Consider this case study. H married W in 1950. H had a daughter, D, and W a son, S, both from previous marriages, but they had no children together. In 1958, they executed homemade mirror wills leaving all their property to the other or, if the other had not survived, to D and S equally. In 1975, they died, W surviving H by about three weeks.

S then reported his mother had destroyed her will during her brief widowhood in order to disinherit D. As administrator of W’s estate, he claimed H’s estate on her behalf and argued he was the sole beneficiary under her intestacy. Whether W really had revoked her will or S had dishonestly suppressed it, this shows a weakness in mirror wills, since it is extremely unlikely H would have approved such an outcome.

D had two problems: to prove the existence of a binding agreement and then to establish its terms. A compromise was quickly reached in this dispute, but it provides an alert as to the difficulties that arise when drafting wills for clients.

THE DOCTRINE OF MUTUAL WILLS

The doctrine of mutual wills (allowing beneficiaries disinherited by the survivor to sue for breach of trust) requires evidence beyond the mere existence of mirror wills that the testators intended the arrangement to bind them both. Mirror wills are the norm for testating couples; effective mutual wills are rare. Cases are still reported occasionally and it would be interesting to know how many testators understand the difference well enough to make an informed decision.

A typical instruction from clients is: ‘We want simple wills: everything to each other and then to the children.’ But how many clients consider the details? It is easy to establish and record whether they want a binding agreement, but the agreement’s terms are more difficult and require explicit decisions by the clients. For instance:

• What is to happen if the survivor (T2) remarries, thereby revoking the will?
• What is to happen if T2 acquires conflicting responsibilities, by remarriage or otherwise?
• Does the trust bind all T2’s property or only that inherited from T1?
• If only T1’s property is bound:
  • Will the trust fund be a fixed amount? If so, how will it be protected against inflation? Or will it be half or some other proportion of T2’s eventual estate?
  • Will half their joint property be bound or will T2 retain the right to take the whole by survivorship, so excluding this from the trust?
  • Will T2 be adequately provided for? Dr Anthony Melows’ comment lodged the point in my mind: ‘If their combined property is held on trust, T2 would need permission to use the toothpaste.’ Without clear answers to these and other questions, will the agreement be void for uncertainty? Apparently not. In Walters v Ollas, the drafting solicitor understood the testators wanted the survivor to be bound in order to defeat family pressure to change their will. The Court of Appeal, upholding the arrangement, said the obligation is equitable, in the form of a constructive trust, rather than contractual. So, it seems, mutual wills bind the survivor even if the agreement, under normal contractual principles, would have been unenforceably vague. That leaves the difficulty of establishing the extent and terms of the trust as best one can, and the court applauded the trial judge’s decision that, because those issues were not before him, they could be left to the parties to agree or to litigate before some hapless other judge.

Many clients cannot afford to divide their estates on the first death without impoverishing the survivor. In my experience, they tend to accept that the survivor should not be bound and is to be trusted to act honourably. This leaves the survivor free use of the property, with the right to disinherit the intended beneficiaries.

A SOLUTION?

There might be a solution, modelled on nil-rate-band discretionary trusts. Having declared a binding agreement in the wills, testators could appoint one or more independent trustees, as well as or instead of the survivor, and could include restrictions or guidelines as to how the trustees’ discretion is to be exercised, to ensure T2 and any other dependants have reasonable provision. This would allow the testators to strike a balance between the needs of the survivor and the children, although at the cost of the inevitable uncertainty and tax consequences of a discretionary trust.2