Wills & Estates
Winter Term 2017

Lecture Notes – No. 3

Contracts: Promises to Leave the Claimant a Gift in a Will

A common enough situation arises: a person promises to leave another a gift in his or her Will in exchange for something (personal care, marriage, some favour, etc). Conceptually there is merely a straight-forward case. If the contract is broken, the plaintiff can sue the Estate in damages. The difficulty, of course, is that Estate may not be able to pay either at all or completely given that there may be other creditors. In the past, cases arose where there was insufficient protection for spouses or dependants (*Synge*, below), on equitable doctrines (part performance, estoppel), or the principle of restitution (*Degleman*, below).

Synge v Synge
[1894] 1 QB 466; cb, 117

The most familiar of all estate litigation: 2nd wife v children of first marriage. The husband induced the 2nd wife to marry him by promising her that she would inherit the house and land as a life tenant after he died. She married him in reliance. He then conveyed the property to his daughters from his first marriage. The second wife sued and was successful in damages. Kay LJ held that the claim might have been made against the daughter but the plaintiff sought only damages from the husband:

> **Sir R. Synge had all his lifetime to perform this contract; but, in order to perform it, he must in his lifetime make a disposition in favour of Lady Synge. If he died without having done so, he would have broken his contract. The breach would be omitting in his lifetime to make such a disposition. True, it would only take effect at his death; but the breach must take place in his lifetime, and as by the conveyance to his daughters he put it absolutely out of his power to perform this contract. Lady Synge, according to well-known decisions… had a right to treat that conveyance as an absolute breach of contract, and to sue at once for damages; and as this Court has both legal and equitable jurisdiction, we are of opinion that such relief should be granted.**
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> We have not before us the materials for assessing such damages. The amount must depend on the value of the possible life estate which Lady Synge would be entitled to if she survived her husband. Their comparative ages would, of course, be a chief factor in such a calculation. There must be an inquiry as to the proper amount of damages.

Part Performance

Certain types of agreements must be in writing to be enforceable under the *Statute of Frauds*, RSO 1990, c. S.19.

The doctrine of part performance is an equitable doctrine that was used to deal with claims based, inter alia, on ineffective transactions. In *Steadman v. Steadman*, [1976] A.C. 536, 558 Lord Simon said:

> [This doctrine] was evoked when, almost from the moment of passing of the Statute of Frauds, it was appreciated that it was being used for a variant of unconscionable dealing, which the statute itself was designed to remedy. A party to an oral contract for the disposition of an interest in land could, despite performance of the reciprocal terms by the other party, by virtue of the statute disclaim liability for his own performance on the ground that the contract had not been in writing. Common Law was helpless. But Equity, with its purpose of vindicating good faith and with its remedies of injunction and specific performance, could deal with the situation. The Statute of Frauds did not make such contracts void but merely unenforceable; and, if the statute was to be relied on as a defence, it had to be specifically pleaded. **Where, therefore, a party to a contract unenforceable under the Statute of Frauds stood by while the other party acted to his detriment in performance of his own contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contract was unenforceable, from performance of his reciprocal obligations; and the court would, if required, decree specific performance of the contract. Equity would not, as it was put, allow the Statute of Frauds "to be used as an engine of fraud." This became known as the doctrine of part performance — the "part" performance being that of the party who had, to the knowledge of the other party, acted to his own detriment in carrying out irremediably his own obligations (or some significant part of them) under the otherwise unenforceable contract.**

[Approved in *Hill v. Nova Scotia (Attorney General)* [1997] 1 S.C.R. 69. For a recent case applying the doctrine see *Frisgo Development Inc. v. Brower*, 2009 ABQB 463].

Quantum Meruit, Proprietary Estoppel, and Unjust Enrichment

In most cases in which the claim is brought against the Estate based on the acts of the deceased, the approach today would be through the action for unjust enrichment.

In ***Degleman v Guaranty Trust Co. of Canada*, [1954] S.C.R. 725 [cb, 122],** a disappointed nephew was promised a testamentary gift by an aged aunt in exchange for his services. The aunt didn't leave the gift and the nephew sued on the promise. The Supreme Court of Canada held that the claim for the services rendered was valid notwithstanding that the oral promise was not enforceable given its obvious non-compliance with formalities. Cartwright J for the majority held:

> In my opinion when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable, but, the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the obligation to pay the fair value of the services rendered to her.

Rand J held for the concurring minority:

> There remains the question of recovery for the services rendered on the basis of a *quantum meruit.* On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.

Given that there was no contract between the aunt and the nephew, what is the ultimate rationale for liability in *Degleman*? It can't be the contract alleged to have existed; both the majority and the concurring minority rejected a contractual basis for relief. Rather than contract, then, it was the principle of unjust enrichment (the retention of a benefit without valid reason) that best rationalized liability in the Court's view.

The law of unjust enrichment in Canada has moved on substantially since *Degleman v Guaranty Trust Co. of Canada*. There is no doubt that there exists an independent action for unjust enrichment in Canada that is not parasitic on an established common law, equitable, or statutory cause of action. That such established law is brought into unjust enrichment as 'juristic reasons' to disallow an otherwise unjust retention of a benefit is not to limit the action for unjust enrichment to those categories. Pragmatically, this ensures that well settled doctrine remains valid but allows for more coherent development. Thus, rather than talking of an 'action for *quantum meruit*' in respect of the services at issue in *Degleman*, we now more usefully speak of remedies properly arising as a response to a valid contract (on which damages may be calculated on a *quantum meruit* basis) or remedies arising on a successful action in unjust enrichment (which might be remedied with a money award to the same ends). We no longer have to rely on *quantum meruit* as an indistinct concept that describes the variety of factors that might support the remedy outside conventional contract, whether in law or equity or otherwise. Rather, we ventilate the inquiry through the law of unjust enrichment which provides for a more structured approach. Thus, at the very least, we can now say with confidence:

> A remedy based upon unjust enrichment may be ordered where there is
>
> (a) a benefit to or enrichment of one party, and
> (b) a corresponding detriment to or deprivation suffered by the other party, and
> (c) the absence of any juristic reason for the benefit or enrichment to be retained.
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> The 'juristic reason' involves consideration of (i) traditional categories that would allow the benefit to be retained and (ii) fact-specific reasons and new categories of general application that would allow the benefit to be retained tested on both the reasonable expectations of the parties and public policy considerations.

Mutual Wills

Mutual Wills can take the form of 'mirror Wills' (there are two documents that are the same) or a joint Will (one document made by two people). **The doctrine arises where there is a contract between two people (spouses usually) to leave their property to specific beneficiaries in specific ways** (e.g. to the surviving spouse for life with a power to encroach on the capital, remainder to children or their issue in equal shares).

If the requirements are satisfied, the estate of the surviving spouse will be obligated to give effect to the Will even as against a later inconsistent Will (made say after death of the first spouse and in favour of a new partner) through the imposition of a constructive trust.

Thus,

1. The valid mutual Will leads to a constructive trust over the property at issue in favour of the named legatees unless the parties have consented to the change.

2. To be enforced:

    a. there is a clear agreement not to revoke the Will in respect of the dispositive provisions either on the face of the Will(s), or as may be inferred from the provisions of the Will(s) or a separate instrument; and

    b. the first party to die did not himself or herself revoke the Will.

3. The survivor may revoke the Will, and the new Will is valid in respect of property not subject to the provisions of the mutual Will, but a constructive trust will be ordered in respect of those assets to give effect to the mutual Will.

LSUC Rules of Professional Conduct

R.3.4-5

Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary:
[1] Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the

clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

[2] A lawyer who receives instructions from spouses or partners as defined in the Substitute Decisions Act, 1992, S.O. 1992, c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with this rule. Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with rules 3.3-1 to 3.3-6 (Confidentiality), the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

[3] After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with rule 3.4-7.

[3.1] Joint retainers should be distinguished from separate retainers in which a law firm is retained to assist two or more clients competing at the same time for the same opportunity such as, for example, by competing bids in a corporate acquisition or competing applications for a single licence. Each client would be represented by different lawyers in the firm. Since competing retainers of this kind are not joint retainers, information received can be treated as confidential and not disclosed to the client in the competing retainer. However, competing retainers to pursue the same opportunity require express consent pursuant to rule 3.4-2 because a conflict of interest will exist and the retainers will be related. With consent, confidentiality screens as described in rules 3.4-17 to 3.4-26 would be permitted between competing retainers to pursue the same opportunity. But confidentiality screens are not permitted in a joint retainer because rule 3.4-5(b) does not permit treating information received in connection with the joint retainer as confidential so far as any of the joint clients are concerned.

University of Manitoba v. Sanderson Estate
(1985), 155 D.L.R. (4th) 40 (BCCA); cb, 129

Here a husband and wife made mutual Wills (including the requisite agreement not to revoke their mutual Wills) that left the residue of their estates to the University of Manitoba. After the wife died, her assets passed to the husband via survivorship. The husband made a new and inconsistent Will. At trial, the Estate successfully argued that by purchasing assets subject to the doctrine of survivorship after the making of the mutual Wills, there was effective revocation of the Wills. On appeal, the University succeeded in obtaining a constructive trust. There was also discussion in the case of a recurring argument in the cases – whether the survivor must be unjustly enriched in some way through the new arrangement (which has of yet to be accepted).

Per Rowles JA:

> In my respectful view, the trial judge was in error when he concluded that there was a revocation of the Agreement by conduct of the parties inconsistent with that Agreement. **While it is true that mutual conduct inconsistent with a contract may be taken to show that the contract is no longer enforceable, that conduct must be quite clear.** Here the evidence would have to show that, by the purchase of assets in their joint names, the Sandersons intended to supercede the operation of their mutual wills.
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> **From the evidence in this case it is not at all clear what effect, if any, the Sandersons intended their subsequent purchase of jointly held assets to have in relation to their Agreement. The creation of a right of survivorship in their assets is not necessarily inconsistent with the operation of the mutual wills, and it has no bearing on the Agreement, which was simply not to revoke the wills.**
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> I am also of the view that the trial judge was in error in finding that the agreement not to revoke, which was contained in both the Agreement and the mutual wills, could be revoked by conduct or implication.
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> The Agreement contained a provision allowing it to be revoked by written consent of both parties. In my opinion, anything less; such as conduct of the parties which might be construed as inconsistent with the continuance of the Agreement, could not be taken to revoke the contract in light of the clear mechanism for revocation contained within it.
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> Quite apart from whether the Agreement could be revoked by conduct inconsistent with it, the mutual wills could not be so revoked. There are only a limited number of ways to revoke a will and the inconsistent conduct said to have occurred in this case is not one of them.
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> The mutual wills clearly contain the parties' agreement not to revoke within them. Short of clear evidence that they were revoked prior to Mrs. Sanderson's death, I must conclude that the agreement not to revoke the mutual wills was still in force at the time of Mrs. Sanderson's death in 1985.

…

The appellant argues that there are two conditions which must be met before the court will impose a trust as a consequence of joint or mutual wills: (1) a mutual agreement not to revoke the joint or mutual wills, and (2) the first to die must have died without revoking or changing his or her will in breach of the agreement.

The question is whether there is a third condition, that is, a benefit flowing to the survivor from the will of the first to die. The appellant argues that a benefit is not required for equity to hold the survivor to his promise.

…

With respect, I do not agree that either the probate of the will of the first to die, or a benefit flowing to the survivor from the will of the other, is a necessary condition for relief to be granted to the University on trust principles.

This is a case in which there was an express agreement made that the mutual wills would not be revoked or altered during the joint lives of the parties to the agreement and that after the death of the first, the will of the survivor would not be altered or revoked. There was an exchange of promises and Mrs. Sanderson did not revoke her will, although she had the legal right to do so, before her death.

The guiding principles to be applied in this case are to be found in *Dufour v. Pereira*, *supra*, in which the enforcement of an agreement in a joint will was held to be within equity's jurisdiction to prevent fraud. Equity considers it a fraud upon the deceased, who has acted upon and relied upon the mutually binding nature of the agreement, for the survivor to change the will and break the agreement. As the deceased cannot intervene to enforce the obligation, equity will enforce the survivor's obligation, despite the survivor's subsequent intentions.

It is also my respectful view that the remedy of constructive trust founded on the principle of unjust enrichment is not analogous to the principles enunciated in *Dufour v. Pereira*, *supra*, and that the trial judge erred when he concluded that an unjust enrichment was required. A constructive trust arising from an unjust enrichment is imposed on property gained at the expense of another for no juristic reason, whereas the obligation created by an agreement not to revoke mutual wills binds not only that portion of the survivor's estate which may have come from the estate of the first to die, but also his or her own property.

…

In my opinion, the requisite conditions for the imposition of a trust on the property of Mr. Sanderson have been met in this case and the University is entitled to succeed on the appeal.

Question:

Does the doctrine of mutual Wills reflect an important public policy in contemporary Canada?