

## CASE NOTE

### OSBORNE v ESTATE OF OSBORNE\*

#### AN EQUITABLE AGREEMENT OR A CONTRACT IN LAW: MERELY A MATTER OF NOMENCLATURE?

JULIE CASSIDY†

*[It has been more than 200 years since the leading case on mutual wills was handed down in Dufour v Pereira. Despite the passage of time, there continues to be a comparative dearth of modern authority on this type of will. This area of the law was, however, recently considered by the Victorian Court of Appeal in Osborne. This case note evaluates Osborne in light of the relevant grounds of appeal. It is ultimately concluded that Osborne was very much a lost opportunity. The grounds of appeal raised many key issues pertaining to both the substantive law and evidential aspects of mutual wills. However, the Court of Appeal did not take the opportunity to articulate clearly its views of the relevant law.]*

#### CONTENTS

I	Introduction .....	218
II	Summary of the Facts .....	219
III	Contract in Law for Mutual Wills .....	222
	A The Court at First Instance .....	222
	B The Court of Appeal .....	222
	C Evaluation .....	223
	1 The View of the Court of Appeal .....	223
	2 The Correct View .....	225
IV	Express Contract or Agreement Not to Revoke .....	232
	A The Court at First Instance .....	232
	B The Court of Appeal .....	232
	C Evaluation .....	233
	1 Agreement as to Irrevocability .....	233
	2 Resolution Not to Revoke .....	235
	3 Express or Implied Irrevocability .....	237
	4 Simultaneous Execution of Identical Wills .....	240
	5 Terms of the Wills .....	242
V	Fraudulent Inducement .....	245
	A The Court at First Instance .....	245
	B The Court of Appeal .....	245
	C Evaluation .....	246

\* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) ('Osborne').

† LLB (Hons) (Adel), PhD (Bond); Barrister and Solicitor of the Supreme Court of Victoria; Associate Professor, School of Law, Deakin University.

VI	Surviving Testator Benefiting under the Deceased Testator's Will .....	249
	A The Court at First Instance .....	249
	B The Court of Appeal .....	249
	C Evaluation .....	250
VII	Conclusion .....	254

[W]hat the appellant had to establish was the existence of a legal obligation of a nature which equity would enforce. Whether one calls it a 'contract', 'an agreement', 'an undertaking' or 'legally enforceable promise' is merely a matter of nomenclature.<sup>1</sup>

## I INTRODUCTION

It has been more than 200 years since the leading case on mutual wills was handed down in *Dufour v Pereira*.<sup>2</sup> Even in the Australian context, the leading authority on mutual wills, *Birmingham v Renfrew*,<sup>3</sup> was handed down 65 years ago. Despite the passage of time, there continues to be a dearth of modern authority on this type of will. Perhaps as a consequence of the lack of authority, this area of law continues to be fraught with uncertainty.<sup>4</sup> Some of these uncertainties pertain to the very foundation of mutual wills, namely whether these wills are based upon principles of equity or contract law. Others relate to the form that the agreement to execute the wills must take. Must there be an express agreement not to revoke the mutual wills? Must the surviving testator be bequeathed property under the will of the first testator to die? There are further issues as to how an agreement for mutual wills may be proved — can the wills themselves evidence the necessary agreement? Some guidance as to these issues has been provided by the recent Victorian Court of Appeal decision in *Osborne*.<sup>5</sup>

It should be noted from the outset that the appellant in *Osborne* is my de facto spouse. In addition to my direct personal interest in the litigation, I also undertook relevant research and analysed and discussed the legal merits of the action with the appellant and his legal advisers.

The Court of Appeal dismissed the appellant's appeal against the first instance decision of Harper J in the Supreme Court of Victoria that the wills executed by his parents were not mutual wills.<sup>6</sup> This case note concludes that the primary judgment of Winneke P is very ambiguous. Even in respect of key issues, such as

<sup>1</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

<sup>2</sup> (1769) Dick 419; 21 ER 332; (1799) 2 Harg Jurid Arg 304 ('*Dufour*').

<sup>3</sup> (1937) 57 CLR 666 ('*Birmingham*').

<sup>4</sup> For a fuller discussion of these uncertainties and mutual wills in general, see Charles Rickett, 'A Rare Case of Mutual Wills and Its Implications' (1982) 8 *Adelaide Law Review* 178; Malcolm Cope, *Constructive Trusts* (1992) ch 12; Julie Cassidy, *Mutual Wills* (2000).

<sup>5</sup> [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001). The primary judgment was delivered by Winneke P, with whom Vincent and Buchanan JJA concurred. Winneke P did not consider the last two grounds of appeal but, like Vincent JA, concurred with certain paragraphs of Buchanan JA's judgment. Buchanan JA, however, only considered the last ground of appeal, namely whether it is necessary for the survivor to benefit under the first testator's will. Thus there is no specific judgment of the Court on the ground of appeal that pertained to the nature of the fraud that effects a breach of a mutual wills agreement.

<sup>6</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000).

whether mutual wills are based in equity or contract law, the Court of Appeal's view is unclear. Although the Court stated that whether mutual wills are based upon 'a "contract", "an agreement", "an undertaking" or "legally enforceable promise"' is merely a matter of nomenclature,<sup>7</sup> it is ultimately unclear if the Court required an equitable arrangement or a contract in law. Perhaps even more troubling, issues that were seemingly uncontroversial, such as the ability to imply the irrevocability of mutual wills from, inter alia, the testators' agreement to execute the wills,<sup>8</sup> are now unclear.

Ultimately, *Osborne* was very much a lost opportunity. While the grounds of appeal raised many key issues pertaining to mutual wills, the Court of Appeal failed to take the opportunity to articulate clearly its views of the relevant law. There is, however, at least one area where the case has furthered the understanding of the law. Whilst stated in obiter, the Court of Appeal suggested that Harper J erred in doubting the correctness of *Re Dale*,<sup>9</sup> and affirmed that mutual wills can exist when the surviving testator does not benefit under the terms of the deceased testator's will.<sup>10</sup>

## II SUMMARY OF THE FACTS

The appellant, Ray Osborne, was the younger son of Frederick and Winifred Osborne ('the testators'). The testators were born 2 April 1912 and 7 September 1905 respectively and married on 24 December 1938.<sup>11</sup> They purchased a residential unit in 1976 where they resided until Winifred died in 1985.<sup>12</sup> Frederick continued to reside in the unit until his death in 1996.<sup>13</sup>

During March 1985, the appellant met with the testators on a number of occasions to discuss proposed changes to their wills of 10 May 1974, under the terms of which they had bequeathed their entire estates to the survivor absolutely.<sup>14</sup> At the time, Winifred was due to receive a legacy from the estate of a sister-in-law. In these discussions, the testators asserted that they had worked long and hard for what they had and that it was very important for them to ensure that their 'life's

<sup>7</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

<sup>8</sup> See *Lord Walpole v Lord Orford* (1799) 2 Harg Jurid Arg 272, 285 (Lord Loughborough LC) ('*Lord Walpole*'); *Hudson v Gray* (1927) 39 CLR 473, 485 (Isaacs J); *Birmingham* (1937) 57 CLR 666, 683 (Dixon J); *Re Gillespie* [1969] 3 DLR (3d) 317, 321 (Kelly JA); *Re Cleaver* [1981] 2 All ER 1018, 1023-4 (Nourse J); *Bigg v Queensland Trustees Ltd* [1990] 2 Qd R 11, 13-15 (McPherson J) ('*Bigg*'); *Low v Perpetual Trustees WA Ltd* (1995) 14 WAR 35, 42 (Master Adams) ('*Low*'); *Baird v Smea* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [72] (Giles JA) ('*Baird*'). Cf Cope, above n 4, 531-2; Cassidy, above n 4, 29-32. Harper J at first instance, and seemingly the Court of Appeal, did not accept this principle: *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [20]; *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [15] (Winneke P).

<sup>9</sup> [1994] Ch 31.

<sup>10</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [25] (Buchanan JA).

<sup>11</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [1].

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid* [3].

worth',<sup>15</sup> 'all of the assets they had built up went equally' to their children.<sup>16</sup> They agreed to put this intention into effect by revoking their 1974 wills and executing new wills that would leave all their real and personal property to their sons rather than to each other.<sup>17</sup>

In 1985, the testators' solicitor, Peter McGrath, took instructions from the testators and prepared new wills.<sup>18</sup> In evidence McGrath stated that he no longer had the files relating to his preparation of the wills and that he had no independent recollection of the testators' instructions.<sup>19</sup> Looking at the subject wills he could not be assisted as to the circumstances of the execution of the wills or the testators' instructions.<sup>20</sup>

On 24 March 1985, the testators executed new wills giving effect to their agreement that all their real and personal estates were to transmit equally to their sons.<sup>21</sup> Under the terms of the wills, if a son predeceased either of the testators his interest would go to his children.<sup>22</sup> The wills were unusual in that no interest in either testator's estate was bequeathed to the survivor. The wills were identical in their terms (apart from the names of the testators) and were executed simultaneously.<sup>23</sup> The appellant alleged that by these wills the testators intended to execute identical and mutual wills, leaving their entire estates to their children.<sup>24</sup>

On 26 July 1985, Winifred died.<sup>25</sup> At the time of her death, the will of 24 March 1985 had not been revoked and the appellant, as trustee and executor, obtained probate on 7 November 1985.<sup>26</sup> In accordance with the terms of her will, the appellant and his older brother, Neil, each received a half share of their mother's monies.<sup>27</sup> However, the appellant was instructed by McGrath that

<sup>15</sup> Transcript of Proceedings, *Osborne v Osborne* (Supreme Court of Victoria, Harper J, 18 February 2000) 111. See also Transcript of Proceedings, *Osborne v Osborne* (Supreme Court of Victoria, Harper J, 17 February 2000) 60, 68–9.

<sup>16</sup> Transcript of Proceedings, *Osborne v Osborne* (Supreme Court of Victoria, Harper J, 17 February 2000) 60. See also at 68, 69–70, 102–3.

<sup>17</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [3]–[6], [23].

<sup>18</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [6] (Winneke P).

<sup>19</sup> *Ibid* [6], [11] (Winneke P).

<sup>20</sup> The Court of Appeal added that McGrath stated that, if instructed to draw mutual wills, he would have severed the joint tenancy over the unit and executed a binding agreement between the parties so that they would not change the wills after the death of the first testator: *ibid* [11] (Winneke P). The Court at first instance ruled that the respondents could not examine the witness as to whether the subject wills were mutual wills, but could only ask him if looking at the documents would assist his recollections: Transcript of Proceedings, *Osborne v Osborne* (Supreme Court of Victoria, Harper J, 17 February 2000) 16. When the witness answered that he could not be so assisted, this line of cross-examination ceased: at 16. The Court of Appeal's reliance on this evidence may, therefore, have been quite inappropriate.

<sup>21</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [4]–[6], [23].

<sup>22</sup> *Ibid* [5].

<sup>23</sup> *Ibid* [4].

<sup>24</sup> Paragraph 4(b) of the appellant's Second Further Amended Statement of Claim: see *ibid* [5].

<sup>25</sup> *Ibid* [1].

<sup>26</sup> *Ibid* [6].

<sup>27</sup> When called as a witness by the respondents at trial, Neil gave evidence that he did not receive monies under Winifred's will. This was contrary to his Defence, wherein he pleaded that he had received such sums: see Transcript of Proceedings, *Osborne v Osborne* (Supreme Court of Victoria, Harper J, 18 February 2000) 147–58.

Winifred's interest in the unit would not pass to her sons in accordance with the terms of her will, but rather to Frederick through survivorship.<sup>28</sup>

Some years later, Frederick commenced a relationship with Daisy Patterson, who sold her home and moved in to the unit to live with Frederick. In May 1990, Frederick requested the appellant to grant Daisy 'a life occupancy of the unit' after he died.<sup>29</sup> In a letter dated 17 May 1990, the appellant set out his opposition to this request.<sup>30</sup> On 18 June 1990, Frederick revoked his will of 24 March 1985 by executing a will in contemplation of marriage, bequeathing all his personalty to, and conferring a life estate in the unit upon, Daisy.<sup>31</sup> Frederick and Daisy were married on 28 July 1990.<sup>32</sup>

'A more radical departure' from the alleged mutual wills agreement occurred on 13 February 1995, when Frederick transferred the unit to Daisy.<sup>33</sup> The transfer of the unit was conditional on Daisy entering into a deed of family arrangement and executing a will as per the schedule of the deed.<sup>34</sup> Frederick and Daisy executed the deed and relevant wills.<sup>35</sup> In essence, these documents provided that Frederick had a right to reside in the unit and that, upon 'release', the unit would be sold.<sup>36</sup> One half of the proceeds of the sale were to go to Neil and the balance was to be divided between Neil's two sons and one of the appellant's sons, Brett.<sup>37</sup> Neither the appellant nor his other son, David, were beneficiaries under either will.<sup>38</sup> Frederick died on 22 May 1996.<sup>39</sup>

On 2 January 1996, prior to his father's death, the appellant commenced proceedings against Frederick, Daisy and Neil.<sup>40</sup> He alleged that Frederick had breached the trusts arising out of the mutual wills agreement by executing, inter alia, the inter vivos and testamentary documents of 13 February 1995.<sup>41</sup>

Harper J held in favour of the respondents finding, inter alia, that the testators had not resolved to execute a contract whereby they would not revoke their wills of 24 March 1985 in any circumstances and that Frederick had not fraudulently induced Winifred to execute her will.<sup>42</sup> The appellant appealed against these findings, asserting that Harper J erred by requiring: (i) the appellant to establish a case in both equity and contract law; (ii) an express contract not to revoke the wills of 24 March 1985; (iii) proof that Frederick had fraudulently induced

<sup>28</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [1].

<sup>29</sup> *Ibid* [25].

<sup>30</sup> *Ibid* [27].

<sup>31</sup> *Ibid* [7].

<sup>32</sup> *Ibid* [1].

<sup>33</sup> *Ibid* [8].

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid* [8], [9].

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* [9].

<sup>39</sup> *Ibid* [1].

<sup>40</sup> *Ibid* [10]. By the time of the trial, Frederick had died. His estate defended the action and contested the appeal.

<sup>41</sup> *Ibid* [11].

<sup>42</sup> *Ibid* [22], [38].

Winifred to execute her will; and (iv) evidence that Frederick received a benefit under her will.<sup>43</sup>

### III CONTRACT IN LAW FOR MUTUAL WILLS

#### A *The Court at First Instance*

Harper J required the appellant to establish his claim that the subject wills were mutual wills both in equity and contract law.<sup>44</sup> His Honour asserted that, even if the appellant were to prove his case in equity, this would not suffice as '[p]roof of the contract is [also] a necessary ... condition.'<sup>45</sup> His Honour stated that 'these cases'<sup>46</sup> make it clear that

if the plaintiff is to succeed, he must overcome the heavy burden of proof required to establish a particular contract between his parents. A loose arrangement will not do. ... It is true that the plaintiff sues not on a contract but upon a trust. But 'without such a definite agreement there can no more be a trust in equity than a right to damages at law' ...<sup>47</sup>

Harper J repeated the requirement of a 'contract between his parents' in a number of parts of the judgment.<sup>48</sup> His Honour ultimately concluded that

the plaintiff has failed to prove the contract upon which his case depends. ... In my opinion, his evidence came nowhere near establishing the contract which is pleaded by paragraph 4(b) of his second further amended statement of claim.<sup>49</sup>

#### B *The Court of Appeal*

The Court of Appeal rejected the appellant's submission that Harper J had

imposed too high a 'ceiling' for the appellant, by requiring the appellant to satisfy him that the testator and testatrix had entered into an 'enforceable contract' [in law] rather than an 'agreement or understanding' enforceable in equity.<sup>50</sup>

<sup>43</sup> It was also contended that Harper J had erred by imposing a higher burden of proof than that required by law and that this affected his Honour's findings of fact and law: *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [17] (Winneke P). A consideration of this issue is beyond the scope of this case note.

<sup>44</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [20], [35].

<sup>45</sup> *Ibid* [35]. See also at [20], [22], [43].

<sup>46</sup> Namely *Re Oldham* [1925] Ch 75 and *Birmingham* (1937) 57 CLR 666, discussed in *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [13]–[19].

<sup>47</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [20] (citations omitted), quoting *Gray v Perpetual Trustee Co Ltd* [1928] AC 391, 400 (Viscount Haldane).

<sup>48</sup> See *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [20], [22], [35], [43].

<sup>49</sup> *Ibid* [22]. See also at [43]. Paragraph 4(b) of the appellant's Second Further Amended Statement of Claim is set out at [5].

<sup>50</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [17] (Winneke P). The respondents did not specifically submit that it was necessary to prove a contract in law to execute mutual wills. However, such a submission is probably implicit in the statement in the Respondent's Outline of Submissions that *Baird* 'provides no comfort to the Appellant in seeking to overturn the decision of Harper J' since Handley JA in *Baird* suggested that there needs to be a contract in law for mutual wills: see *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [24], [26].

The Court of Appeal held that when Harper J declared in the above quote that the appellant had to prove a contract between his parents, his Honour was merely ‘drawing a contrast between what the plaintiff was required to establish, and what he had termed a “loose arrangement” or “honourable engagement”.’<sup>51</sup>

The Court continued by stating that Harper J

well understood, as his reasons demonstrate, that what the appellant had to establish was the existence of a legal obligation of a nature which equity would enforce. Whether one calls it a ‘contract’, ‘an agreement’, ‘an undertaking’ or ‘legally enforceable promise’ is merely a matter of nomenclature. ... [I]t is apparent from the authorities that equity will not intervene unless the plaintiff can establish, upon clear evidence, that a testator has bound himself to an obligation (whether one calls it contract, agreement, promise or otherwise) not to revoke his will, and in such terms as to render it enforceable in equity.<sup>52</sup>

In support, the Court of Appeal quoted passages from: *Birmingham* and *Bigg*, where Dixon J and McPherson J respectively used the word ‘contract’;<sup>53</sup> *Baird*, where Handley JA spoke of the ‘need to prove a legally binding contract’;<sup>54</sup> and *Aslan v Kopf* where Gleeson CJ asserted that ‘a testator may enter into a binding contract not to revoke a will’.<sup>55</sup> Referring to Harper J’s judgment, the Court of Appeal said that ‘[t]here is nothing ... which suggests ... that he has misdirected himself in this regard.’<sup>56</sup> Harper J had simply concluded that ‘the evidence “came nowhere near establishing the contract which is pleaded”.’<sup>57</sup>

### C Evaluation

#### 1 *The View of the Court of Appeal*

Unfortunately, it is unclear from the Court of Appeal’s judgment whether the Court believed that it was necessary to prove a contract in law for mutual wills or whether an agreement in equity sufficed. The Court of Appeal noted that Harper J distinguished ‘between what the plaintiff was required to establish, and what he had termed a “loose arrangement” or “honourable engagement”’,<sup>58</sup> but this begs the question: what was the appellant required to establish?

<sup>51</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [17] (Winneke P) (citations omitted), quoting *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [5].

<sup>52</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

<sup>53</sup> *Birmingham* (1937) 57 CLR 666, 682–3; *Bigg* [1990] 2 Qd R 11, 13–14.

<sup>54</sup> *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [24], [26].

<sup>55</sup> (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Priestley JA, 16 May 1995) 5 (‘*Aslan*’).

<sup>56</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

<sup>57</sup> *Ibid* [17] (Winneke P), quoting *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [22].

<sup>58</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [17] (Winneke P) (citations omitted), quoting *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [5].

At first glance it appears that the Court of Appeal agreed with the appellant's submission that an equitable 'agreement' suffices for mutual wills. The Court recognised that mutual wills are enforced in equity,<sup>59</sup> and it would be thought implicit from this that mutual wills are not enforced in contract law. Moreover, the Court's statement that it is necessary to prove 'an obligation ... in such terms as to render it enforceable in equity' echoes the leading cases in this area.<sup>60</sup> These include *Re Cleaver* and *Re Gardner*, upon which the appellant relied, where it was held that all that is required is an agreement or understanding that is sufficiently definite for equity to enforce.<sup>61</sup> Furthermore, from its statements that it does not matter 'whether one calls it contract, agreement, promise or otherwise',<sup>62</sup> it appears that the Court believed that the reference to a 'contract' in some mutual wills cases was, in essence, a reference to an equitable contract. The term 'contract' is then interchangeable with the terms 'agreement', 'undertaking' or 'legally enforceable promise' and, therefore, the term used 'is merely a matter of nomenclature.'<sup>63</sup>

However, if this was the Court's view, then the appeal should have been allowed unless such a finding could be reconciled with Harper J's conclusion at first instance. The two decisions could be reconciled if the Court of Appeal believed that Harper J's references to a 'contract' merely referred to an equitable contract.<sup>64</sup> However, Harper J clearly used the term 'contract' as referring to a 'contract in law'. The terms 'contract' and 'equity' are treated as two distinct requirements that the appellant had to establish.<sup>65</sup> Moreover, the Court of Appeal clearly did not consider Harper J's reference to a contract as an equitable contract. It recognised that his Honour treated equity as an 'alternative' basis to

<sup>59</sup> The Court stated that 'the appellant had to establish ... the existence of a legal obligation of a nature which equity would enforce': *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

<sup>60</sup> *Ibid.*

<sup>61</sup> *Re Cleaver* [1981] 2 All ER 1018, 1024 (Nourse J); *Re Gardner* [1920] 2 Ch 523, 529 (Lord Sterndale MR). See also *Lord Walpole* (1797) 3 Ves 402, 419–20; 30 ER 1076, 1084–5 (Lord Loughborough LC); *Synge v Synge* [1894] 1 QB 466, 470 (Kay LJ); *Stone v Hoskins* [1905] P 194, 197 (Barnes P); *Re Oldham* [1925] Ch 75, 85, 86 (Astbury J); *Aslan* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Priestley JA, 16 May 1995) 6 (Gleeson CJ). Cf Cope, above n 4, 531; Cassidy, above n 4, 13–15.

<sup>62</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

<sup>63</sup> *Ibid.*

<sup>64</sup> The two decisions could also be reconciled if the Court of Appeal believed that Harper J had erred by requiring a contract, but nevertheless thought his Honour's decision should not be disturbed because the appellant had failed to prove even an equitable 'agreement' or 'understanding'. However, Harper J found an agreement between the testators to revoke their former wills and to execute new wills that bequeathed their estates to their sons, and that the wills of 24 March 1985 were executed pursuant to this 'agreement': *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [4]–[6], [23].

<sup>65</sup> *Ibid* [20], [22], [35], [43]. To this end, it should be noted that Harper J held that establishing a claim in equity did not suffice because without proving a contract in law 'there can no more be a trust in equity than a right to damages at law': *Gray v Perpetual Trustee Co Ltd* [1928] AC 391, 400 (Viscount Haldane), quoted in *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [20]. Correspondingly, Harper J held that establishing a claim in contract would not suffice because privity of contract would prevent the appellant suing upon the contract; if the appellant was to succeed he also had to 'establish his claim in equity': *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [35].



contract law for rejecting the appellant's claim.<sup>66</sup> Further, the Court of Appeal believed that such an approach was not erroneous. Thus the Court of Appeal asserted that Harper J 'well understood ... what the appellant had to establish' and that '[t]here is nothing ... which suggests ... that he has misdirected himself in this regard.'<sup>67</sup>

Importantly, the Court of Appeal reiterated Harper J's finding that 'the evidence "came nowhere near establishing the contract which is pleaded"'.<sup>68</sup> The Court of Appeal<sup>69</sup> also quoted *Baird*, where Handley JA required proof of a contract in law for mutual wills,<sup>70</sup> and other cases, including *Birmingham*, *Bigg* and *Aslan*, where the courts used the word 'contract'.<sup>71</sup> Thus the Court of Appeal must have believed that it was necessary to establish a case in both equity and contract or, at the very least, a case in contract law. If this interpretation accurately portrays the Court of Appeal's view, it is submitted that both its decision, and that of Harper J at first instance, are erroneous and contrary to the weight of authority that merely requires an equitable agreement.

## 2 The Correct View

Harper J did not cite any authority for the proposition that the appellant was required to establish his case both in equity and contract law, apart from a passage from *Gray v Perpetual Trustee Co Ltd*<sup>72</sup> and a reference to 'these cases'.<sup>73</sup> From Harper J's use of *Gray v Perpetual Trustee Co Ltd*, it appears that his Honour believed that if the appellant sought damages as his remedy he had to prove a contract in law.<sup>74</sup> His Honour suggested that the remedy in equity would be a declaration of a trust and that in the absence of a contract there could be no right to damages.<sup>75</sup> However, equitable damages are a recognised remedy for a breach of mutual wills<sup>76</sup> and it is difficult to comprehend how Harper J could make such a fundamental error.

<sup>66</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [19] (Winneke P), [23] (Buchanan JA).

<sup>67</sup> *Ibid* [18] (Winneke P).

<sup>68</sup> *Ibid* [17] (Winneke P), quoting *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [22]. It should be noted that the appellant did not plead a 'contract' but rather an 'agreement': see *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [3] (Winneke P); *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [2].

<sup>69</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

<sup>70</sup> [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [24], [26].

<sup>71</sup> *Birmingham* (1937) 57 CLR 666, 682–3 (Dixon J); *Bigg* [1990] 2 Qd R 11, 13–14 (McPherson J); *Aslan* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Priestley JA, 16 May 1995) 5 (Gleeson CJ).

<sup>72</sup> [1928] AC 391, 400 (Viscount Haldane).

<sup>73</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [20].

<sup>74</sup> *Ibid*.

<sup>75</sup> *Ibid*.

<sup>76</sup> See *Lord Walpole* (1799) 2 Harg Jurid Arg 272, 294–5 (Lord Loughborough LC); *Synge v Synge* [1894] 1 QB 466, 471–2 (Kay LJ); *In the Estate of Heys* [1914] P 192, 199 (Evans P); *Re Richardson's Estate* (1934) 29 Tas LR 149, 155 (Nicholls CJ); *Birmingham* (1937) 57 CLR 666, 685 (Dixon J); *Bigg* [1990] 2 Qd R 11, 13 (McPherson J). The measure of damages is the value

Alternatively, it appears that Harper J may have simply interpreted the requirement of a ‘definite agreement’ as stated in, inter alia, *Gray v Perpetual Trustee Co Ltd*,<sup>77</sup> as requiring proof of a contract in law. However, the courts have held that the ‘definite agreement’ requirement merely necessitates that the terms of the trust (the objects and the trust property) be clear so that equity may enforce it.<sup>78</sup> This is the extent of the evidential test required by equity. There is no need for a formal contract in law. The test is imposed simply to ensure that equity may fulfil its remedial function of enforcing the trusts that arise on the death of one of the testators. Thus, as the Court in *Re Oldham* explained:

‘mutual wills [must be] made in accordance with an arrangement’ — ie an arrangement of which the Court was satisfied by evidence ... an arrangement proved to the satisfaction of the Court, the terms of which are certain and unequivocal and such as the Court can see its way to enforce.<sup>79</sup>

Similarly, in *Re Cleaver*, Nourse J stressed that

the agreement or understanding must be such as to impose on the [surviving testator] a legally binding obligation to deal with the property in the particular way and that the other two certainties, namely those as to the subject matter of the trust and the persons intended to benefit under it, are as essential to this species of trust as they are to any other.<sup>80</sup>

In *Aslan*, one of the decisions that the Court of Appeal relied on for the requirement of a contract, the Court also stressed that ‘it will be important to identify with precision the nature of the implied promise.’<sup>81</sup>

As to Harper J’s reference to ‘these cases’ as authority, this presumably is a reference to *Re Oldham* and *Birmingham* that were quoted earlier in his judgment.<sup>82</sup> The Court of Appeal also relied on *Birmingham* for the need to prove a contract.<sup>83</sup> However, these cases provide to the contrary, being authority for the following propositions:

- mutual wills are enforced in equity, not contract;<sup>84</sup>
- for mutual wills it is only necessary that there be an ‘arrangement’,<sup>85</sup> ‘understanding or promise’, ‘compact’<sup>86</sup> or ‘agreement’,<sup>87</sup> or that one of the

of the interest lost to the plaintiff: *Re Richardson’s Estate* (1934) 29 Tas LR 149, 155 (Nicholls CJ); *Bigg* [1990] 2 Qd R 11, 13 (McPherson J).

<sup>77</sup> [1928] AC 391, 400 (Viscount Haldane), quoted in *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [20], [36].

<sup>78</sup> See *Lord Walpole* (1797) 3 Ves 402, 419–20; 30 ER 1076, 1084–5 (Lord Loughborough LC); *Synge v Synge* [1894] 1 QB 466, 470 (Kay LJ); *Re Gardner* [1920] 2 Ch 523, 529 (Lord Sterndale MR); *Re Oldham* [1925] Ch 75, 85, 86 (Astbury J); *Birmingham* (1937) 57 CLR 666, 681 (Dixon J); *Nowell v Palmer* (1993) 32 NSWLR 574, 579 (Mahoney JA); *Re Cleaver* [1981] 2 All ER 1018, 1024 (Nourse J); *Aslan* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Priestley JA, 16 May 1995) 6, 8 (Gleeson CJ); *Low* (1995) 14 WAR 35, 39 (Master Adams). Cf Cope, above n 4, 531; Cassidy, above n 4, 13–15.

<sup>79</sup> [1925] Ch 75, 86 (Astbury J), quoting *Stone v Hoskins* [1905] P 194, 195 (Barnes P).

<sup>80</sup> [1981] 2 All ER 1018, 1024.

<sup>81</sup> (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Priestley JA, 16 May 1995) 5 (Gleeson CJ).

<sup>82</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [13]–[19].

<sup>83</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

<sup>84</sup> *Birmingham* (1937) 57 CLR 666, 686, 690 (Dixon J).

testators die ‘with the implied promise of the survivor that the arrangement shall hold good’,<sup>88</sup> and

- equity’s only concern is to establish an ‘arrangement’, the terms of which are sufficiently clear for equity to enforce.<sup>89</sup>

The Court of Appeal also relied on *Aslan*, where the Court referred to a ‘contract not to revoke a will’.<sup>90</sup> However, the Court of Appeal failed to note that in that case the Court also recognised that mutual wills were enforced in equity, not in contract law.<sup>91</sup> The Court stated that a breach of mutual wills gives rise to an ‘equitable remedy’ and ‘equity will give effect to [the will] according to its tenor’ or, in the case of an implied agreement for mutual wills, the terms of that ‘implied promise’.<sup>92</sup>

The Court of Appeal particularly relied upon *Baird*<sup>93</sup> as authority for the need to prove a contract in law.<sup>94</sup> In that case, Handley JA asserted ‘[t]he need to prove a legally binding contract’.<sup>95</sup> However, the Court of Appeal failed to note that other members of the Court in *Baird* did not require a contract. Both Mason P and Giles JA only required proof of an ‘agreement’ to execute mutual wills.<sup>96</sup> While these judges use the term ‘contract’,<sup>97</sup> it is contended that such references are to an equitable contract or agreement, not a contract in law as Handley JA required. To this end, Mason P cited *Dufour* as authority for, inter alia, the need for an ‘agreement’ for mutual wills.<sup>98</sup> In that case the Court recognised that mutual wills are enforced in equity, not contract law.<sup>99</sup> Similarly, Giles JA noted that a ‘contract’ for mutual wills is enforced in equity through the imposition of a constructive trust on the survivor.<sup>100</sup> These statements indicate that both Mason P and Giles JA were referring to a contract or agreement enforced in equity, not contract law.

Perhaps more importantly, while Handley JA stated in *Baird* that there needs to be a contract in law for mutual wills, this is contrary to the weight of authority.

<sup>85</sup> *Re Oldham* [1925] Ch 75, 86 (Asbury J); *Renfrew v Birmingham* [1937] VLR 180, 184 (Gavan Duffy J).

<sup>86</sup> *Birmingham* (1937) 57 CLR 666, 689 (Dixon J).

<sup>87</sup> *Ibid* 690 (Dixon J).

<sup>88</sup> *Re Oldham* [1925] Ch 75, 86 (Astbury J), quoting the headnote of *Stone v Hoskins* [1905] P 194.

<sup>89</sup> *Re Oldham* [1925] Ch 75, 86 (Astbury J).

<sup>90</sup> (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Priestley JA, 16 May 1995) 5 (Gleeson CJ), quoted in *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

<sup>91</sup> *Aslan* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Priestley JA, 16 May 1995) 5 (Gleeson CJ).

<sup>92</sup> *Ibid*.

<sup>93</sup> [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000).

<sup>94</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

<sup>95</sup> *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [26].

<sup>96</sup> *Ibid* [5]–[8] (Mason P), [66]–[70], [72]–[75], [77] (Giles JA).

<sup>97</sup> *Ibid* [9] (Mason P), [64], [65], [71], [72] (Giles JA).

<sup>98</sup> *Ibid* [6], [7].

<sup>99</sup> *Dufour* (1799) 2 Harg Jurid Arg 304, 310–11 (Lord Camden LC).

<sup>100</sup> *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [65].

In fact, cases which Handley JA cited for the proposition that ‘[t]he need to prove a legally binding contract has always been insisted upon’ and that these cases ‘have referred to the need for plaintiffs in such cases to prove “a contract at law”’,<sup>101</sup> provide to the contrary that mutual wills are enforced in equity, not contract law.<sup>102</sup> Moreover, the cases cited by Handley JA, upon which the Court of Appeal also relied for the requirement of a contract, also assert that the mutual wills doctrine is just one example of a broader area of equity concerned with ‘equitable fraud’ where a court of equity will intervene to impose a constructive trust.<sup>103</sup> Thus in *Birmingham*, Dixon J said that mutual wills fall ‘under the equitable jurisdiction for the prevention of fraud.’<sup>104</sup> Similarly, in *Re Cleaver* the Court concluded:

The principle of all these cases [of equitable fraud] is that a court of equity will not permit a person to whom property is transferred ... on the faith of an agreement or clear understanding that it is to be dealt with in a particular way for the benefit of a third person, to deal with that property inconsistently with that agreement or understanding.<sup>105</sup>

While Handley JA in *Baird* cited *Dufour* as the definitive authority for the requirement of a contract for mutual wills,<sup>106</sup> Lord Camden LC stated in that case that an alternative basis for his Lordship’s decision was the principle of equitable estoppel by affirmation.<sup>107</sup> As with other examples of equitable fraud, such as secret trusts, proof of a formal contract in law is not a prerequisite, the key in each case being a common intention to benefit certain beneficiaries.<sup>108</sup> Moreover, at the time of the decision in *Dufour*, married women had no ability in

<sup>101</sup> *Ibid* [26].

<sup>102</sup> See *Dufour* (1799) 2 Harg Jurid Arg 304, 310–11 (Lord Camden LC); *Birmingham* (1937) 57 CLR 666, 686, 690 (Dixon J); *Re Cleaver* [1981] 2 All ER 1018, 1024 (Nourse J). Cf Cope, above n 4, 528–9; Cassidy, above n 4, 3–6, 12–13, 15, 19, 21, 44–6.

<sup>103</sup> See, eg, *Bigg* [1990] 2 Qd R 11, 13 (McPherson J); *Birmingham* (1937) 57 CLR 666, 688, cited in *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [26] (Handley JA) and *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P). See also *Dufour* (1799) 2 Harg Jurid Arg 304, 311 (Lord Camden LC); *Ottaway v Norman* [1972] Ch 698, 708–11 (Brightman J); *Re Cleaver* [1981] 2 All ER 1018, 1024 (Nourse J); *Re Dale* [1994] Ch 31, 47 (Morritt J).

<sup>104</sup> (1937) 57 CLR 666, 688.

<sup>105</sup> [1981] 2 All ER 1018, 1024 (Nourse J).

<sup>106</sup> *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [26]. Note that the Court in *Healey v Brown* (Unreported, English High Court of Justice, Donaldson J, 25 April 2002) [21] (*‘Healey’*) similarly cited *Dufour* as authority for the proposition that the ‘mutual wills doctrine is anchored in contract’ and presupposes ‘an enforceable contract at law.’ The Court in *Healey* also relied on the decision in *Re Goodchild* [1997] 3 All ER 63. For a detailed analysis of the latter case in this regard, see Cassidy, above n 4. However, the Court in *Healey* went on to recognise that equity may also intervene in the absence of a legal contract for mutual wills, a legal contract essentially being regarded as providing only one of the impetuses for equity’s intervention: *Healey* (Unreported, English High Court of Justice, Donaldson J, 25 April 2002) [24].

<sup>107</sup> *Dufour* (1799) 2 Harg Jurid Arg 304, 311 (Lord Camden LC). See also *Pratt v Johnson* [1959] SCR 102, 109–10 (Locke J); counsel for the plaintiff in *Re Dale* [1994] Ch 31, 35. Cf H A J Ford and W A Lee, *Principles of the Law of Trusts* (3<sup>rd</sup> ed, 1996) [22 240].

<sup>108</sup> *Ottaway v Norman* [1972] Ch 698, 708–11 (Brightman J). *Healey* (Unreported, English High Court of Justice, Donaldson J, 25 April 2002) [28]. See also I J Hardingham, M A Neave and H A J Ford, *Wills and Intestacy in Australia and New Zealand* (2<sup>nd</sup> ed, 1983) [1218]; Cassidy, above n 4, 16.

law to enter contracts.<sup>109</sup> In England, it was not until 1935 that spouses could contract,<sup>110</sup> yet prior to that date there were considerable authorities on the enforcement of mutual wills agreed to between spouses, including *Dufour*.<sup>111</sup>

These authorities aside, that mutual wills are based on an arrangement or understanding recognised in equity, rather than a contract enforced in law, is evident from three further facts. First, if based in contract law, mutual wills would be enforced through the process of the estate of the deceased testator bringing an action against the surviving testator (or his or her estate) seeking damages for breach of contract or specific performance. While the plaintiff in a mutual wills case may, in a rare case, be one of the testators,<sup>112</sup> generally it is the beneficiaries who enforce the mutual wills agreement.

Second, if mutual wills were contractual in nature, privity of contract would apply. In this regard, it should be noted that Harper J asserted that even if a contract was established, '[n]ot being a party to the contract, the plaintiff cannot sue upon it.'<sup>113</sup> The courts have held, however, that third party beneficiaries under mutual wills may enforce them without facing any privity hurdles as they are enforcing the trust, rather than a contract between the parties.<sup>114</sup> This conclusion seems obvious: if privity applied to mutual wills, most mutual wills litigation would not arise as the beneficiaries would not be able to enforce the mutual wills agreement.

Third, if mutual wills were contractual in nature, the *Statute of Frauds* would apply to oral agreements for mutual wills involving the disposition of interests in land.<sup>115</sup> However, the courts, including the Court of Appeal in *Osborne*,<sup>116</sup> have recognised that agreements for mutual wills may be made orally and that the *Statute of Frauds* will not defeat such an agreement even where the testators' estates include land.<sup>117</sup> This is because what is being enforced under a mutual wills agreement is a constructive trust, not a contract.<sup>118</sup>

<sup>109</sup> H G Beale (ed), *Chitty on Contracts* (28<sup>th</sup> ed, 1999) [8-065].

<sup>110</sup> *Law Reform (Married Women and Tortfeasors) Act 1935*, 25 & 26 Geo 5, c 30.

<sup>111</sup> See, eg, *Gregor v Kemp* (1722) 3 Swans 482; 36 ER 926; *Lord Walpole* (1797) 3 Ves 402; 30 ER 1076; (1799) 2 Harg Jurid Arg 272; *Re Gardner* [1920] 2 Ch 523; *Re Hagger* [1930] 2 Ch 190.

<sup>112</sup> For example, where one testator revokes the mutual will in his or her lifetime, failing to leave the other an agreed interest in the property: *Bigg* [1990] 2 Qd R 11, 15 (McPherson J). See also *Low* (1995) 14 WAR 35.

<sup>113</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [35].

<sup>114</sup> See *Dufour* (1799) 2 Harg Jurid Arg 304, 310–11 (Lord Camden LC); *Hudson v Gray* (1927) 39 CLR 473, 484 (Isaacs J); *Birmingham* (1937) 57 CLR 666, 686, 690 (Dixon J), 691–2 (Evatt J); *Staib v Powell* [1979] Qd R 151, 156 (Lucas J); *Re Cleaver* [1981] 2 All ER 1018, 1024 (Nourse J). Cf Robert Burgess, 'A Fresh Look at Mutual Wills' (1970) 34 *The Conveyancer and Property Lawyer* 230, 231, 235; Cope, above n 4, 528–9; Cassidy, above n 4, 66.

<sup>115</sup> *Horton v Jones* (1935) 53 CLR 475, 487 (Rich and Dixon JJ), 489–90 (Starke J).

<sup>116</sup> [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P), citing *Birmingham* (1937) 57 CLR 666, 677ff (Latham CJ), 690–1 (Dixon J).

<sup>117</sup> *Lord Walpole* (1799) 2 Harg Jurid Arg 272, 294–5 (Lord Loughborough LC), quoted with approval by Dixon J in *Birmingham* (1937) 57 CLR 666, 685, 688. Cf *Dufour* (1769) Dick 419; 21 ER 332; (1799) 2 Harg Jurid Arg 304; *Szabo v Boros* (1967) 64 DLR (2d) 48; *Re Cleaver* [1981] 2 All ER 1018; *Nowell v Palmer* (1993) 32 NSWLR 574; *Low* (1995) 14 WAR 35.

<sup>118</sup> *Lord Walpole* (1799) 2 Harg Jurid Arg 272, 294–5 (Lord Loughborough LC); *Birmingham* (1937) 57 CLR 666, 678–80 (Latham CJ), 685, 690–2 (Dixon J); *Renfrew v Birmingham* [1937] VLR 180, 187–9 (Gavan Duffy J); *Szabo v Boros* (1967) 64 DLR (2d) 48, 49 (Davey CJC); *Healey* (Unreported, English High Court of Justice, Donaldson J, 25 April 2002) [24], [28]. See

Once it is recognised that mutual wills are enforced in equity, not contract law, it is appropriate to return to the issue of the nature of the agreement that equity requires. Does equity require a ‘contract’ as stated by Harper J and the Court of Appeal? While, as noted by the Court of Appeal in *Osborne*<sup>119</sup> and Handley JA in *Baird*,<sup>120</sup> some courts use the word ‘contract’,<sup>121</sup> they use the term not as a prerequisite, but rather interchangeably with ‘agreement’,<sup>122</sup> ‘understanding’,<sup>123</sup> ‘arrangement’,<sup>124</sup> ‘promise’<sup>125</sup> or ‘engagement’.<sup>126</sup> Moreover, given that these courts are referring to this ‘contract’ as being enforced in equity,<sup>127</sup> the references to a contract are to an equitable contract or agreement. This is a ‘definite arrangement’ which is clear enough in its terms (the trust objects and the trust property) for equity to enforce,<sup>128</sup> rather than a contract that satisfies the formal requirements specified in law.<sup>129</sup>

In *Low*,<sup>130</sup> this issue was addressed with more specificity than other cases. The Court stressed that there was no need for the plaintiff even to refer to the word ‘agreement’ in establishing his claim for mutual wills as the circumstances of the case were what was significant.<sup>131</sup> Similarly, in *Szabo v Boros*, Davey CJBC held that no ‘contract or declaration of trust ... was needed, because it was the common intention and dealing with the property that governed.’<sup>132</sup>

Moreover, the distinction is not ‘merely a matter of nomenclature’ as stated by the Court of Appeal in *Osborne*.<sup>133</sup> Requiring a contract imposes a significantly

also *Staib v Powell* [1979] Qd R 151, 156 (Lucas J); *Schaefer v Schuhmann* [1972] AC 572, 585 (Lord Cross).

<sup>119</sup> [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

<sup>120</sup> [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [26].

<sup>121</sup> See, eg, *Dufour* (1799) 2 Harg Jurid Arg 304, 308 (Lord Camden LC); *Bigg* [1990] 2 Qd R 11, 13 (McPherson J); *Birmingham* (1937) 57 CLR 666, 688 (Dixon J); *Aslan* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Priestley JA, 16 May 1995) 5 (Gleeson CJ).

<sup>122</sup> *Dufour* (1799) 2 Harg Jurid Arg 304, 310 (Lord Camden LC); *Birmingham* (1937) 57 CLR 666, 689 (Dixon J); *Bigg* [1990] 2 Qd R 11, 13, 15, 17 (McPherson J); *Aslan* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Priestley JA, 16 May 1995) 7, 8 (Gleeson CJ). See also *Lord Walpole* (1799) 2 Harg Jurid Arg 272, 294 (Lord Loughborough LC); *Re Cleaver* [1981] 2 All ER 1018, 1024 (Nourse J).

<sup>123</sup> *Birmingham* (1937) 57 CLR 666, 688 (Dixon J). See also *Re Gardner* [1920] 2 Ch 523, 529 (Lord Sterndale MR); *Re Cleaver* [1981] 2 All ER 1018, 1024 (Nourse J).

<sup>124</sup> *Renfrew v Birmingham* [1937] VLR 180, 184 (Gavan Duffy J); *Stone v Hoskins* [1905] P 194, 195–6 (Barnes P); *Re Oldham* [1925] Ch 75, 87 (Astbury J).

<sup>125</sup> *Dufour* (1799) 2 Harg Jurid Arg 304, 308 (Lord Camden LC); *Birmingham* (1937) 57 CLR 666, 688 (Dixon J); *Bigg* [1990] 2 Qd R 11, 13 (McPherson J).

<sup>126</sup> *Dufour* (1799) 2 Harg Jurid Arg 304, 310 (Lord Camden LC).

<sup>127</sup> *Ibid* 310–11 (Lord Camden LC); *Birmingham* (1937) 57 CLR 666, 686, 690 (Dixon J); *Renfrew v Birmingham* [1937] VLR 180, 189 (Gavan Duffy J); *Aslan* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Priestley JA, 16 May 1995) 5 (Gleeson CJ). See also *Re Cleaver* [1981] 2 All ER 1018, 1024 (Nourse J).

<sup>128</sup> See the cases cited in above n 78.

<sup>129</sup> Cf Cope, above n 4, 526.

<sup>130</sup> (1995) 14 WAR 35.

<sup>131</sup> *Ibid* 41–2 (Master Adams).

<sup>132</sup> (1967) 64 DLR (2d) 48, 49. Cf *Pettitt v Pettitt* [1970] AC 777, 796 (Lord Reid); Cassidy, above n 4, 11–12.

<sup>133</sup> [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

higher factual burden on the plaintiff. A contract requires proof that the testators intended to enter into a legally binding agreement.<sup>134</sup> This may be particularly difficult in the typical context of mutual wills between spouses where the law presumes legal relations are not intended.<sup>135</sup> By contrast, equity merely requires, inter alia, a common intention or understanding to benefit third party beneficiaries.<sup>136</sup> The agreement, arrangement or understanding between the testators must merely be definite in the sense that its terms (the trust objects and the trust property) are sufficiently clear for enforcement in equity.

It is submitted that had Harper J and the Court of Appeal not erred by requiring a formal contract in law, the relevant 'agreement' as required in equity would have been established on the facts. Harper J accepted the evidence that the testators agreed to revoke their former wills and to execute new wills that bequeathed their estates to their sons, and that the wills of 24 March 1985 were executed pursuant to this 'agreement'.<sup>137</sup> These facts satisfy the requirements of equity.<sup>138</sup> Moreover, given the appellant's evidence and Harper J's findings, the consequent trust — including the objects (the testators' sons) and the trust property (all the testators' estates)<sup>139</sup> — was also sufficiently definite for the Court to be able to enforce its terms.

It is pertinent to conclude by querying how such confusion between contract law and equity has arisen. Given the wealth of cases that state that mutual wills are enforced in equity, why would Harper J and the Court of Appeal require a contract? While no definitive answer can be given, perhaps there has been a doctrinal blurring between equity and contract law as a consequence of equity's superimposition on certain contractual relationships to provide an additional remedial function. The doctrine of *Walsh v Lonsdale*<sup>140</sup> and the *Walton Stores* doctrine of equitable estoppel<sup>141</sup> provide examples of this interplay. Whatever the cause, it is submitted that it is time for doctrinal clarity. The courts need to recognise that the mutual wills doctrine is a purely equitable doctrine that is based on unconscionability and the prevention of equitable fraud,<sup>142</sup> and that it involves no interplay with contractual principles.<sup>143</sup>

<sup>134</sup> *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 457 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

<sup>135</sup> *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 187 ALR 92, 100 (Gaudron, McHugh, Hayne and Callinan JJ).

<sup>136</sup> *Re Cleaver* [1981] 2 All ER 1018, 1024 (Nourse J).

<sup>137</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [4]–[6], [23].

<sup>138</sup> See, eg, *Re Cleaver* [1981] 2 All ER 1018, 1024 (Nourse J); *Birmingham* (1937) 57 CLR 666, 681 (Dixon J); *Nowell v Palmer* (1993) 32 NSWLR 574, 579 (Mahoney JA); *Low* (1995) 14 WAR 35, 39 (Master Adams).

<sup>139</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [4]–[6], [23].

<sup>140</sup> (1882) 21 ChD 9. Under this doctrine, equity will enforce an agreement for a lease even though the formalities for the creation of a lease have not been met and thus the agreement is not enforceable at law.

<sup>141</sup> *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. Under this doctrine, a person's assumption or expectation may be enforced in equity, even though the promise may not be contained in any underlying formal contract where, inter alia, there has been an inducement to adopt the assumption or expectation and the person has acted to his or her detriment on the basis of that assumption or expectation.

<sup>142</sup> *Chamberlaine v Chamberlaine* (1680) 2 Eq Cas Abr 415; 22 ER 352 (Lord Nottingham LC); *Dufour* (1799) 2 Harg Jurid Arg 304, 307, 310 (Lord Camden LC); *Lord Walpole* (1799) 2 Harg

## IV EXPRESS CONTRACT OR AGREEMENT NOT TO REVOKE

A *The Court at First Instance*

Harper J accepted that the testators had entered into an agreement to revoke their wills of 10 May 1974 and to execute new wills that bequeathed their estates to their sons.<sup>144</sup> However, his Honour stated that ‘these cases’<sup>145</sup> provide that:

The plaintiff must prove a contract, to which each of his parents was a party, that each would make a will which, during their joint lives, would not be revoked without notice to the other; and after the death of the first to die would not be revoked by the survivor.<sup>146</sup>

Harper J continued by stating:

In considering whether the plaintiff has overcome the burden of proof which rests upon him, it is as well to remember that many couples join in making wills which reflect their joint view of the proper disposition of their property; but in doing so they do not bind themselves not to revoke their wills nor indeed intend to undertake or impose any other kind of binding obligation.<sup>147</sup>

His Honour concluded that there was

simply no evidence that either parent intended to prevent the other from ever, in any circumstances, revoking his or her will if the first to die left, at the time of his or her death, his or her will in the form it took on 24 March 1985.<sup>148</sup>

B *The Court of Appeal*

The Court of Appeal did not consider separately from the previous ground of appeal the appellant’s submission that Harper J had erroneously required him to prove not only a contract, but an express contract that the testators would not revoke their wills of 24 March 1985 in any circumstances.<sup>149</sup> Nor did the Court

Jurid Arg 272, 294–5 (Lord Loughborough LC); *Birmingham* (1937) 57 CLR 666, 683, 685, 688, 689 (Dixon J); *Bigg* [1990] 2 Qd R 11, 13 (McPherson J); *Re Dale* [1994] Ch 31, 42, 48–9 (Morritt J). Cf *Healey* (Unreported, English High Court of Justice, Donaldson J, 25 April 2002) [26]. See also *Blackwell v Blackwell* [1929] AC 318, 341 (Lord Warrington). See Burgess, above n 114, for an alternative approach based on specific performance of the agreement.

<sup>143</sup> I would like to thank the anonymous referee who raised the matters in this paragraph.

<sup>144</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [4]–[6], [23].

<sup>145</sup> Namely *Re Oldham* [1925] Ch 75 and *Birmingham* (1937) 57 CLR 666, discussed in *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [13]–[19].

<sup>146</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [20]. This passage was quoted by the Court of Appeal: see *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [17] (Winneke P).

<sup>147</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [21].

<sup>148</sup> *Ibid* [22]. See also at [43]. This passage was quoted by the Court of Appeal: see *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [14] (Winneke P).

<sup>149</sup> The respondents did not specifically address the issue of whether any contract or agreement not to revoke had to be express. A contrary submission may be implicit in the assertion in the Respondent’s Outline of Submissions that the ‘general principles are helpfully and clearly articulated in’ *Hardingham, Neave and Ford*, above n 108, [1213]–[1218] and ‘in the final analysis the law is definitively stated in *Birmingham v Renfrew* (1937) 57 CLR 666 at 674–675 and 681–682.’



address the appellant's submission that irrevocability does not have to be actually considered by the testators where their circumstances, such as age and years of marriage, indicate that revocation of the wills would not be contemplated.<sup>150</sup> Further, the Court did not specifically address the appellant's submission that agreement not to revoke the wills need not be express, but rather may be implied from factors such as the agreement to execute the wills, the terms of the wills and the ages and circumstances of the testators.<sup>151</sup>

However, the Court of Appeal stated that there is a 'need for "clear and satisfactory evidence" of an implied agreement on the part of the testator that he would not revoke his 1985 will'.<sup>152</sup> The Court also asserted that:

Apart from the fact that the wills were drawn in identical terms and on the same day, the evidence upon which his Honour was asked to infer the existence of mutual wills with an implied term not to revoke without notice was meagre and speculative ...<sup>153</sup>

The Court continued:

the fact of making identical wills will not, of itself, establish an implied agreement not to revoke. This is because, as his Honour also noted, many husbands and wives make corresponding wills 'by agreement' without binding themselves not to revoke them. Such wills are infinitely more likely to be the product of mutual trust and moral responsibility than a binding obligation not to revoke.<sup>154</sup>

## C Evaluation

### 1 Agreement as to Irrevocability

Whether the agreement as to irrevocability is viewed as a contract in law or equity begs the question of whether any agreement as to irrevocability is necessary. It is submitted that the preferable view is that an agreement not to revoke the wills is simply not necessary for mutual wills.<sup>155</sup> Such a requirement does not accord with the legal principle that any express clause in a will derogating from the ability to make a further will is void.<sup>156</sup> As any clause preventing

<sup>150</sup> See *Swain v Mewburn* (Unreported, Full Court of the Supreme Court of Western Australia, Rowland, Franklyn and Wallwork JJ, 3 March 1994) 9, 12 (Rowland J) ('*Swain*').

<sup>151</sup> See *Re Oldham* [1925] Ch 75, 86–8 (Astbury J); *Birmingham* (1937) 57 CLR 666, 683, 690 (Dixon J).

<sup>152</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [14] (Winneke P), quoting *Birmingham* (1937) 57 CLR 666, 681 (Dixon J).

<sup>153</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [11] (Winneke P).

<sup>154</sup> *Ibid* [15] (Winneke P) (citations omitted).

<sup>155</sup> Burgess, above n 114, 232–3; T G Youdan, 'The Mutual Wills Doctrine' (1979) 29 *University of Toronto Law Journal* 390, 404–5; Rickett, above n 4, 185; Cassidy, above n 4, 32–4.

<sup>156</sup> *In the Estate of Heys* [1914] P 192, 197 (Evans P). Wills are by their nature revocable: see *Dufour* (1799) 2 Harg Jurid Arg 304, 309 (Lord Camden LC); *Hobson v Blackburn* (1822) 1 Add 274, 277–9; 162 ER 96, 97 (Sir John Nicholl); *Stone v Hoskins* [1905] P 194, 197 (Barnes P); *Birmingham* (1937) 57 CLR 666, 674 (Latham CJ); *Re Green* [1951] Ch 148, 155 (Vaisey J); *Re Dale* [1994] Ch 31, 41 (Morritt J); *Healey* (Unreported, English High Court of Justice, Donaldson J, 25 April 2002) [8].

revocation is void, to suggest that it is necessary under the mutual wills doctrine that the parties agree not to revoke their wills is illogical.

Thus irrevocability should not be seen as a prerequisite for mutual wills. Rather, revocation merely provides an example of how the mutual wills agreement may be breached. This is supported by the fact that mutual wills may be enforced by equity even where there is no breach of the agreement, much less a revocation of the mutual wills. Thus in *Re Hagger*<sup>157</sup> the mutual wills agreement was acknowledged and the only question was whether a particular beneficiary had an interest. Similarly, in *Re Green*<sup>158</sup> the only question was the extent of the property governed by the mutual wills. In both cases irrevocability was not an issue.

The requirement as to irrevocability is peculiar given that mutual wills may be breached by acts other than revocation. A breach may arise by the surviving testator gifting the trust property<sup>159</sup> or through an imperfect disposition under the surviving testator's will.<sup>160</sup> If the key to mutual wills is their agreed irrevocability, in these cases the agreement would not have been breached. However, the courts clearly recognise that conduct other than revoking the mutual wills may effect a breach in equity.<sup>161</sup>

Equally, if an agreement not to revoke the wills was essential, the revocation of a mutual will and the subsequent execution of another will largely in conformity with the agreement for mutual wills or the revocation of the will(s) by operation of law upon remarriage, would constitute a breach of the mutual wills agreement. However, the courts have held that such revocation does not breach the mutual wills agreement.<sup>162</sup>

Moreover, placing emphasis on the irrevocability of the surviving testator's will does not accord with the fact that the beneficiaries take under the terms of a trust that is operative when the deceased testator dies, rather than under the terms of the surviving testator's will.<sup>163</sup> Accordingly, beneficiaries who predecease the surviving testator nevertheless obtain a vested interest as at the deceased testator's death.<sup>164</sup> Given that the operative factor is the death of the deceased

<sup>157</sup> [1930] 2 Ch 190.

<sup>158</sup> [1951] Ch 148.

<sup>159</sup> *Gregor v Kemp* (1722) 3 Swans 482, 482; 36 ER 926, 926 (Lord Macclesfield LC); *Re Hagger* [1930] 2 Ch 190, 195 (Clauson J); *Birmingham* (1937) 57 CLR 666, 689, 690 (Dixon J); *Schaefer v Schuhmann* [1972] AC 572, 599 (Lord Simon); *Re Cleaver* [1981] 2 All ER 1018, 1023–4 (Nourse J); *Healey* (Unreported, English High Court of Justice, Donaldson J, 25 April 2002) [13], [14].

<sup>160</sup> *Re Gardner* [1920] 2 Ch 523, 530–1 (Lord Sterndale MR); *Re Gardner* [1923] 2 Ch 230, 233 (Romer J).

<sup>161</sup> See the cases cited in above n 159.

<sup>162</sup> *Re Marsland* [1939] Ch 820, 826 (Greene MR); *Re Kerr* [1948] 3 DLR 668, 679 (Schroeder J); *Re Green* [1951] Ch 148, 155 (Vaisey J); *Clausen v Denson* [1958] NZLR 572, 576–7 (McGregor J).

<sup>163</sup> *Re Gardner* [1920] 2 Ch 523, 528–31 (Lord Sterndale MR); *Re Gardner* [1923] 2 Ch 230, 233, 235 (Romer J); *Re Hagger* [1930] 2 Ch 190, 195–6 (Clauson J); *Re Gillespie* [1969] 3 DLR (3d) 317, 321–2 (Kelly JA).

<sup>164</sup> *Re Gardner* [1920] 2 Ch 523, 528–31 (Lord Sterndale MR); *Re Gardner* [1923] 2 Ch 230, 233, 235 (Romer J); *Re Hagger* [1930] 2 Ch 190, 195 (Clauson J).

testator, why should an agreement not to revoke the wills be an essential element of a mutual wills agreement?

It is submitted that the better view is that it is the agreement to execute the wills, rather than an agreement not to revoke the wills, that is the crux of a mutual wills agreement. To this end, in *Pratt v Johnson*, Locke J held that the question was not whether there was an agreement not to make a disposition of property contrary to the terms of the mutual wills, but whether there was an agreement between the testators that their property should devolve to the said beneficiaries.<sup>165</sup>

## 2 Resolution Not to Revoke

As discussed above, while Harper J at first instance repeatedly required the appellant to prove a contract between his parents not to revoke their wills, the Court of Appeal's view is less clear.<sup>166</sup> To the extent that the approaches of Harper J and the Court of Appeal required a contract in law, it is submitted that they were erroneous as mutual wills are enforced in equity. Thus if an agreement as to irrevocability is required, it need not be a contract at law.

What is distinct from the first ground of appeal is the appellant's suggestion that Harper J required an 'express' agreement between the testators not to revoke their wills. There were two related submissions in this regard. First, that Harper J erred by requiring proof that the testators actually 'resolved never to alter the dispositions they then made, no matter how much their circumstances might change.'<sup>167</sup> The Court of Appeal did not specifically address this issue. However, it is possibly implicit in the Court of Appeal's judgment that it agreed with Harper J given it ultimately concluded that Harper J did not misdirect himself.

It is submitted that Harper J erred by requiring the appellant to prove that the testators actually resolved not to revoke the mutual wills. As stated in *Swain*, the issue of irrevocability does not have to be actually considered by the testators where their circumstances, such as age and years of marriage, indicate that revocation of the wills would not be contemplated.<sup>168</sup> In *Swain*, the Court rejected the requirement for 'an express agreement' not to revoke the wills and held that the issue is: 'what would the parties have agreed at the time the agreement was entered into had they considered the question of whether the agreement evidenced by their mutual wills would be irrevocable.'<sup>169</sup> The Court held that the testators' ages (in their fifties) and their period of marriage (almost 20 years) indicated that: (i) neither would have contemplated the other revoking his or her will; and (ii) had they been asked, they would have agreed that their wills were irrevocable.<sup>170</sup>

In effect, and flowing from the second aspect of the Court's finding in *Swain*, the agreement not to revoke the wills is implied from the ages and circumstances

<sup>165</sup> [1959] SCR 102, 106–7. Cf *Re Cleaver* [1981] 2 All ER 1018, 1024 (Nourse J).

<sup>166</sup> See above Part III(B).

<sup>167</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [24].

<sup>168</sup> (Unreported, Full Court of the Supreme Court of Western Australia, Rowland, Franklyn and Wallwork JJ, 3 March 1994) 9, 12 (Rowland J).

<sup>169</sup> *Ibid* 12.

<sup>170</sup> *Ibid* 9, 12.

of the testators.<sup>171</sup> This echoes Mason P's sentiments in *Baird*, where his Honour acknowledged that 'the family circumstances of the couple' and 'the fact that the couple were at least middle-aged' constituted evidence from which an agreement for mutual wills might be inferred.<sup>172</sup> Mason P added that mutual wills 'might be appropriate in the case of an elderly married couple wishing to settle their affairs in the same way before they die'.<sup>173</sup>

At first instance in *Osborne v Osborne*, the appellant gave evidence that his parents were aware that their agreement would not come into effect until both had died.<sup>174</sup> However, the word 'revocation' was probably not used by them because, given the importance they placed on what they wanted to happen to their estates and their reliance upon each other after so many years of marriage, revocation was never contemplated.<sup>175</sup> Equally, the testators had not discussed remarriage if one of them predeceased the other because 'it wouldn't have been contemplated'.<sup>176</sup>

The testators were married in 1938 and thus had been married for 47 years when the wills of March 1985 were executed. At the time of executing the mutual wills, Winifred was 79 and Frederick was 73. Thus, the facts in *Osborne* that indicated that revocation of the wills was not contemplated by the testators were stronger than those in *Swain*. While in *Swain* the testators were in their fifties, in *Osborne* they were in their seventies. While in *Swain* the testators had been married for nearly 20 years, in *Osborne* they had been married for nearly 50 years. As in *Swain*, given the ages of the testators, their years of marriage and the fact that there was no prospect of further children, it is arguable that neither of the testators in *Osborne* would have contemplated the other revoking his or her will.<sup>177</sup>

These facts explain why Harper J found an absence of any express resolution by the testators not to revoke their wills. They also indicate that, had the testators been asked 'at the time the agreement was entered into ... whether the agreement evidenced by their mutual wills would be irrevocable',<sup>178</sup> they would have

<sup>171</sup> Cf Cassidy, above n 4, 34.

<sup>172</sup> [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [9]. See also *Re Cleaver* [1981] 2 All ER 1018 where the testators were in their seventies when they executed the mutual wills. In that case there was no evidence of an express agreement not to revoke the wills. Cf Rickett, above n 4, 184.

<sup>173</sup> *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [17].

<sup>174</sup> Transcript of Proceedings, *Osborne v Osborne* (Supreme Court of Victoria, Harper J, 18 February 2000) 117–18.

<sup>175</sup> Transcript of Proceedings, *Osborne v Osborne* (Supreme Court of Victoria, Harper J, 17 February 2000) 69.

<sup>176</sup> Transcript of Proceedings, *Osborne v Osborne* (Supreme Court of Victoria, Harper J, 18 February 2000) 119.

<sup>177</sup> At trial, counsel for the respondents in *Osborne* submitted that given the testators' ages it was 'a well and true possibility, if not a probability' they would remarry. Transcript of Proceedings, *Osborne v Osborne* (Supreme Court of Victoria, Harper J, 21 February 2000) 258. It is submitted that such an assertion not only flies in the face of *Swain*, but also commonsense. Persons executing simultaneous and identical wills in their mid- and late-seventies would almost never contemplate having further children or the survivor remarrying and, pursuant to such remarriage, breaching the mutual wills agreement by revoking his or her will.

<sup>178</sup> *Swain* (Unreported, Full Court of the Supreme Court of Western Australia, Rowland, Franklyn and Wallwork JJ, 3 March 1994) 12 (Rowland J).

answered in the affirmative. It is therefore submitted that the circumstances of the testators should have provided a sufficient basis for Harper J to imply the relevant agreement for mutual wills, including the agreement not to revoke the wills.

### 3 *Express or Implied Irrevocability*

The second part of the appellant's submissions in regard to this ground of appeal was that Harper J erred by requiring an express contract not to revoke the wills, when irrevocability is implied in equity. While Harper J clearly required a contract not to revoke the wills,<sup>179</sup> it is not explicit in his Honour's judgment that the agreement must be express. Harper J examined whether a consciousness on the part of Frederick of his obligation to hold property for his sons in accordance with the terms of the March 1985 wills should be inferred from the events that occurred between May 1990 and February 1995.<sup>180</sup> However, his Honour did not consider the possibility of inferring an agreement not to revoke wills from the key facts identified by the case law, such as the agreement to execute the wills or the ages and circumstances of the testators, both established on the evidence.<sup>181</sup> In regard to the former basis for implying irrevocability, Harper J quoted *Birmingham* where Dixon J recognised that, inter alia, the agreement not to revoke the wills is 'implied' from the express agreement to execute the wills.<sup>182</sup> However, in no other part of the judgment did Harper J acknowledge that an agreement not to revoke the wills may be so implied and his Honour did not apply that principle to the facts of the case.

Further, it can be inferred that Harper J required an express contract not to revoke the wills, both from the requirement that the testators actually resolve not to revoke the wills<sup>183</sup> and the statement that there was 'simply no evidence' as to irrevocability.<sup>184</sup> In fact, it will be seen below that courts have inferred agreements not to revoke wills from similar facts. To say there was 'simply no evidence' indicates a dismissal of those facts as irrelevant to implying irrevocability in equity.

While the Court of Appeal asserted that Harper J did not misdirect himself,<sup>185</sup> and thereby suggested that it agreed with his Honour's judgment in this regard, it is submitted that the better view is that the Court of Appeal simply did not appreciate Harper J's error. Indeed, while the Court did not specifically address the issue of whether the contract not to revoke had to be express, it stated that there must be 'an implied agreement' not to revoke the wills.<sup>186</sup> However, this may be too generous an interpretation of the Court of Appeal's judgment. The

<sup>179</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [20], [22].

<sup>180</sup> *Ibid* [25]–[34].

<sup>181</sup> *Ibid* [1], [4].

<sup>182</sup> *Birmingham* (1937) 57 CLR 666, 682–3, quoted in *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [19].

<sup>183</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [24].

<sup>184</sup> *Ibid* [22].

<sup>185</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

<sup>186</sup> *Ibid* [14], [15] (Winneke P).

Court did not appear to accept the ability to imply the agreement not to revoke the wills from factors such as, inter alia, the agreement to execute the wills and the ages and circumstances of the testators. If this is a correct view of the Court of Appeal's judgment, it is submitted that it too erred.

Equity does not require an express resolution by the testators as to irrevocability. Rather, this term is implied.<sup>187</sup> The need for an express agreement not to revoke the wills was specifically rejected by McPherson J in *Bigg*.<sup>188</sup> After surveying the relevant case law, McPherson J noted that in some cases the courts required 'strict proof of an express contract' not to revoke, while in others it was held 'that it may be implied or inferred'.<sup>189</sup> The Court of Appeal quoted this passage from McPherson J's judgment,<sup>190</sup> but failed to quote his conclusion on the point. McPherson J preferred the view of Dixon J in *Birmingham* that:

His obligation not to revoke his will during her life without notice to her is to be implied. For I think the express promise should be understood as meaning that if she died leaving her will unrevoked then he would not revoke his. *But the agreement really assumes that neither party will alter his or her will without the knowledge of the other.*<sup>191</sup>

McPherson J concluded that Dixon J's approach was to be preferred because '[t]here is no point in agreeing to make corresponding wills if the parties to such an agreement are free to revoke immediately after executing them'.<sup>192</sup>

Although Harper J quoted the passage from Dixon J's judgment in *Birmingham*,<sup>193</sup> it appears his Honour ultimately required an express contract not to revoke. The Court of Appeal also quoted this paragraph of Dixon J's judgment,<sup>194</sup> but peculiarly deleted from its quotation the key sentence from the judgment, namely that '[h]is obligation not to revoke his will during her life without notice to her is to be implied.' The failure to quote the passage in full must have been deliberate on the part of Winneke P and thus would indicate that the Court of Appeal disagreed with Dixon J's statement that the agreement not to revoke the wills is implied from the agreement to execute the wills.

<sup>187</sup> *Re Oldham* [1925] Ch 75, 86–8 (Astbury J); *Birmingham* (1937) 57 CLR 666, 683, 690 (Dixon J); *Bigg* [1990] 2 Qd R 11, 13–15 (McPherson J). See also *Aslan* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Priestley JA, 16 May 1995) 6–7 (Gleeson CJ) regarding the implied nature of the condition of irrevocability. See also *Dufour* (1799) 2 Harg Jurid Arg 304, 310 (Lord Camden LC); *Lord Walpole* (1799) 2 Harg Jurid Arg 272, 285 (Lord Loughborough LC); *Hudson v Gray* (1927) 39 CLR 473, 485 (Isaacs J); *Re Gillespie* [1969] 3 DLR (3d) 317, 321 (Kelly JA); *Re Cleaver* [1981] 2 All ER 1018, 1023–4; (Nourse J); *Low* (1995) 14 WAR 35, 42–3 (Master Adams); *Swain* (Unreported, Full Court of the Supreme Court of Western Australia, Rowland, Franklyn and Wallwork JJ, 3 March 1994) 10, 14 (Rowland J); *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [6]–[8] (Mason P), [66], [72] (Giles JA).

<sup>188</sup> [1990] 2 Qd R 11.

<sup>189</sup> *Ibid* 14.

<sup>190</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

<sup>191</sup> (1937) 57 CLR 666, 683 (emphasis added), approved in *Bigg* [1990] 2 Qd R 11, 14 (McPherson J).

<sup>192</sup> *Bigg* [1990] 2 Qd R 11, 14. See also at 13, 15.

<sup>193</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [19].

<sup>194</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [18] (Winneke P).

This view of the Court of Appeal's judgment is also supported by Winneke P's statement that, apart from the fact that the wills were identical and executed on the same day, 'the evidence upon which his Honour was asked to infer the existence of mutual wills with an implied term not to revoke without notice was meagre and speculative'.<sup>195</sup> Given Harper J's acceptance of the testators' agreement to execute mutual wills, from this statement and its ultimate finding against the appellant, it is implicit that the Court of Appeal was of the view that the agreement not to revoke the wills could not be implied from such facts.

If this analysis correctly interprets the judgments, it is submitted that they were clearly erroneous. It is well established that the agreement not to revoke the wills may be implied from, *inter alia*, the agreement to execute the wills.<sup>196</sup> To reiterate the sentiments expressed in *Birmingham* and *Bigg*, this is because the agreement to execute the wills assumes that they will not be revoked as revocation would render the agreement pointless. For this reason, in *Low* the Court said that it could dispose of 'quite shortly' the submission 'that even if the court found the existence of an agreement to make mutual wills, there was no agreement between the [testators] that they would not revoke their wills',<sup>197</sup> by simply quoting Isaacs J in *Hudson v Gray*:

The wills were necessarily separate instruments, but their dual execution was one transaction springing out of a mutual agreement that was manifestly intended to be reciprocally carried out and faithfully adhered to as a binding obligation. To contemplate either or both of the parties afterwards exercising independent testamentary disposal contrary to the arrangement, would be to contemplate defeating the bargain.<sup>198</sup>

Similarly, in *Re Gillespie*, Kelly JA held that an agreement to execute mutual wills 'by necessary implication embodied an agreement that the disposition settled upon should not be revoked as revocation by either party would completely frustrate the scheme upon which they had agreed'.<sup>199</sup>

The seminal case where 'the reason for implying a condition that neither party should revoke his or her will without notice to the other'<sup>200</sup> was explained, namely *Lord Walpole*,<sup>201</sup> dates back to the late 1700s. After finding that an agreement for mutual wills was inferable from the facts of that case, Lord Loughborough LC continued:

Both of the instruments being equally revocable, it is plain, that the contracting parties did not mean absolutely to exclude themselves from making new arrangements. Had that been their meaning, instead of mutual wills, which are in their nature revocable, they would have made mutual irrevocable deeds of settlement. *On the other hand, it is in my opinion as plain, that the two contracting parties did not mean that one should have more liberty of revocation than*

<sup>195</sup> *Ibid* [11] (Winneke P).

<sup>196</sup> See the cases cited in above n 8.

<sup>197</sup> *Low* (1995) 14 WAR 35, 42 (Master Adams).

<sup>198</sup> *Hudson v Gray* (1927) 39 CLR 473, 485.

<sup>199</sup> [1969] 3 DLR (3d) 317, 321.

<sup>200</sup> *Birmingham* (1937) 57 CLR 666, 684 (Dixon J).

<sup>201</sup> (1797) 3 Ves 402; 30 ER 1076; (1799) 2 Harg Jurid Arg 272.

*the other. Consequently they must have intended, that during their joint lives neither should revoke secretly and clandestinely; and that after the death of one without revoking the right of revoking should cease to the other.* Upon any other footing, it would have been a transaction of mutual wills, with a licence to both parties to impose upon each other at pleasure; and instead of a fair honorable and equal bargain, it would have been one of a kind the most hollow deceptive and ensnaring.<sup>202</sup>

In conclusion, Harper J accepted that the testators had agreed that they would revoke their former wills and execute new mutual wills leaving all their real and personal property equally to their two sons. It is submitted that an agreement not to revoke the wills should therefore have been inferred to ensure the efficacy of the underlying agreement to execute mutual wills.

#### 4 *Simultaneous Execution of Identical Wills*

Another aspect of this issue is whether mutual wills, including the agreement not to revoke those wills, may be inferred from the simultaneous execution of identical wills. Harper J did not specifically consider this matter. However, in the course of his Honour's judgment, he quoted a passage from Latham CJ in *Birmingham* where his Honour stated:

The mere fact that two persons make what may be called corresponding wills in the sense that the existence of each will is naturally explained by the existence of the other will is not sufficient to establish a binding agreement not to revoke wills so made ...<sup>203</sup>

The Court of Appeal expressly stated that 'making identical wills will not, of itself, establish an implied agreement not to revoke.'<sup>204</sup> This was said to be because 'many husbands and wives make corresponding wills "by agreement" without binding themselves not to revoke them.'<sup>205</sup> However, the Court of Appeal did not appear to deny the relevance of such facts to proving mutual wills. To this end, the Court of Appeal stated that the only relevant evidence of mutual wills in *Osborne* was the fact that 'the wills were drawn in identical terms and on the same day'.<sup>206</sup>

This aspect of the Court's judgment pertains to two related areas of the law regarding mutual wills: (i) the relevance of the simultaneous execution of identical wills to proving mutual wills; and (ii) the ability to imply mutual wills from the terms of the wills.

As to the simultaneous execution of identical wills, two points can be made. First, the Court of Appeal correctly acknowledged the evidentiary value of the

<sup>202</sup> (1799) 2 Harg Jurid Arg 272, 285.

<sup>203</sup> (1937) 57 CLR 666, 675. Both Harper J and the Court of Appeal quoted this passage: see *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [14]; *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [7] (Winneke P).

<sup>204</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [15] (Winneke P) (citations omitted).

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid* [11] (Winneke P).



simultaneous execution of identical wills.<sup>207</sup> In *Re Oldham*, the Court said: ‘Of course it is a strong thing that these two parties came together, agreed to make their wills in identical terms and in fact so made them.’<sup>208</sup> Similarly, in *Re Hagger*, Clauson J declared:

It is perfectly clear that when the husband and wife made this joint will they contemplated that the property which they were pooling would all go to the same beneficiaries ... if I fail to give effect to this ... I shall be departing from the intention of the parties. I am satisfied that the law does not compel me to depart from that intention ...<sup>209</sup>

In the leading Australian decision, Gavan Duffy J held at first instance in *Renfrew v Birmingham* ‘that the very making of the two wills suggests an arrangement and, although there is little or no evidence other than that of interested parties, I am prepared to find there was such an arrangement.’<sup>210</sup> His Honour went on to explain that the simultaneous execution of the wills is relevant, inter alia, in so far as it ensures that the parties to the arrangement knew the content of each other’s wills.<sup>211</sup>

It is not a necessary consequence of these propositions of law that Latham CJ erred in making the above statement in *Birmingham*, quoted by both Harper J and the Court of Appeal. The word ‘mere’ in Latham CJ’s statement is important. As noted in *Reardon v Mewburn*, while Latham CJ’s statement suggests that

the mere simultaneity of the wills and the similarity of their terms are not enough taken by themselves ... that is not to say that those factors may not be taken into account, with other factors, in determining whether the necessary agreement has been established ...<sup>212</sup>

It must also be recalled that in *Birmingham* the survivor had been conferred an absolute interest in the deceased testator’s property.<sup>213</sup> As discussed below, in such cases the simultaneous execution of the wills is not in itself indicative of mutual wills as the conferral of an absolute interest on the survivor is inconsistent with the obligations that stem from mutual wills.<sup>214</sup>

Second, the Court of Appeal in *Osborne* echoed the view that the simultaneous execution of identical wills will not of itself establish an agreement not to revoke

<sup>207</sup> Ibid. See *Lord Walpole* (1797) 3 Ves 402, 418; 30 ER 1076, 1084 (Lord Loughborough LC); *Re Oldham* [1925] Ch 75, 87 (Astbury J); *Szabo v Boros* (1967) 64 DLR (2d) 48, 49–50 (Davey CJBC); *Re Gillespie* [1969] 3 DLR (3d) 317, 319 (Kelly JA); *Re Cleaver* [1981] 2 All ER 1018, 1022–3 (Nourse J); *Reardon v Mewburn* (Unreported, Supreme Court of Western Australia, White J, 26 January 1993) 17; *Low* (1995) 14 WAR 35, 40, 41 (Master Adams); *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [27], [30] (Handley JA), [71], [72] (Giles JA). Cf Cope, above n 4, 531–2; Cassidy, above n 4, 35–6.

<sup>208</sup> [1925] Ch 75, 87 (Astbury J). Similarly, in *Szabo v Boros* (1967) 64 DLR (2d) 48, 50, Davey CJBC said that ‘the preparation and concurrent execution of the wills are the primary evidence of the tenants’ intention’.

<sup>209</sup> [1930] 2 Ch 190, 194.

<sup>210</sup> [1937] VLR 180, 184.

<sup>211</sup> Ibid 185.

<sup>212</sup> (Unreported, Supreme Court of Western Australia, White J, 26 January 1993) 18 (citations omitted), citing *Re Cleaver* [1981] 2 All ER 1018, 1023 (Nourse J).

<sup>213</sup> (1937) 57 CLR 666, 681 (Dixon J). Moreover, the wills were not in fact executed simultaneously: at 681 (Dixon J).

<sup>214</sup> See below Part IV(C)(5).

the wills.<sup>215</sup> However, this is not always true. An ‘exception’ to this general rule arises when the terms of the wills themselves evidence the agreement for mutual wills. Thus, while Handley JA noted in *Baird* that ‘mutual wills in reciprocal form which do not in terms evidence such an agreement have never been sufficient on their own to establish a binding contract’,<sup>216</sup> and Giles JA stated that ‘the fact that there are corresponding wills will normally not be sufficient of itself’,<sup>217</sup> it is implicit in these statements that, while not common, the mere terms of the simultaneously executed wills may in certain cases evidence an agreement for mutual wills. To this end, Handley JA noted in the previous sentence that ‘[t]he wills themselves may evidence the making of a contract’.<sup>218</sup> If, however, the wills themselves are not explicable of an agreement not to revoke the wills, but rather can be otherwise explained by a non-binding consensus between the spouses, then the general rule will apply and the mere simultaneous execution of the wills will not suffice.<sup>219</sup>

In conclusion, there are occasions when mutual wills have been established on the mere execution of identical wills. Thus, while at first instance in *Rear-don v Mewburn* the Court concluded that the subject wills were mutual wills on the basis of ‘the similarity of the terms of the two wills’ coupled with certain affidavit evidence,<sup>220</sup> on appeal the Full Court held the subject wills to be mutual wills purely on their simultaneous execution to the same effect.<sup>221</sup>

At first instance in *Osborne v Osborne*, Harper J accepted that the testators simultaneously executed identical wills. In particular, his Honour asserted that ‘[c]oincidence cannot explain how two people would have made relevantly identical wills before the same witnesses on the same day’ and that it was ‘clear enough that some consensual arrangement’ led to the simultaneous execution of the identical wills.<sup>222</sup>

## 5 Terms of the Wills

As to the second aspect of the Court of Appeal’s comments on this point, particularly the statement that many couples execute corresponding wills without intending them to be binding,<sup>223</sup> an agreement for mutual wills, including an agreement not to revoke those wills, may be implied from the mere terms of the wills.<sup>224</sup> In *Dufour*, the Court found that ‘[t]he instrument itself is the evidence of

<sup>215</sup> See *Birmingham* (1937) 57 CLR 666, 675 (Latham CJ); *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [6], [7] (Mason P).

<sup>216</sup> [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [30].

<sup>217</sup> *Ibid* [71].

<sup>218</sup> *Ibid* [30].

<sup>219</sup> *Ibid* [27] (Handley JA), [72] (Giles JA). See also *Re Oldham* [1925] Ch 75, 87–8 (Astbury J).

<sup>220</sup> (Unreported, Supreme Court of Western Australia, White J, 26 January 1993) 19.

<sup>221</sup> *Swain* (Unreported, Full Court of the Supreme Court of Western Australia, Rowland, Franklyn and Wallwork JJ, 3 March 1994) 11, 14 (Rowland J).

<sup>222</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [4].

<sup>223</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [15] (Winneke P).

<sup>224</sup> *Dufour* (1799) 2 Harg Jurid Arg 304, 310 (Lord Camden LC); *Re Hagger* [1930] 2 Ch 190, 194 (Clouston J); *Re Dale* [1994] Ch 31, 42 (Morritt J); *Birmingham* (1937) 57 CLR 666, 683 (Dixon J); *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [30] (Handley JA), [71], [72] (Giles JA); *Healey* (Unreported, English High Court

the agreement'.<sup>225</sup> The Court held the will to be a mutual will simply on the basis of its terms (which conferred only a life interest to the surviving testator).<sup>226</sup> This view has also been adopted in the leading Australian authority, *Birmingham*, in which Dixon J quoted with approval the statement in *Lord Walpole* that the 'mutual pledging ... is inferable from the two instruments themselves ... The evidence of the engagement is the thing itself.'<sup>227</sup>

The terms of wills themselves will suffice to prove mutual wills particularly where they confer on the survivor less than an absolute interest in the deceased testator's estate.<sup>228</sup> This was recognised by Dixon J in *Birmingham* where his Honour held that the agreement may be inferred where, as in *Dufour*, the survivor is granted only a life estate in the property.<sup>229</sup> Similarly, Hardingham, Neave and Ford state:

Where the wills in similar form indicate that the survivor is not to enjoy an absolute interest in the property but some lesser interest akin to a life interest, there may be more warrant for implying that each party agreed not to revoke without the others knowledge.<sup>230</sup>

This is because the wills are only explicable by an agreement for mutual wills. As Astbury J explained in *Re Oldham*:

Of course it is a strong thing that these two parties came together, agreed to make their wills in identical terms and in fact so made them. But that does not go nearly far enough. If the spouses intended to do what the plaintiff suggests, it is difficult to see why the mutual wills gave the survivor an absolute interest in the whole of the property of the one who died first. ... Could these parties have acted as they did with any other object or intent than the plaintiff asserts? It is impossible to deny that they could.<sup>231</sup>

Correspondingly, the courts have also recognised that a conferral of an absolute interest upon the survivor is prima facie inconsistent with an obligation to hold that property for another under an agreement for mutual wills.<sup>232</sup> As Mason P explained in *Baird*, where 'the primary and operative gift of the entire

of Justice, Donaldson J, 25 April 2002) [9]. Cf L A Sheridan, 'The Floating Trust: Mutual Wills' (1977) 15 *Alberta Law Review* 211, 214; Hardingham, Neave and Ford, above n 108, [1216]; Cassidy, above n 4, 8–9, 37–8, 40–1.

<sup>225</sup> (1799) 2 Harg Jurid Arg 304, 310 (Lord Camden LC), quoted, for example, in *Re Dale* [1994] Ch 31, 42 (Morritt J).

<sup>226</sup> *Dufour* (1799) 2 Harg Jurid Arg 304, 305 (Lord Camden LC).

<sup>227</sup> *Lord Walpole* (1799) 2 Harg Jurid Arg 272, 285 (Lord Loughborough LC), quoted in *Birmingham* (1937) 57 CLR 666, 683 (Dixon J).

<sup>228</sup> *Dufour* (1769) Dick 419; 21 ER 332; (1799) 2 Harg Jurid Arg 304; *Birmingham* (1937) 57 CLR 666, 690 (Dixon J); Hardingham, Neave and Ford, above n 108, [1216]; Cassidy, above n 4, 8–9, 40–2.

<sup>229</sup> (1937) 57 CLR 666, 690 (Dixon J).

<sup>230</sup> Hardingham, Neave and Ford, above n 108, [1216].

<sup>231</sup> [1925] Ch 75, 87–8 (Astbury J). This passage was quoted by Harper J but it was not applied to the particular facts of the case: see *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [16].

<sup>232</sup> See *Re Oldham* [1925] Ch 75, 87–8 (Astbury J); *Birmingham* (1937) 57 CLR 666, 689 (Dixon J); *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [10] (Mason P). Cf Hardingham, Neave and Ford, above n 108, [1216]; Cassidy, above n 4, 8, 42–3.

estate absolutely' is in favour of the survivor, '[t]he main concern of each was for the other,' rather than making provision for third party beneficiaries under mutual wills.<sup>233</sup> According to the Court in *Baird*, such wills are consistent with the spouses making a non-binding arrangement to execute corresponding wills, rather than binding mutual wills that confer benefits upon third party beneficiaries.<sup>234</sup> Consequently, while not impossible, it is very difficult to establish a case for mutual wills in cases where the surviving testator is bequeathed an absolute interest in the deceased testator's estate.<sup>235</sup>

In *Osborne*, the latter point was acknowledged by Buchanan JA who reiterated that in *Birmingham* one of the challenges to proving the case to the 'satisfaction on the balance of probabilities was the inconsistency between conferring an absolute estate and limiting the beneficiary's ability to deal with that estate.'<sup>236</sup> Buchanan JA also acknowledged that '[i]n certain cases the form taken by identical wills may seem inexplicable unless an agreement for mutual wills is postulated' but '[t]hat is not the position in this case.'<sup>237</sup> One can only ask why not. In *Osborne*, the wills executed on 24 March 1985 did not confer on the survivor an absolute interest. In fact, the surviving testator was not conferred any benefit whatsoever under the deceased testator's will. The beneficiaries under the deceased testator's will were her sons (the appellant and his brother). If we were to apply the *Re Oldham* test, it is submitted that the answer should have been 'no', 'these parties [could not] have acted as they did with any other object or intent than the plaintiff asserts'.<sup>238</sup> How else could the peculiar terms of the wills, conferring no benefit on the surviving spouse, be explained? Thus, contrary to Buchanan JA's conclusion, it is submitted that the wills themselves were explicable of the agreement for mutual wills, including the agreement not to revoke the wills.

A final comment should be made in regard to Harper J's statement, reiterated by the Court of Appeal, that

it is as well to remember that many couples join in making wills which reflect their joint view of the proper disposition of their property; but in doing so they do not bind themselves not to revoke their wills nor indeed intend to undertake or impose any other kind of binding obligation.<sup>239</sup>

Contrary to Buchanan JA's assertion that '[i]t is hardly surprising that a husband and wife should make wills leaving their estates to their children ... and execute

<sup>233</sup> [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [10].

<sup>234</sup> *Ibid* [8], [10] (Mason P), [27] (Handley JA), [72] (Giles JA).

<sup>235</sup> See, eg, *Birmingham* (1937) 57 CLR 666; *Re Oldham* [1925] Ch 75; *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000).

<sup>236</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [28] (citations omitted). See also *Re Oldham* [1925] Ch 75, 87–8 (Astbury J); *Baird* [2000] NSWCA 253 (Unreported, Mason P, Handley and Giles JJA, 11 September 2000) [10] (Mason P).

<sup>237</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [29].

<sup>238</sup> [1925] Ch 75, 87–8 (Astbury J).

<sup>239</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [21]. See also *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [15] (Winneke P).

them on the same day’,<sup>240</sup> ‘many couples’ do not make wills like that in *Osborne* that confer less than an absolute interest on the survivor. ‘Many couples’ execute wills that confer upon the survivor an absolute interest and such wills are not explicable of mutual wills. But where, as in *Osborne*, the terms of the wills are peculiar, the simultaneous execution of the wills in such terms may be sufficient to prove that they are mutual wills.

## V FRAUDULENT INDUCEMENT

### A *The Court at First Instance*

Harper J declared that the appellant had to establish a case in both equity and contract law.<sup>241</sup> His Honour asserted that a breach of the mutual wills agreement by Frederick did not suffice to constitute a breach in equity as ‘it is of course clear that a breach of contract without more does not amount to fraud.’<sup>242</sup> Rather, it was said that the appellant had to prove that Frederick had fraudulently induced Winifred to execute her will of 24 March 1985.<sup>243</sup> As there was no evidence that ‘she was induced by Frederick to do that which she otherwise would not have done’,<sup>244</sup> Harper J found ‘no evidence in any of this of any fraud perpetuated on Winifred by her husband. It follows that, even if the plaintiff could show a breach of a relevant contract, he cannot prove fraud’.<sup>245</sup>

### B *The Court of Appeal*

Winneke P made no comment on the appellant’s submissions that Harper J had erred by requiring proof that ‘Frederick had induced his wife “to do something which otherwise she would not have done”’; namely that he had practised a fraud upon her in 1985.<sup>246</sup> The appellant submitted that, contrary to Harper J’s statement, it was sufficient that the surviving testator breached the mutual wills agreement after the deceased testator died.<sup>247</sup> Winneke P held that Harper J’s comments were not essential to his Honour’s judgment, but rather provided an ‘alternative’ basis for rejecting the appellant’s claim.<sup>248</sup> While Winneke P

<sup>240</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [29].

<sup>241</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [35].

<sup>242</sup> *Ibid* [39].

<sup>243</sup> See *ibid* [38].

<sup>244</sup> *Ibid*.

<sup>245</sup> *Ibid* [38]–[39].

<sup>246</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [19]. Note that counsel for the respondents made no submissions on this ground of appeal.

<sup>247</sup> Citing *Dufour* (1769) Dick 419, 421; 21 ER 332, 333; (1799) 2 Harg Jurid Arg 304, 308, 310–11 (Lord Camden LC); *Lord Walpole* (1799) 2 Harg Jurid Arg 272, 294–5 (Lord Loughborough LC); *Re Hagger* [1930] 2 Ch 190, 195 (Clauson J); *Birmingham* (1937) 57 CLR 666, 682–3, 685–9 (Dixon J); *Bigg* [1990] 2 Qd R 11, 13, 16 (McPherson J); *Re Dale* [1994] Ch 31, 42, 48 (Morritt J); *Healey* (Unreported, English High Court of Justice, Donaldson J, 25 April 2002) [8]. Cf Burgess, above n 114, 236–7, 239–40; Cope, above n 4, 526, 528–30, 542–4; Cassidy, above n 4, 3–6.

<sup>248</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [19].

thereby stated that this aspect of Harper J's judgment was obiter, his Honour was careful to add that his comments should not be taken as an acceptance of Harper J's views.<sup>249</sup> Rather Winneke P stated that his Honour agreed with paragraphs 23–5 of Buchanan JA's judgment.<sup>250</sup>

Buchanan JA's judgment did not, however, specifically address this ground of appeal. The paragraphs to which Winneke P referred are essentially concerned with the last ground of appeal — whether the survivor must benefit under the will of the first testator to die.<sup>251</sup> However, Buchanan JA stated that

fraud in equity lies in the departure by the survivor from the agreement or understanding that caused the first testator to act in reliance upon the survivor abiding by the agreement or understanding. ... If both estates have been left to others, it may be more difficult to infer that each party was induced by the other's promise to act as he or she did.<sup>252</sup>

### C Evaluation

It is unfortunate that the Court of Appeal failed to comment on this ground of appeal specifically. Whilst the Court of Appeal stated that Harper J's comments were obiter, this is not necessarily the case. Harper J held that the appellant had to prove his case in both contract and equity and that even if the case was made in contract law, the appellant had failed to prove what equity required.<sup>253</sup> As a consequence, Harper J's discussion of how the appellant might have proven his case in equity was not merely an aside. Moreover, once it is accepted that mutual wills are proved and enforced in equity, not contract, the only important aspects of Harper J's reasons are those that pertain to why the appellant failed in equity. Thus whether the case in equity was satisfied becomes central to Harper J's decision.

Although Buchanan JA's judgment did not address this ground of appeal, the comments made in regard to the last ground of appeal might give some indication of his Honour's view. Buchanan JA stated that 'fraud in equity lies in the departure by the survivor from the agreement or understanding'.<sup>254</sup> This suggests that, contrary to Harper J, Buchanan JA correctly recognised that the fraud is not effected at the time of executing the wills, but rather after the death of the deceased testator when the surviving testator acts contrary to the terms of the mutual wills agreement. However, even in the context of this statement, Buchanan JA discussed the fraud in terms of causing the deceased testator to act in the manner agreed and, more specifically, his Honour referred to the need to 'infer that each party was induced by the other's promise to act as he or she did.'<sup>255</sup> The latter comments, whilst ambiguous, seem to echo those of Harper J

<sup>249</sup> Ibid.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid [22].

<sup>252</sup> Ibid [24].

<sup>253</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [35], [39].

<sup>254</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [24].

<sup>255</sup> Ibid.

in requiring the surviving testator to fraudulently induce the deceased testator to execute his or her will.

Ultimately, it is submitted that Harper J's assessment of the nature of the fraud required by equity for a breach of mutual wills is clearly erroneous. There is no need to prove a fraudulent inducement, it being sufficient that the surviving testator breaches the mutual wills agreement after the deceased testator dies.<sup>256</sup>

Harper J cited no authority for his views, noting only that '[t]here was no shortage of fraud in *Birmingham v Renfrew*.'<sup>257</sup> However, that case does not provide support for Harper J's statements as to the nature of the fraud required. There was no suggestion in the Court's judgment in *Birmingham* that: (i) its finding of mutual wills was based upon a legal conclusion that the surviving testator had fraudulently induced the deceased testator into executing her will; or (ii) that such a fraudulent inducement occurred as a matter of fact.<sup>258</sup> In fact, contrary to Harper J's statement that a breach of the mutual wills agreement 'without more does not amount to fraud',<sup>259</sup> the Court in *Birmingham* held that the equitable fraud arises out of the surviving testator's breach of the mutual wills agreement after the death of the deceased testator who died leaving his or her will unrevoked.<sup>260</sup>

Fraud, much less a fraudulent inducement to execute wills, is not a prerequisite for mutual wills. Rather, equitable fraud provides the rationale for equity intervening when mutual wills are breached.<sup>261</sup> This is exemplified by cases such as *Re Hagger* and *Re Green* (where there was no allegation of fraud) which simply concerned the question of whether a particular beneficiary had an interest<sup>262</sup> or the extent of the property governed by the mutual wills.<sup>263</sup>

Most importantly, for a breach of mutual wills there is no need to prove a fraudulent inducement to execute the wills, as stated by Harper J.<sup>264</sup> The fraud occurs not when the wills are executed, but when the deceased testator dies leaving his or her will unrevoked in the belief that the surviving testator would comply with the terms of the arrangement, and the latter subsequently attempts to dispose of his or her property otherwise than in accordance with the agreement.<sup>265</sup> Thus as stated in *Dufour*: 'The first that dies, carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract? Certainly not.'<sup>266</sup> Similarly, Dixon J in *Birmingham* declared that the breach of the mutual wills arises upon 'the death of one of the parties leaving a

<sup>256</sup> See the cases cited in above n 247.

<sup>257</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [37].

<sup>258</sup> See (1937) 57 CLR 666, 682-3, 685-9 (Dixon J).

<sup>259</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [39].

<sup>260</sup> (1937) 57 CLR 666, 676 (Latham CJ), 682-3, 685-9 (Dixon J).

<sup>261</sup> See the cases cited in above n 247.

<sup>262</sup> *Re Hagger* [1930] 2 Ch 190.

<sup>263</sup> *Re Green* [1951] Ch 148.

<sup>264</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [38].

<sup>265</sup> See the cases cited in above n 247.

<sup>266</sup> (1769) Dick 419, 421; 21 ER 332, 333 (Lord Camden LC) quoted in *Birmingham* (1937) 57 CLR 666, 676 (Latham CJ) and *Re Dale* [1994] Ch 31, 39 (Morritt J).

will in the form agreed. The result is a disposition of property made upon the faith of the survivor's carrying out the obligations of his contract.<sup>267</sup>

Thus, contrary to Harper J's statement, equity treats the breach of the mutual wills, without anything more, as fraud. This is because the fraud which causes equity to intervene is the surviving testator's breach of the agreement after the deceased testator is no longer in a position to revoke his or her will.<sup>268</sup> Thus in *Dufour*, the Court said:

he, that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. ... Good faith and conscience are the rules, by which every transaction is judged in this court; and there is not an instance to be found since the jurisdiction was established, where one man has ever been released from his engagement, after the other has performed his part.<sup>269</sup>

In *Lord Walpole*, the Court similarly declared that

entering into such engagements and then refusing to perform them having for that purpose been classed, as a fraud upon the testator or other party influenced in his conduct by the particular promise.<sup>270</sup>

Harper J's error in this regard may have flowed from the equally erroneous requirement of proving a contract in law for mutual wills. It appears that Harper J required the appellant to prove fraud in the strict manner required at law, rather than equitable fraud. In the context of mutual wills, courts have stressed that when they refer to the surviving testator acting fraudulently by breaching the mutual wills agreement they mean 'fraudulently (in the sense used in equity) [by rendering] his promise nugatory by making substantial gifts inter vivos or by way of specific legacy'.<sup>271</sup>

If Harper J had not erred in this manner and accepted that equitable fraud is established through the mere breach of the mutual wills agreement, there would have been a number of breaches proved on the facts in *Osborne*. Harper J found that the testators had agreed to, and did, revoke their wills of 10 May 1974 and execute the new wills of 24 March 1985 leaving all their real and personal property equally to their sons. His Honour found that Winifred died on 26 July 1985, without having revoked her will, and probate of the will was granted. Frederick revoked his will of 24 March 1985. To this end it should be noted that Harper J accepted that, if a term of the mutual wills agreement was that the wills were not to be revoked, then Frederick 'departed from that term when, in contemplation of his second marriage, he made a new will on 18 June 1990'.<sup>272</sup> Moreover, Harper J found a 'more radical departure' from the terms of the 24 March 1985 wills occurred on 13 February 1995 when Frederick executed a

<sup>267</sup> (1937) 57 CLR 666, 688.

<sup>268</sup> See the cases cited in above n 247.

<sup>269</sup> (1799) 2 Harg Jurid Arg 304, 310–11 (Lord Camden LC), quoted by the Court in *Re Dale* [1994] Ch 31, 42 (Morritt J).

<sup>270</sup> (1799) 2 Harg Jurid Arg 272, 294–5 (Lord Loughborough LC), quoted with approval by Dixon J in *Birmingham* (1937) 57 CLR 666, 685.

<sup>271</sup> *Schaefer v Schuhmann* [1972] AC 572, 599 (Lord Simon). Cf Burgess, above n 114, 233.

<sup>272</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [7].



further will and a deed of family arrangement and transferred his interest in the unit to Daisy.<sup>273</sup>

## VI SURVIVING TESTATOR BENEFITING UNDER THE DECEASED TESTATOR'S WILL

### A *The Court at First Instance*

Harper J said that, notwithstanding the existence of an agreement to execute mutual wills, he doubted that mutual wills could exist in a case such as *Osborne* where the 'will of the first testator to die did [not] make provision in favour of the surviving testator, who took under it.'<sup>274</sup> His Honour viewed the key authority providing that mutual wills could exist in such a situation, *Re Dale*,<sup>275</sup> as 'unconvincing',<sup>276</sup> and noted that 'in every other case of mutual or corresponding wills in which fraud has been found' there has been such a provision.<sup>277</sup>

### B *The Court of Appeal*

The appellant submitted that the reasoning in *Re Dale* was correct and that Harper J had erred by 'suggesting that the requisite fraud could not be proved unless the testator and testatrix had made wills disposing of their respective estates (or some portion of it) in favour of the other.'<sup>278</sup> In the course of the hearing of the appeal, Winneke P continually stated his agreement with Harper J on this point.<sup>279</sup> In his Honour's written reasons for judgment, however, this view was not reiterated. Winneke P made no comment on the appellant's submissions in this regard, viewing Harper J's comments as obiter.<sup>280</sup> His Honour added that his comments should not be taken as an acceptance of Harper J's views, but rather that he agreed with paragraphs 23–5 of Buchanan JA's judgment.<sup>281</sup>

Buchanan JA agreed with *Re Dale*, rejecting Harper J's view.<sup>282</sup> His Honour stated that although it may be 'difficult to infer that each party was induced by the other's promise to act' where both estates have been left to others, if an agreement or understanding does exist, his Honour did 'not think that the

<sup>273</sup> Ibid [8].

<sup>274</sup> Ibid [41]. See also *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [23] (Buchanan JA).

<sup>275</sup> [1994] Ch 31.

<sup>276</sup> *Osborne v Osborne* [2000] VSC 95 (Unreported, Harper J, 23 March 2000) [42].

<sup>277</sup> Ibid [41].

<sup>278</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [19] (Winneke P).

<sup>279</sup> Although there is no transcript of the Court of Appeal proceedings, I took note of Winneke P's comments during the hearing.

<sup>280</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [19].

<sup>281</sup> Ibid.

<sup>282</sup> Ibid [25].

conclusion that the survivor perpetrated equitable fraud depends upon whether he or she was a beneficiary under the first will.<sup>283</sup>

### C Evaluation

Buchanan JA appropriately adopted the reasoning in *Re Dale*. The Court in that case found that ‘it is no part of the [mutual wills] principle ... that the first testator must have conferred a benefit on the second testator by his will’<sup>284</sup> and that ‘mutual benefit is not necessary.’<sup>285</sup> This was said to be logical because the rationale for the doctrine of mutual wills is to prevent the first to die being defrauded.<sup>286</sup> According to Morritt J, such fraud is not confined to cases where the survivor benefits under the terms of the first will:

I am unable to see why it should be any the less a fraud on the first testator if the agreement was that each testator should leave his or her property to particular beneficiaries, for example their children, rather than to each other. It should be assumed that they had good reason for doing so and in any event that is what the parties bargained for. In each case there is the binding contract. In each case it has been performed by the first testator on the faith of the promise of the second testator and in each case the second testator would have deceived the first testator to the detriment of the first testator if he, the second testator, were permitted to go back on his agreement. I see no reason why the doctrine should be confined to cases where the second testator benefits when the aim of the principle is to prevent the first testator from being defrauded.<sup>287</sup>

Given that the Court of Appeal stated that its acceptance of *Re Dale* was merely obiter,<sup>288</sup> it is appropriate to consider the matter further. First, contrary to Harper J’s assertion, there is authority apart from *Re Dale* that supports the decision. On a general level, a wealth of authority provides that the fraud with which equity is concerned is the deceased testator leaving his or her will unrevoked in the belief that the surviving testator would do the same and the latter failing to do so.<sup>289</sup> For such a fraud to arise it is not necessary for the surviving testator to have obtained a material benefit under the deceased testator’s will.<sup>290</sup> Even where the surviving testator does not obtain a material benefit under the deceased testator’s will, he or she has still obtained the benefit

<sup>283</sup> *Ibid* [24].

<sup>284</sup> *Re Dale* [1994] Ch 31, 42 (Morritt J).

<sup>285</sup> *Ibid* 38 (Morritt J).

<sup>286</sup> *Ibid* 49 (Morritt J).

<sup>287</sup> *Ibid* 48–9 (Morritt J).

<sup>288</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [19] (Winneke P), [23] (Buchanan JA).

<sup>289</sup> See the cases cited in above n 247.

<sup>290</sup> *Re Gardner* [1920] 2 Ch 523, 528–31 (Lord Sterndale MR); *Re Gardner* [1923] 2 Ch 230, 233 (Romer J); *Re Hagger* [1930] 2 Ch 190, 195 (Clauson J); *Birmingham* (1937) 57 CLR 666, 688 (Dixon J); *Re Gillespie* [1969] 3 DLR (3d) 317, 321–2 (Kelly JA); *Swain* (Unreported, Full Court of the Supreme Court of Western Australia, Rowland, Franklyn and Wallwork JJ, 3 March 1994) 10 (Rowland J); *Re Dale* [1994] Ch 31, 42, 48–9 (Morritt J).

for which he or she had agreed, namely the benefit of the deceased testator's performance of the agreement.<sup>291</sup>

More specifically, there have been a number of cases where the survivor was not conferred a benefit under the deceased testator's will, yet the wills were nevertheless held to be mutual wills.<sup>292</sup> There have been cases where, as in *Osborne*, the survivor has not benefited under the terms of the deceased testator's will, but rather indirectly through, inter alia, survivorship<sup>293</sup> or intestacy.<sup>294</sup> It has been held that the fact that the subject 'property passed outside the [mutual] will and by operation of law rather than pursuant to a bequest ... is a matter of form without substantive significance.'<sup>295</sup> Thus if a benefit is necessary, the surviving testator may obtain the benefit indirectly in this manner.

Most importantly, the seminal cases on mutual wills provide that it is not necessary for the survivor to benefit under the will of the deceased testator. Contrary to Harper J's assertion, this issue was not without authority when discussed in *Re Dale*. However, his Honour failed to consider any of these key cases in this context despite reference to them by counsel for the plaintiff. In *Dufour*, Lord Camden held that upon the death of the deceased testator the arrangement was binding,<sup>296</sup> and thus whether the surviving testator actually benefited under the terms of the will was of no consequence. Thus if the surviving testator obtained no benefit under the deceased testator's will by reason of, for example, a disclaimer of the benefits under that will, that would not free the former of his or her obligations: 'It is too late afterwards for the survivor to change his mind because the first dier's will is then irrevocable, which would otherwise have been differently framed if that testator had been apprised of this dissent.'<sup>297</sup>

The Court in *Re Hagger* stated that it regarded *Dufour* as authority for the proposition that the surviving testator's property would still be impressed with the trust imposed under the mutual wills agreement 'even though the survivor

<sup>291</sup> Burgess, above n 114, 240; Youdan, above n 155, 416–17; Rickett, above n 4, 187, 190; A J Oakley, *Constructive Trusts* (2<sup>nd</sup> ed, 1987) 136; Cope, above n 4, 543; Cassidy, above n 4, 44–5.

<sup>292</sup> See, eg, *Re Gardner* [1920] 2 Ch 523; *Re Gardner* [1923] 2 Ch 230; *McGeachy v Russ* [1955] 3 DLR 349.

<sup>293</sup> *Healey* (Unreported, English High Court of Justice, Donaldson J, 25 April 2002). See also *McGeachy v Russ* [1955] 3 DLR 349 where the testators were aware that the surviving testator would benefit through survivorship. Their mutual wills agreement was, therefore, not that the surviving testator would benefit under the deceased testator's will, but rather that the testators' property would be jointly held so that it would devolve upon the surviving testator through survivorship.

<sup>294</sup> *Re Gardner* [1920] 2 Ch 523 where the principles governing mutual wills were said to be equally applicable if the surviving testator derived no gift under the deceased testator's will, but rather had benefited under an intestacy. Lord Sterndale MR held (at 530–1) that

it makes no difference to the principle whether the property which the person in question takes is taken by virtue of an express gift in the will, or whether it comes to him as the result of the imperfect disposition of the testator's property which the will has made.

See also *Re Gardner* [1923] 2 Ch 230, 233 (Romer J).

<sup>295</sup> *Healey* (Unreported, English High Court of Justice, Donaldson J, 25 April 2002) [29]. As in *Osborne*, in this case the interest passed through survivorship, rather than under the terms of the testator's will.

<sup>296</sup> (1769) Dick 419, 421; 21 ER 332, 333; (1799) 2 Harg Jurid Arg 304, 308, 310.

<sup>297</sup> *Ibid*, quoted in *Re Dale* [1994] Ch 31, 41 (Morritt J).

did not signify his election to give effect to the will by taking benefits under it.<sup>298</sup> Similarly, according to Dixon J in *Birmingham*, as soon as one party dies leaving his or her will unrevoked, the equitable obligation attaches to the property.<sup>299</sup> Thus, even if the surviving testator does not take under the terms of the deceased testator's will or disclaims property left to him or her under the deceased testator's will, that will not prevent the operation of the mutual wills doctrine because the surviving testator may nevertheless act fraudulently by not dealing with his or her own property in the manner agreed.<sup>300</sup> These cases were adopted in *Re Gillespie* where Kelly JA stated that

if it were necessary to do so, I would hold, on the authority of *Dufour v Pereira* ... referred to by Clauson J in the *Hagger* case at p 195, that by reason of the death of the wife the trust became binding on the husband's property 'even though the survivor did not signify his election to give effect to the will by taking benefits under it'. The fact that the husband accepted probate of the joint will on his wife's death makes it unnecessary to go further than to say that thereafter his property became subject to trusts in the terms of the joint will. ... The property which became impressed with the trust which arose on the acceptance by the husband of probate was therefore the real and personal property of which the husband was possessed at the date of the death of the wife ...<sup>301</sup>

More recently, in *Swain*, Rowland J said:

It also seems to me that the law is not now in dispute. The appellants submitted that it is necessary to establish that the testator who died last must have taken a benefit as a result of the death of the testator who died first in time before the relevant trust arises. In my view, that is not the law.<sup>302</sup>

In support, Rowland J cited McPherson J's explanation in *Bigg* that the rationale for equity's intervention is merely the 'equitable fraud practised "upon the person to whom the promise is made upon the faith of which wills or settlements are either made or forborne to be made"'.<sup>303</sup>

The Court's conclusion in *Re Dale* is also supported by the law that pertains to other areas of equitable fraud, such as secret trusts<sup>304</sup> and equitable estoppel,<sup>305</sup> where a conferral of a benefit is not required. In such areas of law, the question is not whether a benefit has been provided to the party alleged to be estopped, but

<sup>298</sup> [1930] 2 Ch 190, 195 (Clauson J).

<sup>299</sup> (1937) 57 CLR 666, 688. See also *Healey* (Unreported, English High Court of Justice, Donaldson J, 25 April 2002) [8].

<sup>300</sup> *Hardingham, Neave and Ford*, above n 108, [1218]; *Cassidy*, above n 4, 45.

<sup>301</sup> [1969] 3 DLR (3d) 317, 321–2.

<sup>302</sup> *Swain* (Unreported, Full Court of the Supreme Court of Western Australia, Rowland, Franklyn and Wallwork JJ, 3 March 1994) 10.

<sup>303</sup> [1990] 2 Qd R 11, 13, quoting *Chamberlaine v Chamberlaine* (1680) 2 Eq Cas Abr 415; 22 ER 352 (Lord Nottingham LC).

<sup>304</sup> *Ottaway v Norman* [1972] Ch 698, 708–11 (Brightman J); *Healey* (Unreported, English High Court of Justice, Donaldson J, 25 April 2002) [28]; *Hardingham, Neave and Ford*, above n 108, [1218]; *Cassidy*, above n 4, 46.

<sup>305</sup> *Re Basham* [1987] 1 All ER 405, 410 (Edward Nugee QC); *Re Dale* [1994] Ch 31, 47 (Morritt J); *Cassidy*, above n 4, 46.

rather whether there is an agreement or understanding and one of the parties has acted to his or her detriment in reliance on that agreement.<sup>306</sup>

Moreover, the view espoused in *Re Dale* has been accepted in all the major commentaries on mutual wills.<sup>307</sup> Thus the absence of a benefit under the deceased testator's will or a disclaimer of that benefit will not prevent the mutual wills from being enforced.

Whilst Buchanan JA agreed with this view of the law, his Honour nevertheless asserted that '[i]f both estates have been left to others, it may be more difficult to infer that each party was induced by the other's promise to act as he or she did.'<sup>308</sup> To the contrary, the weight of authority suggests that it is easier to infer that the wills have been executed pursuant to an agreement for mutual wills when both estates have been left to others. As Buchanan JA accepted, where, as in *Birmingham*, each testator bequeathed his or her estate to the survivor, there is an inconsistency in the terms of the bequest and an obligation under a mutual wills agreement 'limiting the beneficiary's ability to deal with that estate.'<sup>309</sup> Where there is no conferral of benefit upon the survivor, there is no inconsistency in the terms of the wills and the obligation of the survivor to hold property for another. In fact, as discussed above, the very terms of the wills are explicable of an obligation to hold the property for the intended beneficiaries under the mutual wills agreement.<sup>310</sup>

Thus it is submitted that Harper J clearly erred in his summation of the law and, as Buchanan JA stated,

if an agreement or understanding does exist, I do not think that the conclusion that the survivor perpetrated equitable fraud depends upon whether he or she was a beneficiary under the first will. The essence of the fraud in equity is the betrayal of the basis upon which the parties reached an agreement or understanding and on the faith of which the first testator acted.<sup>311</sup>

Harper J found that the testators had entered into an agreement to execute mutual wills on the basis that their sons were to receive an equal share of their respective estates. His Honour found that the testators put this agreement into effect by executing the wills of 24 March 1985. Winifred did not revoke her will before her death. To use Buchanan JA's words, there was a 'betrayal of the basis upon which the parties reached an agreement'<sup>312</sup> by, inter alia, Frederick's inter

<sup>306</sup> *Ottaway v Norman* [1972] Ch 698, 708–11 (Brightman J); *Re Basham* [1987] 1 All ER 405, 410 (Edward Nugee QC); *Re Dale* [1994] Ch 31, 47 (Morritt J); Hardingham, Neave and Ford, above n 108, [1218]; Cassidy, above n 4, 46.

<sup>307</sup> Burgess, above n 114, 239; Youdan, above n 155, 416; Rickett, above n 4, 187, 190; Hardingham, Neave and Ford, above n 108, [1218]; Ford and Lee, above n 107, [22 230]; Oakley, above n 291, 136; Cope, above n 4, 543; Cassidy, above n 4, 43–6; R P Meagher and W M C Gummow, *Jacobs' Law of Trusts in Australia* (6<sup>th</sup> ed, 1997) [1342]; Jill Martin, *Hanbury and Martin Modern Equity* (14<sup>th</sup> ed, 1993) 311–17.

<sup>308</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [24].

<sup>309</sup> *Ibid* [28] (citations omitted).

<sup>310</sup> See above Part IV(C)(5).

<sup>311</sup> *Osborne* [2001] VSCA 228 (Unreported, Winneke P, Buchanan and Vincent JJA, 14 December 2001) [24] (citations omitted).

<sup>312</sup> *Ibid*.

vivos gift of the unit to Daisy and the execution of the 1995 will and deed of family arrangement that bequeathed the testators' estates to Neil, his children and one of the appellant's sons. That Frederick obtained the unit through survivorship, rather than under the terms of Winifred's will, was irrelevant to the fact that he effected a fraud upon Winifred.

## VII CONCLUSION

Harper J made a number of significant errors of law. Whilst the judgment was unclear, it is my view that the Court of Appeal either failed to appreciate Harper J's errors or agreed with his Honour's incorrect analysis. It is submitted that, had the correct law been applied to the facts in *Osborne*, the wills would have been held to be mutual wills. Harper J's findings of fact were very much in support of the appellant's case. It was Harper J's errors of law that led his Honour to dismiss the appellant's claim.

Equity merely requires an agreement, not a contract in law, and an agreement to execute mutual wills was found by Harper J. The testators do not actually have to resolve that their wills are to be irrevocable where, as in *Osborne*, their ages and circumstances indicate that revocation would not be contemplated. Irrevocability is implied from, inter alia, the agreement to execute the wills, such an agreement being found by Harper J. An agreement for mutual wills, including the agreement not to revoke those wills, is inferable from the terms of the wills and their simultaneous execution where, as in *Osborne*, they confer no interest on the surviving testator. Equity does not require that the surviving testator fraudulently induce the deceased testator to execute his or her will. The subsequent breach of the mutual wills agreement — in *Osborne* through Frederick's revocation of his will and inter vivos and testamentary gifts — will suffice. That Frederick did not obtain a direct material benefit under Winifred's will should not have prevented his breach being actionable as it is not a requirement of mutual wills that the surviving testator benefit under the deceased testator's will.

Ultimately, *Osborne* leaves more questions unanswered than answered. While at first glance the Court of Appeal appears to provide answers to key issues in the area of mutual wills, ultimately the Court of Appeal's view is unclear. It is unfortunate that the opportunity to clarify these matters was met with either ambiguity or a failure to consider them on the basis that the findings at first instance were merely obiter. Those with an interest in the area will have to wait for a further opportunity for the courts to consider these matters. In the interim, despite the wealth of cases, the relevant jurisprudence in regard to a number of key aspects of mutual wills remains unclear.