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THE DOCTRINE OF MUTUAL WILLS IN SINGAPORE: CASE COMMENT

VTL v VTM

Timothy **Chan***

In *VTL v VTM* [2021] SGHCF 30 ("*VTL v VTM*"), the Singapore High Court had the opportunity to consider the application of the rarely-invoked mutual wills doctrine. The court gave effect to the mutual wills by holding that a subsequent will was invalid and revoking the grant of probate that had been obtained by the executors of that subsequent will. The court in so doing departed from the orthodox understanding that a mutual will takes effect by imposing a constructive trust over the relevant property, rather than by rendering a subsequent will invalid. This comment reviews the law on mutual wills in Singapore and elsewhere, and suggests that *VTL v VTM* was a missed opportunity to unpack some of the thorny issues that have yet to be resolved in relation to the doctrine.

I. Introduction

The term "mutual wills" refers to wills which are made subject to an agreement between the testators that the wills are to be irrevocable.[1] Such wills might be expressed to be absolutely irrevocable, or irrevocable without the consent of the other,[2] or without giving notice to the other.[3] Mutual wills often provide that the first of the testators to die ("T1") will leave all of his or her property to the other ("T2"), and that on T2's death, T2 will leave all of his or her property to specified beneficiaries ("B").[4] In other cases, the mutual wills will provide that T1 and T2 will each leave their entire estate directly to B.[5] The traditional understanding is

* Teaching Assistant, Faculty of Law, National University of Singapore.

1 See John Martyn *et al*, *Theobald on Wills*, 18th ed (London: Sweet & Maxwell, 2016) at para 1-012 [Martyn *et al*, *Theobald on Wills*]; Lynton Tucker, Nicholas Le Poidevin & James Brightwell, eds, *Lewin on Trusts*, 20th ed (London: Sweet & Maxwell, 2020) at para 4-036 [Tucker *et al*, *Lewin on Trusts*]; John McGhee QC & Steven Elliott QC, eds, *Snell's Equity*, 34th ed (London: Sweet & Maxwell, 2020) at para 24-032 [McGhee QC & Elliott QC, *Snell's Equity*]; Ying Khai Liew, *Rationalising Constructive Trusts* (Oxford: Hart Publishing, 2017) at 260 [Liew, *Rationalising Constructive Trusts*].

2 G Raman, *Probate and Administration Law in Singapore and Malaysia*, 4th ed (Singapore: LexisNexis, 2018) at para 3.65 [Raman, *Probate and Administration Law*].

3 Ying Khai Liew, "The Ambit of the Mutual Wills Doctrine" (2016) 132 LQR 664 at 669 [Liew, "Mutual Wills Doctrine"].

4 *Ibid* at 664; Liew, *Rationalising Constructive Trusts*, *supra* note 1 at 259, 260.

5 Tucker *et al*, *Lewin on Trusts*, *supra* note 1 at para 4-037.

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that in all such cases, once T1 dies, the testators' agreement will be enforced by way of a constructive trust over the relevant property in the hands of T2. This approach has been adopted in numerous cases in various Commonwealth jurisdictions,[6] and is taken to be established in the leading commentaries.[7] Yet, many issues remain unresolved in relation to the practical operation of this trust, such as the scope of the property to which the trust attaches, and the extent to which T2's ability to deal with the property is restricted.[8]

The courts in Singapore have not had the opportunity to explore the mutual wills doctrine in detail. There have been no reported decisions in which the traditional constructive trust analysis has been adopted. District Court *obiter dicta* in the case of *Soong Ah Kiow v Yvonne Markham*[9] suggests, following a passage in *Halsbury's Laws of Singapore*, that a party who had made a mutual will is "precluded" from revoking it after the death of the other party to the agreement.[10] However, the present edition of *Halsbury's Laws of Singapore* appears to adopt the traditional constructive trust analysis which is accepted in other jurisdictions. The editors explain that:

> If a mutual will is revoked, the party revoking the will can be liable for breach of contract and breach of trust. Upon the death of one party, a trust arises in favour of the beneficiaries and even though the new will is effective in vesting the property in the new executor, *the executor holds the property on trust for the beneficiaries appointed by the mutual wills*.[11]

Other local commentaries likewise take the position that a mutual will arrangement gives rise to a constructive trust upon the death of one of the testators, relying largely on English authorities. In *Personal Property Law*, Professor Tan Yock Lin explains the mutual wills doctrine as a case of an "imperfectly constituted testamentary trust" which may be enforced in equity by means of a "floating trust".[12] The author of *Trusts, Trustees and Equitable Remedies: Text and Materials* similarly refers to the English position and endorses the proposition that a mutual will is enforceable under a trust.[13] However, these texts do not examine in any detail the difficulties that surround the operation of such a trust.

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6 See *eg Dufour v Pereira* (1769) 21 ER 332 (Ch) [*Dufour v Pereira*]; *Re Dale, Decd* [1993] 4 All ER 129 (Ch) [*Re Dale*]; *Healey v Brown* [2002] EWHC (Ch) 1405 [*Healey v Brown*]; *Olins v Walters* [2009] Ch 212 [*Olins v Walters*]; *Birmingham v Renfrew* (1937) 57 CLR 666 (HCA) [*Birmingham v Renfrew*]; *Re Newey (Deceased)* [1994] 2 NZLR 590 (NZHC) [*Re Newey*]; *Nelson v Trottier* 2019 ONSC 1657 [*Nelson v Trottier*].

7 See *eg* Martyn *et al*, *Theobald on Wills*, *supra* note 1 at para 1-015; Tucker *et al*, *Lewin on Trusts, supra* note 1 at para 4-036; McGhee QC & Elliott QC, *Snell's Equity*, *supra* note 1 at para 24-032.

8 See Jamie Glister & James Lee, *Hanbury & Martin on Modern Equity*, 21st ed (London: Sweet & Maxwell, 2018) at paras 12-016, 12-017 [Glister & Lee, *Modern Equity*].

9 [2014] SGDC 319 [*Soong Ah Kiow*].

10 *Ibid* at para 72.

11 *Halsbury's Laws of Singapore* (Volume 15) (Singapore: LexisNexis, 2021) at para 190.224 [emphasis added].

12 Tan Yock Lin, *Personal Property Law* (Singapore: Academy Publishing, 2014) at paras 10.99-10.102. As to the operation of the "floating trust", see Parts IV and V below.

13 Tey Tsun Hang, *Trusts, Trustees and Equitable Remedies: Text and Materials* (Singapore: LexisNexis, 2010) at 385.

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In the recent case of *VTL v VTM*,[14] the Singapore High Court had the opportunity to consider a dispute involving a mutual will. As it turned out, the focus of the judgment was on the validity of the mutual will, rather than on its effect. This was because the defendants, who challenged the mutual will, do not appear to have raised issues concerning the scope of the constructive trust arising from the mutual will. It seems that the parties and the court assumed that the mutual will prevented the testator's subsequent will from taking effect. This departs from the orthodox understanding that a mutual will takes effect by imposing a constructive trust over the relevant property, rather than by rendering a subsequent will invalid. In making this assumption, the defendants missed an opportunity to run their case from a different and potentially promising angle. Equally, the court was deprived of the opportunity to consider and unpack some of the thorny issues that have yet to be resolved in relation to the mutual wills doctrine.

II. The Facts of *VTL v VTM*

In *VTL v VTM*, a dispute arose between five siblings over the estate of their parents, referred to in the judgment as the Father and the Mother. At the time of the trial, the net value of the estate was SGD356,344.01, the bulk of which consisted of the flat in which the Mother had resided. The Father and the Mother had executed mutual wills ("Mutual Wills") in 2001. It appears that they had bequeathed all of their property to the survivor among them.[15] Further, they agreed that the survivor would bequeath 35% of their estate to their son, VTL, 35% to their grandson, VTE, and 10% each to their three daughters, VTM, VTJ and VTN. They did not give anything to their eldest son, VTC, who was VTE's father. The Mutual Wills appointed VTL and VTM as executors and trustees. Under the terms of the Mutual Wills, the Father and the Mother agreed not to alter the terms of the wills, and the wills were expressed to be irrevocable. The Mutual Wills were placed in VTL's possession.

The Father passed away in 2004. At that time, the entire family assumed that all of the parents' assets devolved upon the Mother, and VTL's evidence was that he had forgotten about the mutual wills. However, on 5 April 2017, the Mother executed another will ("2017 Will"), appointing the defendants, VTM and VTN, as executors and trustees. In this will, the mother's entire estate was bequeathed to VTM and VTN equally, and VTL, VTC and VTJ were to receive only one dollar each. After the Mother died in 2019, the defendants obtained a grant of probate in respect of the 2017 Will.

In the suit, VTL sought a declaration that the Mutual Will of the Mother was the last Will and testament of the Mother, and that the grant of probate to the defendants be revoked. The defendants counterclaimed for an order that the 2017 Will was the last Will and testament of the Mother. The defendants attempted to challenge the validity of the Mutual Wills by asserting that they were not properly explained to the

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[14] [2021] SGHCF 30 [*VTL v VTM*].

[15] This is presumably the case, although not expressly stated in the judgment, given that the court found that upon the Father's death, the entire family assumed that all his assets devolved upon the Mother: *ibid* at para 3.

Father and Mother, who could not have understood the terms of the Mutual Wills.[16] However, after hearing evidence from the solicitor who had drafted the will, the court was satisfied that the wills were properly drawn up and executed.[17] There was also no evidence to indicate that the Father and Mother had acted under duress or undue influence in executing the Mutual Wills.[18]

III. The Requirements to Invoke the Mutual Wills Doctrine

Having rejected the defendants' challenges to the validity of the Mutual Wills, the court seemed to assume that they took effect as mutual wills in law on the basis that, under the terms of the wills, the Father and the Mother had agreed not to alter the terms of the wills,[19] and the wills were expressed to be irrevocable.[20]

That conclusion does not appear to have been contested by the defendants, and is clearly correct. The authorities unanimously indicate that the mutual wills doctrine is invoked upon proof of an agreement that the testators should make certain bequests in their wills which are intended to be irrevocable.[21] In this regard the English cases establish that the agreement must amount to a "contract at law" between the testators,[22] although it is not required that the agreement be sufficiently certain to be enforceable as a contract.[23] It has been suggested that an agreement that states explicitly that the wills are not to be revoked will satisfy the requirement,[24] but it seems questionable whether this alone is sufficient to invoke the doctrine, unless it is referable to an agreement between the testators. Given that, on the facts of *VTL v VTM*, the wills themselves contained an agreement that the parties would not alter the terms of the wills, there is no doubt that the wills took effect as mutual wills.

One point that may be worth noting is that the mutual wills doctrine can only be invoked where the testators have agreed to make their wills irrevocable, as opposed to merely agreeing to make their wills in the same form. This requirement was

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16 *Ibid* at para 8.

17 *Ibid* at paras 9-12.

18 *Ibid* at para 13.

19 *Ibid* at para 4.

20 *Ibid* at para 5.

21 Martyn *et al*, *Theobald on Wills*, *supra* note 1 at para 1-013; Tucker *et al*, *Lewin on Trusts*, *supra* note 1 at para 4-038; McGhee QC & Elliott QC, *Snell's Equity*, *supra* note 1 at para 24-033.

22 *Ibid*; *Olins v Walters*, *supra* note 6 at para 36.

23 Such an argument was rejected in *Olins v Walters*, *ibid*, because a mutual wills claim arises from an equitable obligation imposed on the survivor, and is not a contractual claim for specific performance or other relief: see para 24. A contrary suggestion from the English High Court in *Healey v Brown*, *supra* note 6 to the effect that a mutual wills contract had to comply with the formality requirements in *Law of Property (Miscellaneous Provisions) Act 1989* (UK), s 2(1) has been strongly criticised in multiple quarters as unsustainable: see *eg* Liew, *Rationalising Constructive Trusts*, *supra* note 1 at 277; Tucker *et al*, *Lewin on Trusts*, *supra* note 1 at para 4-044; Peter Luxton, "*Walters v Olin*: Uncertainty of subject matter - an insoluble problem in mutual wills?" (2009) Conveyancer & Property Lawyer 498 at 502 [Luxton, "mutual wills"].

24 *Ibid* at 501.

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clearly met in *VTL v VTM*.[25] It is however insufficient if the wills were merely executed at the same time, even if they were virtually identical.[26] For example, in *Re Oldham*,[27] a husband and wife made mutual wills in the same form. This was done pursuant to an agreement to make the wills in that manner, but the evidence did not establish any further agreement (and, therefore, there was no express provision for the wills to be irrevocable). The wife survived the husband and later remarried and made substantial changes to her testamentary dispositions. However, as there was no evidence on which the court could hold that there was an agreement that the mutual wills should be irrevocable, the court reluctantly held that it was unable to give effect to the mutual wills.[28] *Re Oldham* was affirmed by the Privy Council on appeal from the High Court of Australia in *Gray v Perpetual Trustee Company*.[29] Given the established authority on this point, it is likely that the same position will be adopted in Singapore. The required agreement may be found outside the text of the wills,[30] and a mutual wills agreement may be proven through inferences drawn from facts, rather than from direct evidence of the agreement itself.[31] But it is preferable that such agreement be recited in the will[32] (as appears to have been done in *VTL v VTM*).

IV. The Effect of the Mutual Wills Doctrine

Having rejected the defendants' challenges to the validity of the Mutual Wills, the High Court in *VTL v VTM* failed to explore in any detail a more interesting issue concerning the effect of the Mutual Wills. The court concluded that the Mutual Wills had to "take precedence over the 2017 Will of the Mother" and granted an order in terms of prayers (a) to (f) of the plaintiff's claim (which presumably included the declaration sought by the plaintiff that the Mutual Will of the Mother was the last Will and testament of the Mother, and the order that the grant of probate to VTM and VTN in respect of the 2017 Will be revoked).[33]

In assuming that the Mutual Wills took precedence over the subsequent will executed by the Mother, the court took the position that the Mutual Wills were truly irrevocable. This approach departs from the orthodox understanding which holds that a mutual will does not render a subsequent will invalid, but rather causes the relevant property to be affixed with a constructive trust in the hands of the survivor. That a mutual will takes effect by way of a constructive trust is established

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25 See *VTL v VTM*, *supra* note 14 at para 5: "Clause 2 of the Mother's Mutual Will also provide (*sic*) that the Mutual Wills are irrevocable".

26 Martyn *et al*, *Theobald on Wills*, *supra* note 1 at para 1-013; Tucker *et al*, *Lewin on Trusts*, *supra* note 1 at para 4-038; McGhee QC & Elliott QC, *Snell's Equity*, *supra* note 1 at para 24-033.

27 [1925] 1 Ch 75 [*In re Oldham*].

28 *Ibid* at 88, 89.

29 [1928] AC 391 (PC). See further *Re Dale, supra* note 6 at 139d.

30 See *Re Cleaver* [1981] 2 All ER 1018 (Ch) [*Re Cleaver*].

31 See *Fry v Densham-Smith* [2010] EWCA Civ 1410 at para 33; *St Clair v King* [2018] EWHC 682 (Ch) at para 78.

32 Glister & Lee, *Modern Equity*, *supra* note 8 at para 12-012.

33 *VTL v VTM*, *supra* note 14 at paras 7, 16.

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in English,[34] Australian,[35] New Zealand,[36] and Canadian[37] decisions. A leading English decision on mutual wills puts it thus:

> The doctrine of mutual wills is to the effect that where two individuals have agreed as to the disposal of their property and have executed mutual wills in pursuance of the agreement, on the death of the first ("the first testator") the property of the survivor ("the second testator"), the subject matter of the agreement, is held on an implied trust for the beneficiary named in the wills. The survivor may thereafter alter his will, because a will is inherently revocable, but if he does his personal representatives will take the property subject to the trust.[38]

The reason that a mutual will takes effect only in equity is the established view that a will is "by its very nature revocable".[39] Notably, it is accepted in Singapore law that revocability is inherent in the nature of a will.[40] In departing from this established position, the approach in *VTL v VTM* is unusual.

At first glance, it appears that the approach in *VTL v VTM* gives mutual wills the most literal effect possible. The Mutual Wills were expressed to be irrevocable, and the court held that they were in fact irrevocable.[41] Upon consideration, however, this approach imposes fewer restrictions on the surviving testator than the constructive trust analysis. If the only effect of a mutual will were to render a subsequent will invalid, this would leave the surviving testator free to make *inter vivos* dispositions that would defeat the purpose of the mutual will. For example, in *VTL v VTM*, the Mother could during her lifetime have transferred the flat she lived in (which made up the bulk of her testamentary estate) to VTM and VTN (rather than bequeathing it to them in her 2017 Will). It would be unsatisfactory if the mutual wills doctrine could not address such situations. With respect, it is suggested that this aspect of the judgment in *VTL v VTM* should be treated with caution. It is notable that no authority was cited in *VTL v VTM* for the proposition that the mutual wills took precedence over the subsequent will, and the court's attention did not seem to have been drawn to the constructive trust analysis. Had the point been raised, it is likely that, at the very least, the court would not have granted the plaintiffs the declaration sought, and would not have revoked the grant of probate in respect of the 2017 Will.

That in itself would not have assisted the defendants. If the defendants had taken the argument no further, the court would likely have simply declared that they held the entire estate on trust for the beneficiaries in the proportions stated in the Mutual

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34 See *eg Dufour v Pereira*, *supra* note 6; *Re Dale*, *supra* note 6; *Healey v Brown*, *supra* note 6; *Olins v Walters*, *supra* note 6.

35 See *Birmingham v Renfrew*, *supra* note 6.

36 See *eg Re Newey*, *supra* note 6.

37 See *eg Nelson v Trottier*, *supra* note 6.

38 *Re Dale*, *supra* note 6 at 132f.

39 *Ibid* at 133g; *Healey v Brown*, *supra* note 6 at para 8.

40 See *ULV v ULW* [2019] 3 SLR 1270 (HC) at para 23; Raman, *Probate and Administration Law*, *supra* note 2 at para 3.65; Martyn *et al*, *Theobald on Wills*, *supra* note 1 at para 1-010.

41 Or, depending on their terms, absolutely irrevocable without the consent of, or notice to, the other testator.

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Wills, with no change to the substantive result. However, the constructive trust analysis might have enabled the defendants to raise a further argument that the trust did not affix to the Mother's entire estate at the point of her death, but only to a limited subset of that property. In this regard, the judgment did not provide any breakdown of the Mother's estate, save to state that its net value was SGD356,344.01, of which the bulk consisted of the flat that the Mother stayed in, which was estimated to be worth SGD350,000.[42] The judgment did not distinguish between (i) property that devolved to the Mother upon the Father's death; (ii) property that already belonged to the Mother at that time;[43] and (iii) property that the Mother acquired subsequent to the Father's death.[44] If a substantial part of the Mother's estate had comprised property in the latter two categories, and in particular the third category, it might have been worthwhile for the defendants to contend that the constructive trust should have attached only to property in the first category, *ie* that devolved upon the Mother on the Father's death in 2004. Had this contention succeeded, the defendants would have been entitled to a larger share of the Mother's estate.

V. Three Areas of Controversy

The argument outlined above might have been open to the defendants because there remains significant uncertainty as to the precise scope of the constructive trust that arises out of a mutual will arrangement. It has been said in England that there is controversy as to when and how it takes effect,[45] and Rimer J in *Birch v Curtis*[46] complained that the precise nature of the trust was "obscure".[47] In particular, there remains uncertainty in relation to: (1) how and when the trust arises; (2) the scope of the property to which the trust attaches; and (3) the extent to which the survivor is restricted from dealing with that property during his or her lifetime.[48]

A. *The Nature of the Trust*

Various approaches have been suggested to explain the nature of the trust. These include an argument that mutual wills should be regarded as *sui generis*,[49] and that resort should be had to a remedial constructive trust analysis.[50] However, the approach that enjoys the greatest support in the cases is that upon T1's death, all

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42 *VTL v VTM*, *supra* note 14 at para 4.

43 If the flat had been held by the Mother and Father jointly, then the Mother's own share would have fallen into this category.

44 Which might have taken the form of monetary allowances from her 5 children over the period of 15 years from the Father's death in 2004 to the Mother's death in 2019.

45 *Legg and another v Burton and others* [2017] EWHC 2088 (Ch) at para 68 [*Legg v Burton*].

46 [2002] EWHC 1158 (Ch) [*Birch v Curtis*].

47 *Ibid* at para 61.

48 Glister & Lee, *Modern Equity*, *supra* note 8 at paras 12-016, 12-017.

49 See C E F Rickett, "Mutual wills, restitution and construction trusts – again" [1996] Conveyancer & Property Lawyer 136 at 141; Liew, *Rationalising Constructive Trusts*, *supra* note 1 at 261, and the authorities cited therein at n 20.

50 See Liew, *Rationalising Constructive Trusts*, *ibid* at 261; Luxton, "mutual wills", *supra* note 23 at 504.

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the property belonging to T2 at that point is affixed with a "floating" obligation.[51] Under this conception, the beneficiaries' interest does not crystallise until T2's death, and therefore does not attach to any specific property while T2 is alive. But upon T1's death, the mutual wills agreement becomes irrevocable, and upon T2's death, the relevant property becomes affixed with a trust. During his or her lifetime, T2 may enjoy the property, and may make *inter vivos* gifts and settlements, but not if they are "calculated to defeat the intention of the compact".[52] The High Court of Australia put it thus in the leading decision of *Birmingham v Renfrew*:

> The purpose of an arrangement for corresponding wills must often be, as in this case, to enable the survivor during his life to deal as absolute owner with the property passing under the will of the party first dying. That is to say, the object of the transaction is to put the survivor in a position to enjoy for his own benefit the full ownership, so that, for instance, he may convert it and expend the proceeds if he chooses. But when he dies he is to bequeath what is left in the manner agreed upon. *It is only by the special doctrines of equity that such a floating obligation, suspended, so to speak, during the lifetime of the survivor, can descend upon the assets at his death and crystallise into a trust. No doubt gifts and settlements inter vivos, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition inter vivos is, therefore, not unqualified. But, substantially, the purpose of the arrangement will often be to allow full enjoyment for the survivor's own benefit and advantage upon condition that at his death the residue shall pass as arranged*.[53]

It has been suggested in some quarters that this "floating obligation" approach creates conceptual difficulties. The primary objection is that it contemplates a trust which lacks certainty of subject-matter.[54] However, it is arguable that uncertainty over the subject-matter of the trust exists only because the courts have yet to clarify the scope of the doctrine. If the courts were to definitively state that, for example, all property belonging to T2 at the time of T1's death falls within the scope of the doctrine, then the subject-matter over which the obligation floats would be clear.[55] Seen in this context, the uncertainty over the scope of the mutual wills doctrine is distinct from the uncertainty arising where the subject-matter of a trust is by nature impossible to identify, as where a settlor purports to declare a trust over "the bulk" of his residuary estate,[56] or a trust over some part of a larger mass of fungible

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[51] *Re Cleaver, supra* note 30 at 1023, 1024; *Re Goodchild (Deceased)* [1996] 1 WLR 694 (Ch) at 702, affirmed on appeal in [1997] 1 WLR 1216 (EWCA) at 1225; *Birch v Curtis*, *supra* note 46 at para 61; *Healey v Brown*, *supra* note 6 at para 13. See also Tucker *et al*, *Lewin on Trusts*, *supra* note 1 at para 4-055; McGhee QC & Elliott QC, *Snell's Equity*, *supra* note 1 at para 24-036.

[52] *Birmingham v Renfrew*, *supra* note 6 at 689.

[53] *Ibid* at 689 [emphasis added].

[54] Luxton, "mutual wills?", *supra* note 23 at 504; Liew, *Rationalising Constructive Trusts*, *supra* note 1 at 261.

[55] If the trust is held to extend to *future* property to be acquired by T2, a problem of uncertainty of subject-matter arises. See further Part B below.

[56] McGhee QC & Elliot QC, *Snell's Equity*, *supra* note 1 at para 22-017.

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property.[57] Another objection is that insofar as the "floating obligation" is akin to a floating charge, the analysis is inconsistent with the policy that an individual may not grant a floating charge over his personal chattels.[58] But the prohibition thereto originates from sections 4 and 5 of the *UK Bills of Sale Act (1878) Amendment Act 1882*,[59] which prohibit the creation of floating securities over personal chattels unless specifically described. The "floating obligation" arising pursuant to a mutual will is distinct from a floating charge because it involves no element of security. The objection based on the *Bills of Sale Act* therefore does not stand, and there appears to be no reason why the "floating obligation" may not be developed along the lines of the floating charge.[60]

B. *What Property is Subject to the Mutual Wills Obligation?*

Conceptualising the trust as a "floating obligation" may explain the nature of the obligation, but does not explain the scope of the property to which the floating obligation attaches. Of course, the terms of the mutual will are the starting point: for example, if the parties have agreed to preclude property acquired after T1's death from being bound,[61] or conversely agreed that such property shall be bound,[62] then there are indications that the courts will give effect to their agreement.[63] But in the absence of such stipulation, such as where the parties simply agree to leave their entire estate to specified beneficiaries in particular shares (as seems to have been the case in *VTL v VTM*), the position remains unclear. In *Birmingham v Renfrew*,[64] the High Court of Australia held that the obligation attaches to property passing to the survivor under the will of the first-deceased,[65] but did not state further whether the obligation would extend to the survivor's own property. The balance of authority suggests that the trust attaches at least to all the property belonging to both testators at the time the mutual wills were made,[66] as well as the traceable proceeds thereof.[67] But as to property acquired by T2 after T1's death, there appears

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57 *Ibid* at para 22-018.

58 Liew, *Rationalising Constructive Trusts*, *supra* note 1 at 261.

59 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, 6th ed (London: Sweet & Maxwell, 2017) at para 4-01 [Goode & Gullifer, *Credit and Security*]. For the equivalent provisions in Singapore, see *Bills of Sale Act* (Cap 24, 2011 Rev Ed Sing), s 5(1), (2) [*Bills of Sale Act*].

60 See Christine J Davis, "Floating rights" (2002) 61(2) Cambridge LJ 423 at 429.

61 As appears to have been the case in *Re Gillespie* (1968) 69 DLR (2d) 368 (Ontario CA) at paras 9, 12.

62 As in *Nelson v Trottier*, *supra* note 6 at para 38.

63 Note that it is unclear how exactly this obligation takes effect. While a covenant to transfer future property is effective and takes automatic effect at the point when the property becomes vested in the covenantor (here T2), such a covenant is not enforceable by a volunteer: see Tucker *et al*, *Lewin on Trusts*, *supra* note 1 at para 2-036. It is therefore difficult to explain how such "after-acquired" property becomes affixed by a trust in favour of the beneficiaries of the mutual will. The court in *Nelson*, *ibid*, did not explain how such a trust would operate.

64 *Birmingham v Renfrew, supra* note 6.

65 *Ibid* at 689.

66 See *Re Dale*, *supra* note 6 at 132e; *Re Hagger* [1930] 2 Ch 190 at 195; see also *Powell v Glover* 2008 ABQB 532 (Alberta QB) at paras 20-25 and Glister & Lee, *Modern Equity*, *supra* note 8 at para 12-016.

67 *Hubbard and anor v Mason and ors* (1997) unreported, Lexis Citation BC9706574 (NSWSC) at 35; Liew, *Rationalising Constructive Trusts*, *supra* note 1 at 269.

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to be no support in the cases for the proposition that such "after-acquired" property will be bound.[68] The leading commentaries are ambivalent.[69] Ying Khai Liew has proposed that such after-acquired property should not be subject to any trust obligations, but may be subject to a claim in proprietary estoppel;[70] however, this novel approach has yet to receive judicial consideration. The position accordingly remains unsettled.

The result of the foregoing is that the trust will likely extend at least to all property belonging to T2 at the point of T1's death. It should be borne in mind that this discussion assumes that the testators have not expressly contemplated how such property should be treated; the question therefore is what the default position ought to be. In this light, extending the trust to all of T2's property at the time of T1's death is entirely logical, as a mutual wills arrangement by definition contemplates each party committing to leave some or all of their own property to the agreed beneficiaries, rather than only property received from the other.[71] Being consistent with what the makers of mutual wills most likely intended, this is the appropriate default position. However, as to after-acquired property, it is suggested that such property ought not to be subject to mutual wills obligations in the absence of clear stipulation. To treat the property as subject to such obligations would be extremely onerous and would effectively "reduce the survivor to the position of a life tenant in respect of all his property", even property acquired in the future.[72] The law regards mutual will agreements as inherently improbable, and cogent evidence is therefore required to persuade a court that such an agreement is proven on the balance of probabilities.[73] It would be inconsistent with this position to adopt a default position that sweeps after-acquired property within the ambit of the obligation; to the contrary, it is even more improbable that testators would have intended to include after-acquired property within the mutual wills. Accordingly, the preferable position is that whether or not such property is included should be left purely to a matter of interpretation and proof. The court should have regard to all the circumstances, including the age of the testators at the time of the mutual will, and whether they would have foreseen that the survivor might continue generating income after the demise of the other. If the party seeking to enforce the mutual will is unable to prove that the testators intended to include after-acquired property, then there is no reason for which the law should presume such property to fall within the mutual wills.

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68 *Legg v Burton*, *supra* note 45 suggests at para 69 that the subject-matter of the trust is everything left at the death of the survivor, but at para 71 states that the equitable obligation arose in relation to property that T2 received from T1 as well as property that T2 had at the time of making the will; it therefore does not stand as unequivocal authority for the proposition that after-acquired property should be bound.

69 See Glister & Lee, *Modern Equity*, *supra* note 8 at para 12-016; McGhee QC & Elliott QC, *Snell's Equity*, *supra* note 1 at para 24-036.

70 Liew, *Rationalising Constructive Trusts*, *supra* note 1 at 264, 265.

71 The latter situation would simply involve one testator granting a life interest to the other, and need not be analysed under the mutual wills doctrine.

72 Glister & Lee, *Modern Equity*, *supra* note 8 at para 12-016. There are also suggestions that, in the context of the law of assignment, it is contrary to public policy for an individual to assign his entire estate, both present and future, as this renders the purported assignor "destitute or a quasi-slave of the assignee": see Liew, *Rationalising Constructive Trusts*, *supra* note 1 at 266.

73 *Birmingham v Renfrew*, *supra* note 6 at 674; *Legg v Burton*, *supra* note 45 at para 28.

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C. *What Restrictions are Imposed on the Survivor?*

Beyond the scope of the property to which the mutual wills attach, the cases also have not definitively determined what restrictions are imposed upon the survivor during his or her lifetime. Given the reference to a "floating" obligation, the natural comparison is with a floating charge, where it is well established that the chargor may deal with the property subject to the charge in the "ordinary course of business" prior to crystallisation.[74] Comparable guidance in the mutual wills context is found in *Birmingham v Renfrew*.[75] That case indicates that only dispositions "calculated to defeat the intention of the compact" would be prevented, but otherwise *inter vivos* dispositions are permissible.[76] In *Healey v Brown*, it was held that an outright gift[77] of a flat that formed the subject-matter of the mutual wills agreement would run "directly and fully counter to the intention of the mutual will compact" and was therefore impermissible.[78] But in the recent case of *Nelson v Trottier*,[79] the Ontario Superior Court of Justice held that a gift of CAD200,000 out of an asset pool of approximately CAD4 million was not in breach of the terms of, or intended to defeat, the mutual wills agreement.[80] Once again, of course, the extent to which the survivor may deal with the property depends on the construction of the mutual wills agreement.[81] It appears, therefore, that the default position is that set out in *Birmingham v Renfrew* but the testators are free to stipulate more restrictive or less restrictive provisions. Substantial uncertainty nevertheless remains as to how the courts will assess whether a gift runs counter to the intention of the mutual wills compact. The cases have yet to resolve important questions such as whether the assessment is objective or subjective, or (as is likely) a combination of the two, and whether, and to what extent, the testators can modify the default position.

VI. Conclusion

Had the conventional constructive trust approach been adopted in *VTL v VTM*, the Mutual Wills would have created a "floating obligation" that became irrevocable on the Father's death and crystallised into a constructive trust on the Mother's death. That trust would have encompassed all the property belonging to the Mother at the time of the Father's death in 2004. But, on the view advanced here, any property subsequently acquired by the Mother would not have been subject to such obligations (unless expressly provided for in the wills). Given that the bulk of the Mother's estate consisted of the flat in which she resided, it would have been relevant to

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74 See Goode & Gullifer, *Credit and Security*, *supra* note 59 at para 5-42.

75 *Birmingham v Renfrew*, *supra* note 6.

76 *Ibid* at 689.

77 By transferring the flat in question into the joint names of the surviving testator and his son, so as to effect an immediate gift of a 50% undivided share in the flat, with effect on death as to the remainder by the operation of survivorship: *Healey v Brown*, *supra* note 6 at para 14.

78 *Ibid* at para 14.

79 *Nelson v Trottier*, *supra* note 6.

80 *Ibid* at para 51.

81 *Legg v Burton*, *supra* note 45 at para 70.

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investigate when the Mother acquired the flat. If the Mother had acquired the flat after 2004, the defendants might have run an argument that the flat did not form part of the property subject to the mutual wills agreement; accordingly, they could have said that the trust that crystallised upon the Mother's death did not extend to the flat, and the flat devolved in accordance with the Mother's 2017 Will.

Of course, there would be no guarantee that such an argument would have succeeded. The operation of the mutual wills doctrine remains obscure in Singapore. Even elsewhere, the doctrine has been criticised as being a "clumsy way of dealing with a complicated problem".[82] In *Olins v Walters*, the English Court of Appeal observed that the mutual wills doctrine "continues to be a source of contention for the families of those who have invoked it."[83] The mutual wills doctrine nevertheless throws up a number of fascinating issues, some of which have been explored above. We await with interest the direction in which the law on mutual wills will develop, both in Singapore and elsewhere.

[82] Glister & Lee, *Modern Equity*, *supra* note 8 at para 12-018.

[83] *Olins v Walters*, *supra* note 6 at para 3.