Life (or more so death) after *Barns v Barns*

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Introduction

This article critically evaluates the decision in Barns v Barns.[1] This High Court decision provides an important precedent on the interplay between mutual wills and testator family maintenance legislation. To briefly introduce this peculiar form of will, the most crucial attribute of mutual wills is their legally binding nature. A party to a mutual wills agreement is bound not to revoke his/her will in their lifetime without notifying the other party and thereby giving the other party the opportunity to revoke their own will.[2] Moreover, once one party to the mutual wills agreement dies leaving his or her will unrevoked, equity intervenes and treats the agreement as irrevocable.[3] The issue before the High Court was whether an agreement for mutual wills was void for public policy reasons and, in particular, whether property of a deceased that was obligated under the

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1 [2003] HCA 9 (High Court of Australia).

2 *Bigg v Queensland Trustees Ltd* [1990] 2 Qd R 11, 15 (Supreme Court of Queensland,1989). See also Julie Cassidy, *Mutual Wills* (2000) 54-55; Rosalind Croucher, "Mutual Wills: Contemporary Reflections on an old doctrine" (2005) 29 *Melb U Law Rev* 390, 395-397.

3 *Chamberlaine v Chamberlaine* (1680) 22 ER 1053 (Eng. Chancery Division of the High Court, 1680); *Dufour v Pereira* (1769) 21 ER 332, 333; 1 Dick 419, 420; 2 Harg Jurid Arg 304, 308, 310 (Eng. Chancery Division of the High Court, 1769); *Lord Walpole v Lord Orford* (1797) 3 Ves 402; Ch 38; (1799) 2 Harg Jurid Arg 292, 294-295 (Eng. Chancery Division of the High Court, 1797); *Birmingham v Renfrew* (1937) 57 CLR 666, 682, 683, 685-689 (High Court of Australia, 1937); *Re Cleaver* [1981] 1 WLR 939, 947 (Eng. C.A.1981); *Bigg v Queensland Trustees Ltd* ibid 13, 16; *Proctor v Dale* [1994] Ch 31, 42, 48; [1993] 3 WLR 652, 659-660, 665 (Eng. Chancery Division of the High Court, 1993); *Re Goodchild* [1996] 1 WLR 694, 698-699, 700, 702 (Eng. Chancery Division of the High Court, 1996). See also Cassidy ibid 54-56; Croucher ibid 398-402.

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maintenance legislation and thus could, by court order, be passed to an applicant contrary to the mutual wills agreement.

As *Barns v Barns*[4] indicates, mutual wills may be used in a bid to avoid testator family maintenance legislation. As will be seen from the discussion below, the High Court concluded that despite mutual wills having in a given case such a purpose, this did not render the underlying mutual wills agreement void for public policy reasons. A majority of the High Court did, however, conclude that the subject mutual wills and deed did not have the effect of preventing the application of the *Inheritance (Family Provisions) Act*, 1972 (SA).

It is contended that despite this decision there is 'life' after *Barns v Barns*[5] for mutual wills. Mutual wills continue to have a role despite the decision. This is supported by five propositions. First, the case was very much confined to its particular facts and in another case could be easily distinguished. It will be seen that the factual basis of the case was particularly relevant to the conclusion of two of the majority justices, namely Gleeson CJ, with whom Kirby J agreed.

Second, the majority justices' decision is erroneous and is based on a misunderstanding of the legal effect of mutual wills. The majority justices fail to appreciate that mutual wills have legal effect as soon as the mutual wills agreement is entered into. In this regard, Callinan J in his dissent correctly acknowledges that mutual wills have an impact on the first to die, not merely the survivor. Thus it will be contended that if challenged in the future, the majority decision would be found to be incorrect.

Third, there was no clear majority; in a sense the court was divided: 2:2:1. As already noted, the finding of two of the majority justices (Gleeson CJ, with whom Kirby J agreed) was based on Gleeson CJ's particular view of the facts. It will also be seen that Gleeson CJ certainly would not agree with the reasoning of the other two majority justices, Gummow and Hayne JJ, in particular their application of the legislation to the gross, rather than net, estate of the deceased. Thus the precedent value of the decision is weak in light of the lack of agreement amongst the majority justices.

4 [2003] HCA 9.

5 Ibid.

Fourth, and related to the last point, two of the majority justices (Gleeson CJ, with whom Kirby J agreed), acknowledged that the *Inheritance (Family Provision) Act*, 1972 (SA) has its limitations and *inter vivos* arrangements are still effective to avoid the legislation unless the particular Act expressly extends to such transactions. Mutual wills are often combined with *inter vivos* agreements and thus continue to be effective in this regard even post *Barns v Barns*.[6] Finally, and perhaps most importantly, mutual wills have a purpose beyond avoiding family maintenance legislation and in this regard mutual wills remain unaffected.

II Mutual wills

Before turning to the decision in *Barns v Barns*[7] the purpose underlying mutual wills is briefly detailed. [8] As mutual wills are binding, the key purpose of such wills is to ensure that property flows to intended, agreed, beneficiaries.[9] They are generally used to ensure that a testator's property can be enjoyed by another during his or her lifetime, but then passes to a third party, the 'ultimate beneficiary.'[10] They may also be used to ensure that a testator's interest in jointly owned property passes to a third party beneficiary, not the other joint owner.[11] Who may benefit from mutual wills is discussed below.

6 Ibid.

7 Ibid.

8 See further Cassidy, above n 2, 1-2; Croucher, above n 2, 392-393.

9 *Chamberlaine v Chamberlaine* (1680) 22 ER 1053 (Eng. Chancery Division of the High Court, 1680); *Dufour v Pereira* (1769) 21 ER 332, 333; 1 Dick 419, 420; 2 Harg Jurid Arg 304, 308, 310 (Eng. Chancery Division of the High Court, 1769); *Lord Walpole v Lord Orford* (1797) 3 Ves 402; Ch 38; (1799) 2 Harg Jurid Arg 292, 294-295 (Eng. Chancery Division of the High Court, 1797); *Birmingham v Renfrew* (1937) 57 CLR 666, 682, 683, 685-689 (High Court of Australia, 1937); *Re Cleaver* [1981] 1 WLR 939, 947 (Eng. C.A.1981); *Bigg v Queensland Trustees Ltd* [1990] 2 Qd R 11, 13, 16; *Proctor v Dale* [1994] Ch 31, 42, 48; [1993] 3 WLR 652, 659-660, 665 (Eng. Chancery Division of the High Court, 1993); *Re Goodchild* [1996] 1 WLR 694, 698-699, 700, 702 (Eng. Chancery Division of the High Court, 1996).

10 See for example *Birmingham v Renfrew* ibid 682, 683, 685-689; *Re Cleaver* ibid 947; *Bigg v Queensland Trustees Ltd* ibid 13, 16.

11 See for example *Proctor v Dale* [1994] Ch 31, 42, 48; [1993] 3 WLR 652, 659-660, 665 (Eng. Chancery Division of the High Court, 1993); *Osborne v Osborne*, [2001] VSCA 228, [24]-[25] (Victorian Court of Appeal, 2001).

In effecting these purposes, equity is concerned with preventing fraud.[12] Disputes pertaining to mutual wills fall '[u]nder the equitable jurisdiction for the prevention of fraud'.[13] The 'fraud' is often expressed in leading cases such as *Dufour v Pereira*[14] and *Birmingham v Renfrew*[15] in terms of the survivor, the second testator, taking the benefit under the first testator's will and the second testator then abrogating the trust embodied in his or her own will by revoking that will.[16] In this context the second testator has acted fraudulently by attempting to take the benefit under the first testator's will without the burden attaching to it. Alternatively, 'fraud' can be described in terms of the second testator allowing the first testator to die in the belief that the second testator would comply with the terms of the agreement and the second testator then subsequently disposes of his or her property other than in accordance with the agreement.[17] This is the author's preferred manner of describing the fraud, as it does not necessitate the second testator taking a benefit under the first testator's will. This accommodates the case law that provides that it is not a prerequisite of the mutual wills doctrine that the second testator benefit under the first testator's will.[18] Under this view of the fraud, the crucial element is that the first testator has acted to his or her detriment by

12 *Chamberlaine v Chamberlaine* (1680) 22 ER 1053; *Dufour v Pereira* (1769) 21 ER 332; 1 Dick 419; 2 Harg Jurid Arg 304, 307, 310; *Lord Walpole v Lord Orford* (1797) 3 Ves 402; Ch 38; (1799) 2 Harg Jurid Arg, 294-295; *Birmingham v Renfrew* (1937) 57 CLR 666, 683, 685, 688, 689; *Bigg v Queensland Trustees Ltd* [1990] 2 Qd R 11, 13; *Proctor v Dale* [1994] Ch 31, 42, 48, 49; [1993] 3 WLR 652, 659-660, 665, 666.

13 Dixon J in *Birmingham v Renfrew* (1937) 57 CLR 666, 688 quotes *McCormick v Grogan*, (1869) LR 4 HL 82, 97 (Eng. H.L. 1869) to the effect that 'the jurisdiction which is invoked here by the appellant is founded altogether on personal fraud. It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud.'

14 (1769) 21 ER 332, 333; 2 Harg Jurid Arg 304, 311.

15 (1937) 57 CLR 666, 683.

16 See also *Stone v Hoskins* [1905] P 194, 197 (Eng. Probate Division, 1905); *Re Hagger* [1930] 2 Ch 190, 195 (Eng. Chancery Division of the High Court, 1930); *Clausen v Denson* [1958] NZLR 572, 579 (Supreme Court of New Zealand, 1958); *Re Cleaver* [1981] 1 WLR 939, 947; *Low v Perpetual Trustees WA Ltd* (1995) 14 WAR 35 (Supreme Court of Western Australia, 1995).

17 See also *Chamberlaine v Chamberlaine* (1680) 22 ER 1053; *Lord Walpole v Lord Orford* (1797) 3 Ves 402; Ch 38; (1799) 2 Harg Jurid Arg 292, 294-295; *Re Hagger* [1930] 2 Ch 190, 195; *Bigg v Queensland Trustees Ltd* [1990] 2 Qd R 11, 13, 16; *Proctor v Dale* [1994] Ch 31, 42, 48; [1993] 3 WLR 652, 659-660, 665.

18 The courts have held that it is not a prerequisite of the mutual wills doctrine that the second testator benefit under the first testator's will. *See Re Hagger* ibid 195; *Swain v Mewburn* (unreported, WASC, No 36 of 1993, 17 February 1994) (Supreme Court of Western Australia, 1994), 11; *Proctor v Dale* ibid 38 and 42, 48, 49; 656, 659-660, 665, 666; *Osborne v Osborne* [2001] VSCA 228, [24]-[25] (Victorian Court of Appeal, 2001). See also Cassidy, above n 2, 43-46; Croucher, above n 2, 402-404.

exercising the power of testamentary disposition in the agreed manner and as a consequence the second testator should not act contrary to the mutual wills agreement.

III Facts

The appellant was the adopted daughter of Mr Barns (the 'deceased') and the second respondent, Mrs Barns. The first respondent was their son, who was the executor of the deceased's will and effectively the sole beneficiary under his mother's will.

The deceased and Mrs Barns had carried on business together as farmers. Their son had worked on the family farm for the whole of his working life. The appellant, who had two children, had been married and divorced. She and her husband had embarked upon a business venture that failed and as a consequence she had been declared bankrupt. There was evidence that the deceased and Mrs Barns had made some financial provision for their daughter consequent to this financial collapse.
In light of this fact the deceased and Mrs Barns determined that they wanted their son to inherit their assets and sought legal advice to give effect to this intention. Pursuant to this advice they entered into a deed and executed mutual wills. The deed stated that the deceased and the second respondent had agreed to execute a will in a certain form annexed to the deed and to act in a manner to ensure that all of their property on death would devolve in accordance with the will unless the other parties consented.

In accordance with the deed, the deceased executed a will. By his will, the deceased appointed his son his executor. He bequeathed the whole of his estate to his spouse, on condition that she survived him for 30 days (which she did). If she did not survive him, the whole estate was to pass to his son. Similarly, the second respondent executed a will under which she appointed her son as her executor. She bequeathed the whole of her estate to the deceased on condition that he survived her for 30 days. If he did not survive her, the whole estate passed to her son. Ultimately, the effect of the wills was that their son would inherit the whole estate of the survivor - his father or mother.

The deceased died on 14 August 1998. The appellant made an application under the *Inheritance (Family Provision) Act* 1972 (SA) seeking an order for provision out of the estate of her father.

IV Legislation

It is important to note at the outset that the case did not involve the concept of "notional estate" under *Family Provision Act* 1982 (NSW). The case is particularly significant as it concerned the considerably narrower legislation, *Inheritance (Family Provision) Act* 1972 (SA). Section 6 of the Act identifies the classes of persons who are entitled to claim a benefit, which includes the (adopted) child of a deceased. In turn, s 7 provides that where such a person is left without adequate provision for proper maintenance, education or advancement in life, the court may "order that such provision as the Court thinks fit be made out of the estate of the deceased person for the maintenance, education or advancement of the person so entitled". Under s 9 the order may specify what part of the estate of the deceased person will bear the burden of the provision. Under s 10, the order has effect as if were a codicil to the deceased's will, executed immediately before death or where the deceased dies intestate, as if it were a will executed immediately before death.
Gleeson CJ noted three relevant points in regard to the legislation:[19]

> First, provision may be made, and can only be made, out of a deceased's estate; that is to say, out of property which is beneficially owned by the deceased at the time of death and which passes to the deceased's legal personal representative. Secondly, contractual obligations undertaken by a deceased during his lifetime, which bind an estate, may affect the property available to meet an order under the Act. For example, if, during his lifetime, a testator contracted to sell Blackacre, and the contract remained on foot at the time of death, although full beneficial ownership of Blackacre had not passed to the purchaser at the time of death, Blackacre would not be an available asset for the purposes of an order for provision, although the purchase price payable under the contract would be. And, of course, if the contract were subsequently rescinded, the position would change. Thirdly, the estate out of which an order for provision may be made is the available estate after meeting the liabilities of the deceased. Obligations incurred by a deceased, and binding upon a legal personal representative, must be taken into account in determining the extent of the estate out of which provision may be made.

Later in the judgment he further stated:[20]

[19] [2003] HCA 9, [7].
[20] Ibid [18].

> Reference has already been made to an inherent weakness in the scheme of the Act, and its earlier legislative counterparts, as an instrument to deal with the mischief at which it is aimed. Provision under the Act can only be made out of the assets of which a person dies possessed. If property is not beneficially owned by a deceased, then (subject to later legislative amendments in some jurisdictions) it does not form part of the deceased's estate, and cannot be made a source of provision for a claimant under the Act. Furthermore, contractual obligations undertaken by a person prior to death, which bind the legal personal representative in the administration of the estate, may diminish the available estate out of which provision may be made.

Gleeson CJ succinctly described the issue as: 'when a testamentary provision is made pursuant to a legal obligation on the part of the testator, is the property the subject of that provision available as part of the estate which may be redistributed under the Act?'[21] A further related issue was whether the deed was void because it was contrary to public policy?

V Procedural background

The appellant was quite aware that the success of her claim would depend upon the effectiveness of the deed and the mutual wills. To this end, she pleaded in her statement of claim that the deed was void as being contrary to public policy. The proceedings were assigned to a Master of the Supreme Court of South Australia, Burley J, who ordered that the validity of the deed be determined as a preliminary issue. In regard to this preliminary issue, Burley J ruled in favour of the appellant. He found that the objective purpose of the deed was to preclude a claim under the *Inheritance (Family Provision) Act,* 1972 (SA). As the deed was made 'with a view to excluding the jurisdiction of the court under the Act' it was declared void as being contrary to public policy.[22]

The respondents successfully appealed to the Full Court of the Supreme Court of South Australia in regard to this preliminary issue.[23] Lander J, with whom Prior and Wicks JJ agreed, declared the deed to be valid. The court noted that while the wills and deed had the effect of precluding the

21 Ibid.

22 Quoted by Gleeson CJ: ibid [14].

23 *Barns v Barns* (2001) 80 SASR 331.

appellant and her children making a claim under the *Inheritance (Family Provision) Act,* 1972 (SA), this was not contrary to public policy. This effect was simply a legal consequence of the scheme of the Act that, unlike the New South Wales legislation, contained no provisions extending claims to notional estates. Akin to the reasoning of Callinan J in the High Court, the court asserted it was for the legislature, not the courts, to address this issue. The substantive application was then referred back to the Supreme Court and was heard by Nyland J. In accordance with reasoning of the Full Court, Nyland J dismissed the appellant's claim. The appellant then appealed to the High Court against the decisions of both the Full Court and Nyland J.

VI Previous case law

There was no binding precedent on the issue. The matter had been considered in other jurisdictions, however, these decisions were divided on the issue. In *Re Richardson's Estate*[24] the mutual wills executed by the deceased and his housekeeper were held to be effective in preventing a claim by the deceased's widow and daughter under the *Testator's Family Maintenance Act* 1912 (Tas). The deceased had been separated from his wife for a considerable period (30 years) and lived with a housekeeper 14 years prior to his death. They had pooled their assets and operated a small business together. The deceased and the housekeeper executed mutual wills, leaving their entire estates to each other. The deceased died and his estate passed to the housekeeper.

The justices' approaches to the case differed significantly. Nicholls CJ held that under the legislation provision could only be made out of the net value of the estate, which was to be calculated taking into account all liabilities to which the estate was subject. Such liabilities included the housekeeper's claim to the deceased's entire estate under the mutual wills. Thus Nicholls CJ held there was no available net estate to make provision for the widow.

Very relevant to the discussion below, Nicholls CJ stressed that the housekeeper's rights arose, not under the deceased's will, but rather under an independently existing agreement/contract between the parties.[25] If the deceased had breached the mutual wills agreement by not making a

24 (1934) 29 Tas LR 149.

25 Ibid 155.

will, or making a will contrary to the terms agreed (ie in favour of his widow), Nicholls CJ pointed out that the housekeeper could have sued the deceased's estate for damages and her status would have been that of creditor.[26] Nicholls CJ would not 'reduce contractual rights to the level of gifts under a will' and refused to, by way of a court order, effect a codicil that 'the testator had no right to make.'[27] It will be seen that Nicholls CJ's approach was subsequently adopted by the majority justices in *Schaefer v Schuhmann.*[28]

Nicholls CJ also asserted that even if there had been available estate, the housekeeper had a far greater moral claim to the deceased's estate and he would, therefore decline to make an order in the widow's favour. Crisp J agreed that the Chief Justice had appropriately exercised the court's discretion and rejected the widow's and daughter's claims on this basis.[29]

Clark J took a different approach to the effect of the mutual wills agreement, asserting 'the contract between the testator and the respondent does not and never did subject the testator's estate to any debt or other lawful liability.'[30] Clark J believed the obligation under the mutual wills agreement was simply the execution of the will in the agreed terms. 'That the testator did, and thus he fully implemented his contract.'[31] Clark J asserted that the Statute could not displace this fact.[32]

The next relevant case was the Privy Council's decision in *Dillon v Public Trustee of New Zealand.*[33] This was not a mutual wills case strictly, but did involve a testamentary agreement. The deceased had agreed to bequeath his farm to his children and executed a will giving effect to this agreement. The deceased subsequently remarried. His widow made a claim under the *Family Protection Act* 1908 (NZ). She asserted that the deceased had not made adequate provision for her maintenance and support. In response the children argued that the court had no power to vary the deceased's will as the will simply gave effect to the contract.

26 Ibid.
27 Ibid.
28 [1972] AC 572.
29 (1934) 29 Tas LR 149, 156-157.
30 Ibid 159.
31 Ibid 160.
32 Ibid.
33 [1941] AC 294.

While a majority of the Court of Appeal agreed with the children's submission, this was reversed on appeal to the Privy Council. The Privy Council held in favour of the widow, finding that the farm was part of the deceased's estate and thus provision could be made for the widow. While it was acknowledged that an *inter vivos* gift of the land to the children would have taken the farm out of the legislation's reach, bequeathing by will was said not to have the same effect.[34] The children were classified as beneficiaries under the will, rather than creditors of the estate.[35]

Again, relevant to the discussion below, the decision was very much a policy one, based on the purpose underlying the legislation. Thus as Viscount Simon asserts:[36]

> [A contrary conclusion would mean that] a young bachelor, who had agreed for a consideration to leave all his property by his last will to a relative, friend, or creditor, might later marry and leave his widow and children without any support in circumstances where the Act could not modify the distribution of the testamentary estate. The manifest purpose of the *Family Protection Act*, however, is to secure, on grounds of public policy, that a man who dies, leaving an estate which he distributes by will, shall not be permitted to leave widow and children inadequately provided for, if the court in its discretion thinks that the distribution of the estate should be altered in their favour, even though the testator wishes by his will to bestow benefits on others, and even though he has framed his will as he contracted to do.

While the existence of the agreement was relevant as to what was 'just' in the circumstances, it did not remove the court's discretion to make a redistribution.

While *Dillon v Public Trustee of New Zealand*[37] was followed in *Re Seery and the Testator's Family Maintenance Act,*[38] on appeal (under the name of *Schaefer v Schuhmann)*[39] the Privy Council declined to follow its

34 Ibid 302.

35 Ibid 303.

36 Ibid 303-304.

37 Ibid. Note also that this decision was to some extent legislatively reversed by the *Law Reform (Testamentary Promises) Act* 1944 and 1949 (NZ).

38 (1969) 90 WN (Pt 1)(NSW) 400.

39 [1972] AC 572.

earlier decision, preferring the reasoning of Nicholls CJ in *Re Richardson's Estate.*[40]

The deceased had entered into a testamentary agreement with his housekeeper to the effect that if she would work for him for the rest of his life for no wage, he would bequeath to her his home and contents. The deceased executed a codicil in the agreed terms and when he died certain of his children made claims under *Testator Family Maintenance and Guardianship of Infants Act* 1916 (NSW).

As indicated above, Street J at first instance followed *Dillon v Public Trustee of New Zealand*[41] and held that provision should be made for three of the four applicants.[42] On appeal the Privy Council overruled *Dillon v Public Trustee of New Zealand.*[43] The Privy Council held that property the subject of a valid testamentary agreement did not form part of the testator's estate for the purposes of such legislation. The Privy Council held that an obligation to bequeath property was analogous with a debt against the estate.[44] Thus the housekeeper was seen as benefiting, not as a beneficiary under the will, but through the testamentary contract. Again, relevant to the discussion below, Lord Cross of Chelsea recognised that the testamentary agreement had effect during the lifetime of the first testator:[45]

> If the contract is to devise or bequeath specific property the position of the promisee during the testator's lifetime is stronger than if the contract is simply to leave a legacy. If the testator sells the property during his lifetime the promisee can treat the sale as a repudiation of the contract and recover damages at law which will be assessed subject to a reduction for the acceleration of the benefit and also if the benefit of the contract is personal to the promisee subject to a deduction for the contingency of his failing to survive the promisor. But if he can intervene before a purchaser for value without notice obtains an interest in the property he can obtain a declaration of his right to have it left to him by will and an injunction to restrain the testator from disposing of it in breach of contract.

40 (1934) 29 Tas LR 149.
41 [1941] AC 294.
42 (1969) 90 WN (Pt 1)(NSW) 400.
43 [1941] AC 294.
44 [1972] AC 572, 585-586.
45 Ibid.

His Lordship rejected the notion that performance of the contract through the will changed the party's status from a creditor into a mere beneficiary. In turn, the personal representative was duty bound to perform the testator's promise and the property affected by the promise could not form part of the testator's estate for the purposes of a family provision claim.[46] The Board asserted specific legislation, not merely the general terms of the subject family provision legislation, would be necessary to empower a court to interfere with testamentary dispositions made pursuant to *bona fide* arrangements.[47]

Lord Simon of Glaisdale dissented. Lord Simon asserted that the policy underlying the relevant family provision legislation was 'to prevent family dependants being thrown on the world with inadequate provision.'[48] In turn he believed that this allowed him to include the property the subject of the testamentary promise in the testator's estate.[49]

VII Mutual wills post *Barns v Barns*

As noted above, in *Barns v Barns*[50] a majority of the High Court held that the subject mutual wills and deed did not have the effect of preventing the application of the *Inheritance (Family Provisions) Act* 1972 (SA). Ultimately, despite the decision, mutual wills continue to have an important role in testamentary planning.

A Distinguishing facts

First, the case was very much confined to its particular facts and in a given case could be easily distinguished. The factual basis of the case was particularly relevant to Gleeson CJ's conclusion, with whom Kirby J agreed. Gleeson CJ clearly believed that the agreement between the deceased and his spouse was to prevent their daughter making a claim against the estate of the survivor, not the first to die. This is evident from a number of passages from his judgment where he outlines the facts of the case. The Chief Justice states:[51]

46 Ibid 592.

47 Ibid.

48 Ibid 592, 593.

49 Ibid.

50 [2003] HCA 9.

51 Ibid [11], [13], emphasis in original.

> The deceased and the second respondent took legal advice. A solicitor described that advice as relating to 'the steps ... Lyle and Alice Barns should take should they wish to effectively exclude their [daughter] from participating in *the estate of the survivor of them*' [emphasis added]. This was said to be on the assumption that the first of them to die would leave his or her entire estate to the survivor. The present proceedings do not concern the estate of the survivor. They concern the estate of the first to die. ...Thus if the wills remained unaltered, the first respondent would inherit the whole estate of whichever his father or mother survived the other. It was that estate which the solicitor had set out to protect from claims of the appellant. The essence of the arrangement was that the estate of the first to die of Lyle and Alice Barns would devolve by will upon the survivor of them, and the estate of the survivor would devolve by will upon their son. It is the first of those steps that is presently in question.

Had Gleeson CJ concluded that the deceased and his spouse had intended the estate of the first to die to also be placed outside the scope of the Act, the Chief Justice's conclusion may have been different.

Before leaving this point, it should be noted that the deceased and the second respondent were clearly concerned to exclude their daughter from making a claim under the estate of both the first to die and the survivor. This is evident from the survivorship clause in their wills. If the second respondent did not survive the deceased by 30 days the deceased's estate passed to his son, not his spouse. This indicates they intended their son to benefit from the entire estates, not just that of the survivor.

B Timing of effect of mutual wills

Second, and perhaps most importantly, it is contended that the decision is erroneous and the majority justices' decision is based on a misunderstanding of the legal effect of mutual wills. The majority justices assert that mutual wills only impact on the estate of the survivor. Gummow and Hayne JJ reject the suggestions that mutual wills (i) have effect before the death of the first testator and (ii) impact on the estate of the first testator. [52] They assert that the trust obligations under the mutual wills agreement do not arise until the survivor acts in an unconscionable manner. [53] In turn, they assert that mutual wills only impact on the estate of the survivor.[54] Gleeson CJ also appears to be under the

[52] Ibid [85].

[53] Ibid [82], [84].

[54] Ibid.

misapprehension that mutual wills only impact on the estate of the survivor.[55] This is erroneous and as a consequence the dissenting view of Callinan J is to be preferred.

Callinan J stresses that mutual wills should not be treated differently from any other disposition or contractual obligation that would place property outside the scope of the deceased's estate and thus beyond the reach of the *Inheritance (Family Provision) Act* 1972 (SA).[56] This view is in turn based on a correct understanding of the timing of the effect of mutual wills. As Callinan J states, the obligations under the mutual wills agreement impact on the first testator,[57] not only on the survivor. In support of this view two points can be made.

First, as noted in some of the previous case law outlined above, an actionable breach of the mutual wills agreement may occur even when both parties are alive.[58] For example, in *Low v Perpetual Trustees WA Ltd*[59] the plaintiff's mother, the second testator, and her new husband, the first testator, executed mutual wills. Under the terms of the wills they bequeathed an absolute interest to each other and in remainder their respective shares of the estate to her son in the second testator's case, to his niece and the Salvation Army in the first testator's case. It was discovered that the first testator had revoked his will during the second testator's lifetime, but after she had lost testamentary capacity through mental illness. Under the terms of this new will the second testator only had a life interest and the remainder was divided between two of the first testator's nieces. The court held the mutual wills agreement had been breached and as a consequence of the breach the estate of the first testator was held on trust according to the terms of the earlier mutual will. Thus mutual wills have effect as soon as executed and can be binding on both testators while they are alive. It should be noted that Gummow and Hayne JJ were aware of the case law to this effect,[60] but instead chose to follow *Dillon v Public Trustee of New Zealand*.[61]

55 Ibid [29].

56 Ibid [140], [161], [166].

57 Ibid [149], [163], [169].

58 *Bigg v Queensland Trustees Ltd* [1990] 2 Qd R 11, 17; *Low v Perpetual Trustees WA Ltd* (1995) 14 WAR 35; *Synge v Synge* [1894] 1 QB 466.

59 *Low v Perpetual Trustees WA Ltd* ibid.

60 They refer to *Bigg v Queensland Trustees Ltd* [1990] 2 Qd R 11 but most importantly specifically note that *Synge v Synge* [1894] 1 QB 466 provides that an action for a breach may be made in the lifetime of the first testator: [2003] HCA 9, [109].

61 [1941] AC 294.

Second, mutual wills can confer legal and equitable rights that impact on the property of the first to die, not only the estate of the survivor. This is because the beneficiaries under the mutual wills derive their rights from the enforcement of the trust(s) stemming from the agreement, rather than the survivor's will.[62] In turn, these trusts affect the property of both the first testator and the survivor, the second testator. Where a less than absolute interest in the first testator's property is conferred on the second testator under the first testator's will, the trust immediately fixes on the first testator's property on the death of the first testator and is held absolutely for the intended beneficiaries.[63] In such cases there is no need for a 'floating trust', discussed below, because the second testator is not entitled to deal with the first testator's property.[64]

More specifically, where the second testator is conferred no interest under the terms of the first testator's will, the property owned by the first testator, either individually or as a tenant in common with the second testator, will devolve upon the beneficiaries specified under the will. Where the first testator holds property with the second testator as a joint tenant, equity will sever that joint tenancy to ensure the first testator's interest ultimately devolves on the beneficiaries under the mutual wills agreement.[65]

If a life interest has been conferred on the second testator, the property devolves upon the first testator's personal representative and is held on trust for the second testator for life and in remainder for the intended beneficiaries.[66] As the court recognised in *Re Gillespie*[67] in such a case the second testator has no beneficial interest in the first testator's property

62 *Re Richardson's Estate* (1934) 29 Tas LR 149 (Supreme Court of Tasmania, 1934); *Proctor v Dale* [1994] Ch 31, 41; *Re Goodchild* [1996] 1 WLR 694, 700.

63 *Re Hagger* [1930] 2 Ch 190, 195; *In re Gardner* [1920] 2 Ch 523, 529, 531; *Pratt v Johnson* (1958) 16 DLR (2d) 385, 389, 394; *Szabo v Boros* (1967) 64 DLR (2d) 48, 50, 53; *Re Gillespie* [1968] 3 DLR (3d) 317, 321, 322.

64 *Re Hagger* ibid.

65 *In re Wilford's Estate* (1879) 11 Ch D 267, 269; *Re Heys* [1914] P 192, 194, 195-196; *Gould v Kemp* (1834) 2 My & K 304, 309, 310; ER 959, 961, 962; *Re Hagger* ibid; *Re Kerr* [1948] 3 DLR 668, 678; *Clausen v Denson* [1958] NZLR 572, 579; *Szabo v Boros* (1966) 60 DLR (2d) 186, 189-190; (1967) 64 DLR (2d) 48, 49-50, 52-53; *Re Gillespie* [1968] 3 DLR (3d) 317, 321, 322. This principle is applicable to all forms of property including real property. Cf *Szabo v Boros* (1966) 60 DLR (2d) 186; (1967) 64 DLR (2d) 48.

66 *Re Hagger* ibid; *Szabo v Boros* ibid 50, 53; *Re Gillespie* ibid 321, 322.

67 Ibid 322.

apart from any life tenancy conferred under the terms of the first testator's will.

Where, however, the second testator is conferred an absolute interest in the first testator's property, indicating that he or she is to be able 'to enjoy for his own benefit the full ownership' of the property, equity accommodates this arrangement through a 'floating trust' which allows the second testator to use the property in his or her lifetime.[68] Thus in *Birmingham v Renfrew*[69] Dixon J refers to the trust as a 'floating obligation, suspended, so to speak, during the lifetime of the survivor [which] can descend upon the assets at his death and crystallise into a trust.' The majority justices' error in believing that mutual wills only impacts on the estate of the survivor[70] may have stemmed from the fact that their focus when discussing the legal effect of mutual wills was purely on the 'floating obligation' over the survivor's property.[71]
Thus the mutual wills agreement is effective earlier than that suggested by the majority justices and impacts upon the deceased's estate in the manner suggested by Callinan J.

C Divided views of majority

Third, relevant to the decision's authoritative value is the fact that there is no clear majority. While, as noted above, Gleeson CJ's finding, with whom Kirby J agreed, was very much based on his factual conclusions[72] and a misapprehension that mutual wills only impact on the estate of the survivor.[73] Ultimately, his finding was very much a policy decision. Unlike Gummow and Hayne JJ, Gleeson CJ acknowledged that the *Inheritance (Family Provision) Act* 1972 (SA) has its limitations and ordinarily would only impact on the net estate of the testator.[74] As quoted above, Gleeson CJ acknowledged that in the absence of 'notional estate'

68 *Birmingham v Renfrew* (1937) 157 CLR 666, 689, 690. See also *Dufour v Pereira* (1769) 21 ER 332, 333; 1 Dick 419, 420; 2 Harg Jurid Arg 304, 308; *Re Green* [1951] Ch 148; *Birmingham v Renfrew* [1937] VLR 180, 189; 57 CLR 666, 675, 686, 683, 687- 690; *Re Cleaver* [1981] 1 WLR 939, 946; *Nowell v Palmer* (1993) 32 NSWLR 574, 580-581; *Low v Perpetual Trustees WA Ltd* (1995) 14 WAR 35; *Re Goodchild* [1996] 1 WLR 694, 700, 702; [1997] 1 WLR 1216, 1224, 1229, 1230.

69 Ibid 689.

70 [2003] HCA 9, [29], [82], [84], [85].

71 Ibid [29], [85].

72 Ibid [11], [13].

73 Ibid [29].

74 Ibid [7], [18].

legislation,[75] property the subject of trust or contractual obligations did not constitute the estate of the testator and thus could not be subject to a court order under the *Inheritance (Family Provision) Act* 1972 (SA).[76] This meant, Gleeson CJ noted, that he had to decide whether to treat the mutual obligations the same way 'as any other obligation binding on the estate' and thus place it outside the Act's reach, or to treat the obligation 'as subject to the operation of the statute'.[77] Gleeson CJ chose the latter.[78] To some extent this decision was based on the perceived need to give effect to the legislation's purpose. [79] Gleeson CJ believed that mutual wills had to be treated differently from other contractual obligations that would otherwise place the subject property outside the deceased's estate and thus the legislation's reach.[80] To this end, he asserted that he was not compelled to adopt a 'construction of the Act that permits a testator to nullify its operation by agreeing in advance to dispose of his or her estate in a certain fashion [as this] tends to defeat the purpose of the legislation.'[81] Kirby J reinforces this aspect of the Chief Justices' judgment by asserting that Gleeson CJ's reasoning meant that Mrs Barns' rights 'under the deed she executed with the deceased, were such that they were always liable to be affected by the potential operation of the Act. ...Only this construction gives effect to the purpose of the Act according to its terms. That purpose could not be defeated by an agreement, in advance, to dispose of the estate in a way that would tend to defeat the achievement of the Act's objectives.'[82]

While Gummow and Hayne JJ also refer to the policy underlying the legislation, their primary basis was the above discussed suggestion that mutual wills only impact on the survivor. They asserted that the court's order under the Act operates as a codicil on the deceased's will and the mutual wills obligations were antecedent the court's determination regarding the deceased's estate.[83] They also state that the *Inheritance (Family Provision) Act* 1972 (SA) impacts on the deceased's gross, not

75 Ibid [5].

76 Ibid [7], [18].

77 Ibid [19].

78 Ibid [33].

79 Ibid [34]. Cf Rosalind Croucher, "Contracts to Leave Property by Will and Family Provisions after Barns v Barns (2003) 196 ALR 65 - Orthodoxy or Aberration?" (2005) 27 *Sydney L Rev* 263, 274-275.

80 Ibid.

81 Ibid.

82 Ibid [129]. Cf Croucher, above n 80, 275.

83 Ibid [82], [84], [94], [108].

net, estate[84] even though it contains no 'notional estate' provisions.[85] As discussed above and below, Gleeson CJ (with who Kirby J agreed) clearly disagreed with this view. Thus there was no consensus in the majority justices' reasoning.

As noted above, Callinan J believed the mutual wills agreement effected a disposition/contractual obligation that placed property outside the scope of the deceased's estate and thus beyond the reach of the *Inheritance (Family Provision) Act* 1972 (SA).[86] He believed it was for the legislature, not the courts, to extend the reach of the Act to such dispositions.[87] Thus in a sense the court was divided: 2:2:1.

D Inter vivos dispositions

Fourth, Gleeson CJ, with whom Kirby J agreed, acknowledged that the *Inheritance (Family Provision) Act* 1972 (SA) has its limitations. Gleeson CJ stressed that contractual obligations and *inter vivos* arrangements are still effective to avoid the legislation unless the particular Act expressly extends to such transactions, as is the case under the *Family Provision Act* 1982 (NSW).[88] Mutual wills can be combined with *inter vivos* transfers of property and thus continue to have a role in this regard despite the decision in *Barns v Barns*.[89]

As an aside, care must be taken with such *inter vivos* transactions if it is intended that the recipient should not have full enjoyment of the property and/or be bound to bequeath the property to the ultimate beneficiaries. It is important that testators understand that the legal arrangements are *prima facie* irrevocable and the recipient's interest in that property is absolute in the absence of any express restrictions.

Moreover, while the mutual wills agreement or deed might seek to limit the recipient's enjoyment of the property, if this is intended the agreement must be very clear. *Osborne v Osborne*[90] is factually instructive. The

84 Ibid [105], [106]. Cf Croucher, above n 80, 275.

85 Cf Croucher, ibid 275-276, 279.

86 [2003] HCA 9, [140], [161], [166].

87 Ibid [132], [159], [171].

88 Ibid [5], [7], [19], [30], [33].

89 Ibid.

90 [2000] VSC 95; [2001] VSCA 228.

plaintiff had asserted that his parents had executed mutual wills. After the plaintiff's mother died, his father remarried. It was contended that when his father gifted the family home ('the unit') to his new spouse, his father had breached the mutual wills agreement. The courts held the wills were not mutual wills. The courts ordered that the caveat the plaintiff had placed over the subject unit for the duration of the litigation was to be removed.

The new spouse, the recipient of the gifted unit, mortgaged the property on two occasions and ultimately, through the first mortgagors, sold the unit. This was so even though the gift of the unit to her had been conditional on her entering into a Deed of Family Arrangement and executing a will bequeathing the unit to certain members of the Osborne family.[91] Subsequent to the first mortgage, in the course of refusing an application to stay the orders of the court at first instance,[92] Beach J asserted that even a life tenant, such as the new spouse, was entitled to mortgage the property. In later proceedings, brought by one of the intended beneficiaries under the Deed of Family Arrangement and the consequent will of the new spouse, the new spouse pleaded that she was the absolute owner of the unit and that any obligations pertaining to that property under the Deed of Family Arrangement ceased when the donor, Mr Osborne, died. The plaintiff ultimately discontinued the proceedings. Thus despite the deed and the will bequeathing the unit to the agreed beneficiaries being intact on her death, the new spouse mortgaged and ultimately sold the unit. Thus if property is to be conveyed through an *inter vivos* transfer, it is important to clearly draft any restrictions, such as the ability to sell or mortgage the property, that apply to the property.

The discussion of this case highlights the unfortunate reality that ultimately, if a surviving spouse wants to, he/she may undermine a mutual wills agreement. As Callinan J warned in *Barns v Barns,*[93] the 'fact that the surviving contracting party, who is the beneficiary under the will of the first of the two to die, may use, and indeed even ultimately use up in their entirety the assets passing under the first will, provides a reminder that in human affairs, even in legal affairs, perfection, and the complete effectuation of intention are sometimes not possible.'

91 Ibid [24]-[25].

92 Ibid [24].

93 [2003] HCA 9, [152].

Before concluding on the impact of *Barns v Barns*[94] it should be noted that only those entitled to apply under such legislation will have the ability to undermine any mutual wills agreement through the legislation. The issue will also not arise where the deceased has made provision for the claimant.

E Mutual wills' use other than disinheriting

Finally, while this decision is contrary to the previous understanding of mutual wills,[95] disinheriting a person is not the sole reason why mutual wills are executed. More often the focus is upon binding the survivor to pass property to the ultimate beneficiaries. This reason for executing mutual wills remains unchallenged post *Barns v Barns*.[96] There are a number of circumstances when testators will be particularly concerned to ensure that their property passes in the manner they intend. The most common category is persons whom remarry and have children from a previous marriage. In such circumstances they may wish to make provision for their new spouse, but also intend their property to ultimately flow to the children of the first marriage. Subject to the surviving spouse not breaching the mutual wills agreement, mutual wills can be used to ensure that the testator's children from the previous marriage are the ultimate beneficiaries of such property.

Alternatively, the testator may simply wish that his/her estate pass to the testator's children from the previous marriage without conferring any interest on the new spouse. Mutual wills will be particularly relevant in such circumstances when property is jointly owned. Thus in *Smeaton v Pattison*[97] the testator wished for his interest in jointly owned property to pass to his children, rather than his new wife.[98] The solicitor drafting the will was held to be liable to the children as a failure to sever the joint tenancy meant that the property devolved to the new wife.[99] Mutual wills can ensure property passes in the intended manner, rather than passing to the joint owner through the law of survivorship. While best practice is to formally sever the joint tenancy in the testator's lifetime, the effect of the

94 Ibid.

95 Cf Charles Rowland, *Hutley's Australian Wills Precedents* (8th ed, 2004) at 33.9.

96 [2003] HCA 9.

97 [2002] QSC 431; [2003] QCA 341. Not a mutual wills case, but nevertheless instructive on the point.

98 Ibid [3] and [27]; ibid [5].

99 Ibid [39]; ibid.

mutual wills is to sever any joint tenancy in equity, creating a tenancy in common.[100] As a consequence of the mutual wills, the survivor holds, *inter alia*, the first testator's property on trust for the beneficiaries of the mutual wills.[101]

Blended families are not the only persons who may benefit from mutual wills. A testator may simply wish that their estate pass to a particular beneficiary, rather than their spouse or a joint tenant. Thus in *Osborne v Osborne*[102] the testator and testatrix were concerned that their property pass to their two sons, rather than each other.[103] While the courts ultimately held the subject wills were not mutual wills because there was no clear contract/agreement not to revoke the wills,[104] the case provides an example of the variety of concerns that might be promulgated through mutual wills. Similarly in *Carr-Glynn v Frearsons,*[105] the testatrix wished to bequeath to her niece property that the testatrix held with her nephew as joint tenants. The solicitor drafting the will was held liable to the niece because the failure to sever the joint tenancy meant that the property devolved to the joint tenant rather than as the testatrix had instructed. While again it is suggested that in such a situation the joint tenancy should have been severed in the testator's lifetime, as noted above, the effect of the mutual wills is to sever any joint tenancy in equity, creating a tenancy in common.[106] Thus mutual wills may be used to ensure an interest in joint property devolves in the manner intended by the testator/testatrix.

[100] *In re Wilford's Estate* (1879) 11 Ch D 267, 269 (Eng. Chancery Division of the High Court, 1879); *Re Heys* [1914] P 192, 194, 195-196 (Eng. Probate Division, 1914); *Gould v Kemp* (1834) 2 My & K 304, 309, 310; ER 959, 961, 962 (Eng. C.A. 1834); *Re Hagger* [1930] 2 Ch 190, 195; *Re Kerr* [1948] 3 DLR 668, 678 (Ontario High Court, 1948); *Clausen v Denson* [1958] NZLR 572, 579; *Szabo v Boros*, (1966) 60 DLR (2d) 186, 189-190 (British Columbia Supreme Court, 1966); (1967) 64 DLR (2d) 48, 49-50, 52-53 (British Columbia Court of Appeal, 1967); *Re Gillespie* [1968] 3 DLR (3d) 317, 321, 322 (Ontario Court of Appeal, 1968).

[101] *Re Hagger* ibid.

[102] [2000] VSC 95; [2001] VSCA 228, [24]-[25].

[103] Ibid [3]-[6], [23].

[104] Ibid [20], [21] and [22]; ibid [11], [14], [15].

[105] [1999] Ch 326. Again, this did not involve mutual wills, but is factually instructive. See also *Schofield v Watts*, unreported, 5 October 1999, (District Court of Queensland, 1999).

[106] *In re Wilford's Estate* (1879) 11 Ch D 267, 269; *Re Heys* [1914] P 192, 194, 195-196; *Gould v Kemp* (1834) 2 My & K 304, 309, 310; ER 959, 961, 962; *Re Hagger* [1930] 2 Ch 190, 195; *Re Kerr* [1948] 3 DLR 668, 678; *Clausen v Denson*, [1958] NZLR 572, 579; *Szabo v Boros* (1966) 60 DLR (2d) 186, 189-190; (1967) 64 DLR (2d) 48, 49-50, 52-53; *Re Gillespie* [1968] 3 DLR (3d) 317, 321, 322.

A person who is in a relationship that is not recognised in law as constituting a marriage may be particularly concerned that their partner is provided for when they die. Laws governing the devolution of property on the death of one party to a legally recognised marriage may be inapplicable to, for example, gay couples. Such couples may, therefore, be concerned to ensure that their property devolves to their partner under the terms of a will, rather than to other family members under intestacy laws.

Thus despite *Barns v Barns*[107] mutual wills continue to play a very relevant part in testamentary planning.

[107] [2003] HCA 9 (High Court of Australia, 2003).