

Wills and Trusts

(for couples with children)

Guidance Notes

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Estate Planning

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Introduction

When we see married couples to prepare their Wills, most arrive to the meeting with the assumption that they will leave their Estates automatically to each other and then it shall pass in a straightforward way to their child(ren). They say that their wishes are simple and straightforward.

What is a simple wish?

The phrase we often hear is “We have very simple wishes. Our estates are to pass to each other and then on to the children”.

When we explain that Wills are not in fact ‘jointly’ made but ‘**individually**’ made, the couple may ask how they can mutually have their Wills ‘set in stone’ so that everything will be protected to 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 one or all of the children may lose out.

NOTE: That a basic will saying “I leave my estate to my wife/husband” does not ensure that it is protected to then pass on to children. It is because the estate is passed unprotected to the widow(er) as an outright gift. Therefore, if that occurs it will be the Will of the surviving spouse that dictates what is to happen – and if that surviving spouse remarries, changes his/her Will and the same children are not benefiting, they are effectively removed from inheriting and the wishes of the 1st spouse who died first are not upheld. This can of course lead to some very upset children – and particularly at a time of grieving for their deceased parent!

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

So, what are Mutual Wills?

Basically, Mutual Wills are contracted documents made by a couple with the attempt to ensure that the provisions in the Wills are not changed after the death of the 1st spouse. Despite what we say below and contrary to some legal opinions, it is possible to create a “Mutual Will”, using appropriate wording. There is a significant degree of skill and expertise required in drafting – but it is possible to 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.

However, it is a fact that most advisors in this area (myself included) do not recommend drafting ‘Mutual Wills’ for couples. There are very good reasons for this:

First, a Will must by law always be a 'revocable' document, in other words capable of being changed or undone in future. To depart from this to bind a spouse's Will from never being changed would involve complication, and it may by law not be possible to achieve.

Secondly, there is a better option to address the problem, as shall be shown below.

Are Mutual Wills in fact the best option?

Some of the potential disadvantages of Mutual Wills

- (1) There can be uncertainty as to what assets are included in the Court's construction of a trust;
- (2) The children (or next beneficiaries) would have to be able to prove that the two spouses made a binding legal agreement to create the Mutual Will;
- (3) How can the Trust be enforced if the surviving spouse chooses to gift away the assets during his or her lifetime?
- (4) 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!
- (5) 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).
- (6) 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 a **Flexible Trust Structure*** within their Wills.

Flexible Family Trusts can seek to solve each of the problems 1-6 above.

What is a Flexible Family Trust?

In this context, a Flexible Family Trust is a trust where there are two main types of beneficiaries. The first type of beneficiary is the surviving spouse who is the primary beneficiary for his/her lifetime. The second type of beneficiary are the remainder beneficiaries, usually children and further descendants such as grandchildren. The spouse receives the use of the 1st spouse's estate, either as a life interest, or as a loan with full access and use, but with sufficient protection of the overall value so that on his/her subsequent death, the children and ultimately grandchildren benefit.

Why are Flexible Trusts used to solve the disadvantages of Mutual Wills?

- The Trusts show the extent of the assets that are included within the estate of the 1st spouse and what value passes to the surviving 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 the surviving spouse can use the assets – being either a full use or a restricted use;
- 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 better 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

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.

Contact Us

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