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## Mutual Wills

**Q** [A Notary asks] I have been consulted by married clients who adamantly want me to prepare mutual Wills and an agreement regarding same. I have a precedent that specifically details how the residue is to be distributed and to bind each spouse to this. Does this match the residue distributions in mirror Wills or should there be some residue designated in contemplation of remarriage, should one of the spouses predecease?

**A** In my opinion, you should just as adamantly refuse to prepare mutual Wills for the clients. Many years ago I was consulted by an equally adamant married couple. Against my better judgment, I prepared mutual Wills for them, including a written contract between them that they would not change their Wills without the other's consent. Within a short time, the parties separated. It then became a legal issue between them that they had contractually agreed not to change their Wills without the written consent of the other.

It is simply not a good idea to go that route. Before detailing some of the problems and some possible alternatives, I will briefly explain what mutual Wills are.

The mutual Wills doctrine concerns a special form of contract to leave property by Will. It is invoked when two persons make Wills, similar in their terms, in accordance with a written agreement to make the Wills

and not to revoke them, except by the consent of both. The mutual Wills doctrine thus alters the general law that barring testamentary incapacity, a Will can always be changed or revoked.

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Typically, spouses agree to provide for each other or, if the other does not survive, for third parties (often, in "blended family" situations, the third parties will be the spouses' children from their previous marriages). If the surviving spouse breaches the agreement—that is, makes a new Will that provides for someone else—then the third parties will be able to enforce the agreement by way of constructive trust, the principle being that the courts of equity will not allow the law to be used as an instrument of fraud and will impose a constructive trust on the assets of the deceased party who has breached the mutual agreement.

### What Are the Problems with Mutual Wills?

- One problem, as indicated at the outset, is that mutual Wills can create legal issues in the event of a marital breakdown.
- Another problem is it could be difficult to determine what assets are subject to the mutual

agreement, and thus available to the third parties in the event of breach.

- A third problem is that the surviving spouse may significantly deplete the assets before his/her death, leaving little or nothing for the third parties.

### What Are the Alternatives?

- The simplest approach would be for the clients to do the usual kind of mirror Wills, without any attempt to bind the surviving spouse.
- If that is not acceptable, each spouse could provide for the third parties to receive a share of his/her estate immediately upon his/her death, whether or not the other spouse survives (this could necessitate severing joint tenancies or changing beneficiary designations).
- As a third alternative, the clients could consider providing life trusts for each other, rather than outright gifts. To pursue this, the clients would have to consult a lawyer and their asset-ownership arrangements might have to be changed. ▲

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