutual Wills” is at the forefront of their minds and constitutes a primary wish. However, the fact is that the use of Flexible Trusts within the Will structure is a much better way to cope with those wishes and is thus the primary option that generally you ought to consider for the purpose of protecting a couple’s assets for their children.

Footnotes

* **Estate assets** - individual assets include all property titled in the decedent's sole name without co-owners or payable-on-death and beneficiary designations. They commonly include bank accounts, investment accounts, stocks, bonds, vehicles, boats, airplanes, business interests, and property.

** **Flexible Trust** – a Flexible Trust is a trust where there are two types of beneficiaries. The first type of beneficiary is the default beneficiary. These beneficiaries are entitled to any income from the trust as it arises. In practice, if the life policy is the only asset in the trust there will not be any income. The second type of beneficiary is the discretionary beneficiary. These discretionary beneficiaries only receive capital or income from the trust if the trustees make appointments to them during the trust period. If no appointments are made by the end of the trust period, the default beneficiaries will receive all of the benefits.

For more information and for an initial discussion for advice please contact Robert

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