

**KEY POINTS****What is the issue?**

The Supreme Court of Cyprus has recently examined whether mutual wills are, recognised in the Cypriot legal system.

**What does it mean for me?**

Following the recent judgment, practitioners will be able to advise clients who wish to execute a mutual will.

**What can I take away?**

The judgment has resulted in mutual wills being applied by Cypriot law and implemented by the Cyprus courts.

# The feeling is mutual

**ELENI DRAKOU EXPLAINS HOW MUTUAL WILLS ARE IMPLEMENTED UNDER CYPRUS LAW, TAKING INTO CONSIDERATION RECENT DEVELOPMENTS IN CYPRUS CASE LAW**



A will is the legal declaration in writing of the intentions of a person (the testator) with respect to the disposal of their assets, including movable and immovable property, after the testator's death.<sup>1</sup>

A mutual will is a will where two or more persons mutually agree on a consistent way of distributing their estate, either in whole or in part, upon their death. Their agreement is stated in their wills in such a way that the wills appear to be reciprocal or corresponding. One mutual will can be executed by the testators or a separate will can be executed by each testator, each will reflecting, in content, the other.

The importance of a mutual will lies in the fact that the testators' common agreement and understanding is binding between each other and cannot be altered, even after the death of one of the testators. A mutual will provides that, upon the death of one of the testators, the survivor shall not be able to alter the content of the will as they will be bound by its provisions, which shall remain valid and enforceable even if the survivor's life conditions change.

**ELEMENTS OF A MUTUAL WILL**

To verify whether a mutual will has been executed, the court will examine whether there was a mutual agreement between the parties. Their agreement should not only include a particular way of disposing of

their estates, but should also entail their undertaking not to revoke their wills without the knowledge of the other party. As such, besides the mutuality, another crucial element of this doctrine is the undertaking not to revoke the will, which, in all other instances, would be possible, due to the parties' arrangement to be bound by the mutual wills.

**A MATTER OF TRUST**

It can, therefore, be stated that mutual wills are executed by testators who share a common intent as to how their estate shall be distributed and, moreover, the expectation that the surviving party shall not diminish their trust nor execute a subsequent will that contradicts the content of the mutual will, hence revoking the former will.

Ultimately, the persons executing this type of will rely on the assumption that their shared intentions shall be irrevocable. Their intentions are not only binding upon the wills' execution, but they also intend to continue to be binding after their death.

**THE CASE OF SPOUSES**

Mutual wills are often executed between a married couple who decide to dispose of their estate together. The estate could include their joint assets (e.g., joint bank accounts or immovable properties



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children's inheritance shall be decreased. This is undoubtedly a development that the predeceased spouse would not have consented to, since it would be contrary to the original agreement for the making of mutual wills. In order to prevent this, it can be argued that the personal representatives of the surviving spouse shall thus hold the property on a constructive trust for the benefit of the heirs stated in the mutual wills.<sup>2</sup>

#### THE RIGHT OF REVOCATION UNDER CYPRIOT LAW

Section 37 of the *Cyprus Wills and Succession Law* (Cap 195) provides that a will may be revoked:

- by a subsequent will expressly revoking the former one;
- by a subsequent will inconsistent with the provisions of the former one, but so far only as the provisions of the two wills are inconsistent; or
- by burning, tearing or otherwise destroying the same by the testator or by some person in their presence and by their direction, with the intention of revoking it.

Therefore, the testator's freedom to revoke the will is established under these provisions and, as such, it can be argued that the doctrine of mutual wills creates limitations to the freedom of revocation.<sup>3</sup>

#### MUTUAL WILLS IN LEGISLATION AND CASE LAW

Succession in Cyprus is regulated by Cap 195 and the *Administration of Estates Rules* (Cap 189).

Even though the doctrine of mutual wills is not expressly provided for in Cap 195, this doctrine can be enforced through common law and the principles of equity.

This was reinforced in a recent judgment of the Supreme Court of Cyprus (the Supreme Court) in its appellate jurisdiction,<sup>4</sup> which put aside a judgment of the Cyprus District Court of First Instance (the District Court).<sup>5</sup> The District Court held that mutual wills are unknown to Cypriot law. Moreover, the District Court stated that the principle that a will can always be revoked is a fundamental rule of common law that has been incorporated in s.37 of Cap 195. Nonetheless, with the Supreme Court handing down its judgment on 18 February 2016,<sup>6</sup> the District Court's decision was put aside.

The Supreme Court ruled that a constructive trust was created over the

estate of a deceased spouse after the predeceased's death, adding that the deceased spouse was holding the estate in order to give effect to the mutual will as a trustee and not as the beneficial owner of the predeceased's estate.

Moreover, the Supreme Court examined the crucial question as to whether mutual wills are, in fact, recognised in the Cypriot legal system, in light of the existence of the legislative provision of s.37 of Cap 195.

As per the provisions of s.29(1)c of the *Courts Law* (14/1960), the principles of common law and equity form part of the Cypriot legal system. However, it has been confirmed by case law that invocation of the principles of common law and equity shall not be acceptable in cases where a Cypriot law provides a certain provision on a particular matter.

The Supreme Court went on to clarify that, indeed, s.37 provides for the revocation of a will in an exhaustive manner. Nonetheless, this express provision of Cypriot legislation offers an effective option to revoke a former will, without establishing the right to be exempted from a previous agreement or consisting of a special arrangement that contradicts the doctrine of mutual wills.

The Supreme Court concluded that mutual wills do apply to Cypriot law, based on the provisions of s.29(1)c of the *Courts Law*. As a result, executing a subsequent will does not exempt the testator from a former agreement that had been concluded with another party in the context of executing mutual wills. Such an agreement shall still exist after death, with bounding consequences.

#### EXECUTION OF A MUTUAL WILL

Following this crucial judgment, a mutual will can apply to Cypriot law and can be implemented by Cypriot courts. Persons who are interested in executing such a will are advised to take into consideration the provisions of Cap 195 as to the validity of wills under Cypriot law.

Unlike many other jurisdictions, Cyprus, in general (with a rare exception provided by s.43 of Cap 195), considers wills to be valid if they have been executed in writing only.<sup>7</sup> Moreover, Cap 195 introduces certain formalities that are mandatory and imperative for the will's validity. Therefore, oral wills or wills that are not properly signed and witnessed are not considered valid.

co-owned between them), as well as assets owned by each spouse separately. In practice, the spouses usually agree in their wills to distribute both of their estates to the surviving spouse upon the one spouse's death, with a view to leaving both estates to their heirs (e.g., their children).

In such a case, the estate of the survivor shall be increased by the estate of the predeceased spouse. Once the survivor also passes away, the estate shall ultimately devolve on the children.

In case a spouse passes away, the surviving spouse is not able to revoke the will as explained above, even if such spouse's circumstances change; for example, if the surviving spouse remarries or has another child, as the surviving spouse is still bound by the provisions of the mutual will.

#### REVOCATION OF A MUTUAL WILL

If the surviving spouse decides to revoke the mutual will by executing a new will (e.g., in order to provide for a new spouse), it may become apparent that the

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#CONTENTIOUS TRUSTS AND ESTATES

#ESTATE PLANNING

<sup>1</sup> Cap 195 (s.2) <sup>2</sup> Dr Christos Clerides, *Trusts – The Law of Trust in Cyprus*, 2020 <sup>3</sup> Achilles Emilianides, *Cyprus Inheritance Law*, 3rd edn (Nicosia: Hippasus, 2017), p.151 <sup>4</sup> Civil Appeal 239/2010 <sup>5</sup> Civil Claim 6358/04 <sup>6</sup> Above, note 4 <sup>7</sup> Cap 195 (s.23)