The England and Wales High Court (EWHC) rejects claim based on mutual wills but allows it on grounds of proprietary estoppel

Synopsis: An EWHC case, in which, whilst it rejected a will challenge made by two brothers on the basis of mutual wills allegedly made by their parents, it allowed the claim on the alternative ground of proprietary estoppel.

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Mutual wills

A mutual will is one that covers a married or legally bound couple rather than a single individual. It is a will drawn up between two people who agree between them that at no point in the future will they revoke (that is, cancel) or amend their will without the consent of the other party. In a mutual will, the terms remain binding for the remaining party after the first partner dies.

The purpose of this type of will is often to ensure that assets pass to children rather than a new spouse/civil partner if the living partner remarries/enters into a new civil partnership.

Proprietary estoppel

This is a legal claim which may arise in relation to property where someone is given a clear assurance that they will acquire a right over the property, they reasonably rely on the assurance and they act substantially to their detriment on the strength of the assurance.

The case

When Albert Winter died, the principal asset in his estate was his share in the market garden business which the family had operated together for many years. This had been operated since 1988 as a partnership, known as Team Green Growers between Albert, his wife, Brenda, and their three sons.

On Brenda's death on 13 April 2001, her share in the partnership was left under her will to Richard, Adrian and Philip, her three sons, in equal shares. The residue of her estate passed to Albert.

The partnership was thereafter in practice continued between Albert (who had a 20% share) and the sons (each of whom had a 26.66% share) but in January 2004 the business was transferred to a limited company, Team Green Growers Ltd, of which Albert and the sons were equal shareholders.

Albert died on 17 July 2017. By the 2015 will, he left a gift of £20,000 to his then partner Diana Turner and left the residue of his estate – including his interests in the company - to Philip.

A challenge was brought by Richard and Adrian who argued that the deceased, their father, and their mother made mutual wills in 2000 splitting the business equally among the three siblings.

The outcome

The EWHC noted there was no documentary evidence of any such agreement and very little evidence of any discussion either of the parents had with anyone as to their testamentary intentions. The mother had talked to another family member shortly before her death about her and the deceased's wish that the business would be passed to their children, but the EWHC said that such an agreement did not go far enough.

There was also nothing to support the mutual wills case in the files held by the family's solicitor, the court found. The solicitor had accepted in cross-examination that he had not asked the parents whether they intended to make mutual wills but said that was because there was nothing in the circumstances that suggested that might have been their intention.

'The very fact that Albert felt able to change his will without compunction points away from him having agreed with Brenda that his will could not be revoked after her death', commented the EWHC. It further noted that the deceased was considered 'a loyal person who felt bound to honour his promises' and that this counted against the case for mutual wills, 'the essential feature of which is the agreement between the testators that the survivor's will cannot be changed.'

Accordingly, the EWHC rejected this ground of the claimants' case. It did, however, allow their claim to a one-third share of the parents' company assets (although not their personal assets) on the alternative ground of proprietary estoppel.