Wills & Estates
Winter Term 2025

Lecture Notes – No. 6

IV. WILLS & WILL-SUBSTITUTES (III)

LIFE INSURANCE

Life insurance forms a part of most people's estate plan; indeed, for people of modest means, it may be the primary device to provide for family members after death. The issues surrounding insurance become complex at times. The deceased may have a former spouse, current spouse, children to whom he or she owes obligations from one or both or other relationships (with or without disabilities), etc. The contract of insurance itself is a complex arrangement, it may be a policy for a term of years or have a fixed premium for the life of the insured. The policy may be just on the life of the deceased, or the deceased and another (a 'multiple life' policy covering the deceased and his or her spouse for example).

One aspect of insurance that is important is in respect of the designation of the beneficiaries. Insurance statutes commonly allow for an irrevocable designation which prevents creditors accessing the funds when the deceased dies; that is, the proceeds form no part of the estate. One must check the terms of the *Insurance Act*, RSO 1990, c.I.8 carefully. Thus, for example, the deceased cannot be the single beneficiary of the policy but can be one of the designated beneficiaries; see the Insurance Act, s.171; *Tennant v Tennant* (2003), 62 OR (3d) 185 (CA).

Richardson Estate v. Mew
2009 ONCA 403 (Ont. C.A.); cb, p.184, note 4

Here a man died leaving an ex-wife (and their children) and a second wife (and their children). He died in a long-term care facility as he developed Alzheimer's Disease and required institutional care in his final years. The second wife managed his affairs using a Power of Attorney provided for that purpose. A question arose in respect of a life insurance policy payable to the first wife. It had been taken out originally when the deceased was married to his first wife and then made subject of a condition in the separation agreement between them that the first wife remain as beneficiary for a year (the end of his child care obligations). He told his second wife that he would designate her as the beneficiary at the end of the commitment under the separation agreement but never did so. Some few years later, the deceased became incapable of managing his affairs due to Alzheimer's Disease. The costs of his care exhausted his retirement savings and the second wife assumed the costs of his care including paying the premiums due on the life insurance policy. It wasn't entirely clear in the report of the judgement whether it was established as a matter of fact that the second wife did actually pay premiums with her own money and the suggestion was that if she did, the sum was relatively modest. In any case, the action was brought in unjust enrichment claiming a constructive trust over the policy.

The Court of Appeal held that while the first wife may have been enriched, there was no corresponding deprivation and a juristic reason that allowed her to retain – the contract of insurance. That is, the plaintiff might have a theoretical claim against the Estate for the

premiums that she paid; ‘theoretical’ because she inherited the Estate. As against the designated beneficiary (the first wife), there was no claim in unjust enrichment as the contract of insurance constituted a good juristic reason for her to retain the insurance proceeds. The separation agreement may have contained a standard clause release or renouncing all claims against the other’s estate, but it is well recognized that the quality of title to insurance proceeds is unaffected where the policy continues to designate the former spouse as beneficiary upon death.

As an aside, there is an interesting point that arises and that was addressed, in *obiter dicta*, by Gillese JA as to the ability of the plaintiff to change the designation in view of her fiduciary obligation to her incapable husband:

> 49 As a fiduciary, Ms. Ferguson was obliged to act only for the benefit of Mr. Richardson, putting her own interests aside: see *Ermineskin Indian Band & Nation v. Canada*, 2009 SCC 9 (S.C.C.), at para. 125. In *Egli (Committee of) v. Egli* (2004), 28 B.C.L.R. (4th) 375 (B.C. S.C.), aff'd (2005), 262 D.L.R. (4th) 208 (B.C. C.A.), Garson J. described the prohibition against using a power for the attorney's profit, benefit or advantage at para. 82 in the following way:
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> It is the attorney's duty to use the power only for the benefit of the donor and not for the attorney's own profit, benefit or advantage. The attorney can only use the power for his or her own benefit when it is done with the full knowledge and consent of the donor. I am not aware of any authority that detracts from this principle in circumstances where the benefit is conferred on family members. [Citations omitted.]
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> 50 I do not understand Ms. Ferguson to suggest that she was entitled to change the beneficiary designation, cancel the Policy or cease paying the premiums during the time that Mr. Richardson was still capable of managing his property. To the extent that she makes such an argument, I would reject it. Given that there is no evidence that Mr. Richardson instructed her to do any of those things, if she had so acted, she would have been in breach of her duty to carry out the donor's instructions. Furthermore, changing the beneficiary designation to herself would have contravened the prohibition against using the Power for her own benefit, as Mr. Richardson had not expressly consented to such a change.
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> 51 After Mr. Richardson became incapable, as has been noted, Ms. Ferguson owed him an even higher duty of loyalty when exercising the Power. As a fiduciary in a role rising to that of a trustee, she was bound to use the Power only for Mr. Richardson's benefit and any exercise of the Power had to be done with honesty, integrity and in good faith. There is nothing in the record to suggest that a change in the beneficiary designation, cancellation of the Policy or a cessation of the premium payments would have been for Mr. Richardson's benefit.

Richardson Estate v. Mew must now be read in the context of ***Moore v. Sweet*, 2018 SCC 52 (S.C.C.).** Here a man made an oral agreement with his ex-wife; if she maintained the policy of insurance that he owned on his own life, she would be entitled to the proceeds of the insurance policy at his death. The ex-wife held up her end of the bargain and paid the premiums for 13

years. The man did not; he designated his second wife irrevocably. Côté J. for the majority held that an action in unjust enrichment should be successful:

> [46] **Taking a straightforward economic approach to the enrichment and corresponding deprivation elements of the unjust enrichment framework, I am of the view that Michelle stands deprived of the right to receive the entirety of the policy proceeds (for a value of $250,000) and that the necessary correspondence exists between this deprivation and Risa's gain. With respect to the extent of Michelle's deprivation, my view is that the quantification of her loss should not be limited to her out-of-pocket expenditures — that is, the $7,000 she paid in premiums between 2000 and 2013. Pursuant to her contractual obligation, she made those payments over the course of 13 years in exchange for the right to receive the policy proceeds** from the Insurance Company upon Lawrence's death. In breach of his contractual obligation, however, Lawrence instead transferred that right to Risa. Had Lawrence held up his end of the bargain with Michelle, rather than designating Risa irrevocably, the right to payment of the policy proceeds would have accrued to Michelle. **At the end of the day, therefore, what Michelle lost is not only the amount she paid in premiums. She stands deprived of the very thing for which she paid — that is, the right to claim the $250,000 in proceeds.**
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> [47] To be clear, therefore, Michelle's entitlement under the Oral Agreement is what makes it such that she was deprived of the full value of the insurance payout. In other cases where the plaintiff has some general belief that the insured ought to have named him or her as the designated beneficiary, but otherwise has no legal or equitable right to be treated as the proper recipient of the insurance money, it will likely be impossible to find either that the right to receive that insurance money was ever held by the plaintiff or that it would have accrued to him or her. In such cases, the properly designated beneficiary is not enriched at the expense of a plaintiff who had no claim to the insurance money in the first place — the result being that the plaintiff will not have suffered a corresponding deprivation to the full extent of the insurance proceeds (*Love v. Love*, 2013 SKCA 31, 359 D.L.R. (4th) 504, at para. 42).
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> **...**
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> [49] My view is that it is not useful, in the context of unjust enrichment, to distinguish between expectations based on a contractual obligation and expectations where there was a breach of an equitable duty (see my colleagues' reasons, at para. 104). Rather, a robust approach to the corresponding deprivation element focuses simply on what the plaintiff *actually* lost — that is, property that was in his or her possession or that would have accrued for his or her benefit — and on whether that loss corresponds to the defendant's enrichment, such that we can say that the latter was enriched *at the expense of* the former. As was observed by Professors Maddaugh and McCamus in The Law of Restitution, one source of difficulty in these kinds of disappointed beneficiary cases is
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> a rigid application of the "corresponding deprivation" or "expense" element as if it requires that the benefit in the defendant's hands must have been transferred from, or constitute an out-of-pocket expense of, the plaintiff. . . . [R]estitution of benefits received from third parties may well provide a basis for recovery. In this particular

context, the benefit received can, in any event, normally be described as having been received at the plaintiff's expense in the sense that, but for the mistaken failure to implement the arrangements in question, the benefit would have been received by the plaintiff. [Emphasis added; p. 35-21.]

I agree. In this case, given the fact that Michelle held up her end of the bargain, kept the policy alive by paying the premiums, did not predecease Lawrence, and still did not get what she actually contracted for, it seems artificial to suggest that her loss was anything less than the right to receive the entirety of the insurance proceeds.

[50] From this perspective, it is equally clear that Risa's enrichment came at Michelle's expense. It is not only that Michelle's payment of the premiums made Risa's enrichment possible — something which the application judge found to be the case: "The change of designation, and [Risa's] later receipt of the proceeds of the Policy, would not have been possible but for [Michelle's] performance of her obligations under the agreement" (para. 48). What is more significant is that Risa's designation gave her the statutory right to receive the insurance proceeds, the necessary implication being that Michelle would have no such right *despite* the fact that she had a contractual entitlement, by virtue of the agreement with Lawrence, to remain named as beneficiary. Because Risa received the benefit that otherwise would have accrued to Michelle, the requisite correspondence exists: the former was enriched at the expense of the latter.

[Emphasis in original.]

PENSIONS AND BENEFICIARY DESIGNATIONS

The *Succession Law Reform Act* provides a scheme in Part III respecting pension funds and plans. They are not available to creditors of the deceased normally (unless designated to the Estate), except may be brought back into the Estate for the purposes of family provision.

Amherst Crane Rentals Ltd. v. Perring
(2004), 11 E.T.R. (3d) 112 (Ont. C.A.); cb, p.188

Per Feldman JA:

2 **The facts of the case are quite typical. The appellant is a creditor of the deceased. The respondent is the widow of the deceased and the designated beneficiary of two RRSP funds. She received the proceeds of the two funds from the two plan administrators. Because the estate of the deceased was unable to pay all of its debts and declared bankruptcy, the creditor sought to obtain payment of the outstanding debt owed by the estate from the beneficiary out of the proceeds of the RRSPs.**
…

33 I agree with Cameron J. that **there is neither a legal principle nor statutory authority that requires that the creditors have any claim on the proceeds of an RRSP that devolve directly to a designated beneficiary. I also agree that the equities do not necessarily favour the claims of creditors over those of beneficiaries of RRSP.** The beneficiaries are often spouses, and therefore, not

volunteers in the traditional sense, but partners in life, who have provided support to their spouses with the expectation that they will be supported after the death of their spouses. Finally, there are several potential procedural difficulties if creditors are permitted to pursue beneficiaries directly for the proceeds of the RRSPs in their hands.

34 I am also satisfied that in order to give full effect to s. 53 as an exemption from the rule that an RRSP designation is a testamentary disposition, and following Kerslake, it would be anomalous to hold that RRSP proceeds that have devolved to the designated beneficiary remain subject to the claims of the creditors of the deceased.

35 I therefore conclude that the effect of s. 53 is to except RRSP proceeds in the hands of a designated beneficiary from the claims of creditors of a deceased RRSP owner's estate.

V. CONTRACTS, OBLIGATIONS, MUTUAL WILLS

A common enough situation arises: a person promises to leave another a gift in his or herWill in exchange for something (personal care, marriage, some favour, etc). Conceptually this is 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 wherethere 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, p.124

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 thatconveyance 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.**

> 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 wouldbe 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 tothe 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; cb., p.128, fn 1**, 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 makesuch 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; andthe 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.**

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,** 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 theoral 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 ofthe services rendered to her.

Rand J held for the concurring minority:

> There remains the question of recovery for the services rendered on the basisof 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 tobe paid for. The statute in such a case does not touch the principle of restitutionagainst what would otherwise be an unjust enrichment of the defendant at theexpense 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 inequitableto allow the promissor to keep both the land and the money and the other partyto the bargain is entitled to recover what he has paid. Similarly is it in the caseof 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 themajority 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.

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 isa contract between two people (spouses usually) to leave their property to specificbeneficiaries 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 obligatedto 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.

University of Manitoba v. Sanderson Estate
(1985), 155 D.L.R. (4th) 40 (B.C.C.A.); cb, p.137

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 therewas a revocation of the Agreement by conduct of the parties inconsistent withthat 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 intendedto 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 themutual 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.

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 alimited number of ways to revoke a will and the inconsistent conduct said to have occurred in this case is not one of them.

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'sdeath, I must conclude that the agreement not to revoke the mutual wills wasstill 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 mutualwills: (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 herwill 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 hispromise.

…

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 mutualwills would not be revoked or altered during the joint lives of the parties to theagreement 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 willwas held to be within equity's jurisdiction to prevent fraud. Equityconsiders 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 cannotintervene 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 trustfounded on the principle of unjust enrichment is not analogous to the principles enunciated in *Dufour v. Pereira*, *supra*, and that the trial judgeerred 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, whereasthe obligation created by an agreement not to revoke mutual wills bindsnot only that portion of the

survivor's estate which may have come fromthe 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.

Nelson v. Trottier
2019 ONSC 1657 (Ont. S.C.J.)

When may a remedy be ordered?

Patillio J.:

[32] What then are the terms of Bill and Huguette's Mutual Wills Agreement?

[33] The Applicants submit that the terms of the Mutual Wills Agreement are set out in the three documents executed by them on October 13, 2010, that is their Wills, the Agreement and the Acknowledgement and Direction.

[34] Huguette on the other hand submits that the terms of her Mutual Wills Agreement with Bill are contained solely in the Agreement. That is that she would not revoke her Will; the terms of the Will included all after acquired property and any cohabitation agreement entered into before the Will was revoked. She submits that the provisions of the Acknowledgement and Direction, being addressed to the solicitors, forms no part of the Mutual Wills Agreement.

[35] In my view, the terms of the Mutual Wills Agreement between Bill and Huguette are not restricted to the terms set out in the Agreement. Rather, as submitted by the Applicants, they are all contained within the provisions of the three documents signed by them on October 13, 2010. Apart from the fact that the Agreement contains no exclusionary clause restricting it to its terms, it is clear from reading the Wills and the other two documents that they all relate to and form part of the Mutual Wills Agreement.

[36] The Wills, by their terms, reflect the Bill and Huguette's agreement. That agreement is expanded by the terms in both the Agreement and the Acknowledgement and Direction.

[37] Specifically, when the Acknowledgement and Direction is read on its own and in conjunction with both the Wills and the Agreement, it is clear that it refers to and is part of the Mutual Wills Agreement. The fact of its title and that it is addressed to the solicitors, does not alter the provisions of the document which clearly evidence the intention of both Bill and Huguette that certain of the items raised therein form part of their agreement. On more than one occasion they refer to "this agreement" and use the terms "confirm our intention" and "our mutual expectation and understanding" to speak about various provisions of their agreement.

[38] **Having regard therefore to the three documents, and apart from the agreement not to revoke or amend the Wills (which extends to automatic revocation on remarriage), I find that the Mutual Wills Agreement between Bill and Huguette provides, among other things, that both Bill and Huguette would give the survivor all their property absolutely; the property includes both property owned by each of them at the time of the agreement as well as after-acquired property; the survivor can deal with the property as absolute owner while alive which includes the ability to make gifts; however, the survivor cannot dispose of substantial portions of the property received during his or her lifetime in order to defeat the agreement.**

[39] Even if I am wrong that Huguette's right to deal with Bill's property gifted to her absolutely is subject to the restriction that she cannot deal with it in order to defeat the agreement is an express term of the Mutual Wills Agreement, equity imposes such a term on the survivor in such circumstances. See: Edell, para. 62; Powell v. Glover, 2008 ABQB 532 at paras. 20 & 26.

[40] Although the Acknowledgement and Direction provides that both Bill and Huguette "fully understand and accept" that if one of them breaches the terms of the agreement, "a constructive trust would arise in favour of all of our respective children with respect to the property", I do not consider that provision to be a term of their Mutual Wills Agreement. Rather, it reflects their understanding of how their Mutual Wills Agreement would be enforced in the event of a breach by the survivor.

[41] Turning next to the authorities, it is not clear when a constructive trust will arise in respect of a mutual wills agreement.

[42] There is authority where there is a mutual wills agreement and the survivor is left a life interest in the assets with a remainder to another, that a constructive trust arises when the first party dies. See: Dufour v. Pereira; Re Gillespie, 1968 CanLII 281 (ON CA), [1969] 1 O.R. 585 (C.A.); Re Grisor (1979), 1979 CanLII 1743 (ON SC), 26 O.R. (2d) 57 (Ont. H.C.); Edell at para. 57.

[43] There is also some authority to support the Applicants' position, holding that in circumstances where the survivor receives the assets of the first party to die as an outright gift that the constructive trust arises at the time of the first testator's death. See: Birmingham v. Renfrew (1937), 57 CLR 666 (High Court of Australia) at p. 683; Hall v. McLaughlin Estate, [2006] O.J. No. 2848.

[44] In Birmingham v. Renfrew, at p. 689, Dixon J. refers to the trust as a "floating obligation, suspended, so to speak, during the lifetime of the survivor" which descends upon the assets at the survivor's death and crystallizes into a trust. See too: Julie Cassidy, Mutual Wills, (Sidney: The Federation Press, 2000) at p. Para. 7.4 at p. 60.

[45] A mutual wills agreement is a contract. As noted, the purpose of imposing a constructive trust is to enforce the terms of the contract in circumstances where one of the parties to the agreement has died and cannot do so.

[46] One thing is clear. Given the parties to a mutual wills agreement can revoke their wills by mutual agreement or independently, provided they give notice to the other party [Dufour v. Pereira; Pratt v. Johnson, 1958 CanLII 79 (SCC), [1959] S.C.R 102], there is no need for equity to impose a constructive trust to enforce the agreement while both parties are living. They have contractual remedies to enforce the agreement if one of them breaches it.

[47] In circumstances where one of the parties to a mutual wills agreement has died, however, and based on the nature of a mutual wills agreement and the purpose of imposing a constructive trust in respect of such agreement, it is my view that a constructive trust does not arise until either the survivor dies or earlier, in the event there has been a breach of the agreement by the survivor.

[48] Based on the above discussion, therefore, I conclude that a constructive trust would only arise in this case in the event of a breach of the Mutual Wills Agreement by Huguette.

[49] The Applicants submissions regarding Huguette's alleged breach are based on their position that the constructive trust arises on Bill's death. In that regard, they submit that Huguette has breached the constructive trust in two ways. First, they submit that Huguette's failure to respond to their inquiries for information constitutes an anticipatory breach. Further, they submit that Huguette's payment to the College of $200,000 constitutes a breach of the trust.

[50] Based on the above discussion, however, it is my view that the proper question to ask is whether the above actions by Huguette are a breach of the Mutual Wills Agreement, requiring equity to intervene and impose a constructive trust.

[51] In answering that question, I am satisfied, based on the record that Huguette is not in breach of the terms of the Mutual Wills Agreement requiring a constructive trust to be imposed. There is no evidence that she has altered her October 13, 2010 Will. Further, I accept her evidence both as to the reason for her gift to the College and the value of Bill's assets (both owned outright or jointly) at the time of his death. I do not consider the $200,000 to be "substantial" based on assets of approximately $4 million. I also do not consider that the purpose of the gift was to defeat the Mutual Wills Agreement. In my view, given Bill's history and involvement with the College, it was a fitting way to honour his memory.

[52] Further, I do not consider that Huguette's failure to respond to the Applicant's requests for information concerning Bill's assets and what she has done with them since his death amount to a breach by her of the Mutual Wills Agreement. Given that she received Bill's assets absolutely and can deal with them as her own, apart from a breach of the Mutual Wills Agreement, she has no legal obligation to provide the Applicants with that information. Huguette also has no duty as Bill's Estate Trustee to provide the Applicants, who are not beneficiaries under Bill's Will, with information about his Estate.

[53] The Applicants submit that they are entitled to the relief they seek against Huguette, including repayment by her of the $200,000, preventing her from gifting her assets until further order of the court, and requiring her to provide monthly

financial information, based on Huguette's alleged breach of constructive trust. As I have found, however, in the circumstances of this case, a constructive trust only arises if there has been a breach of the Mutual Wills Agreement and Huguette is not in breach of it. Accordingly, there is no basis to impose a constructive trust or to grant the relief requested.