Opening a Pandora's box?

THE FORSTER DECISION REGARDING MUTUAL WILLS AGREEMENTS HAS IMPLICATIONS FOR BINDING FINANCIAL AGREEMENTS AND PROPERTY SETTLEMENTS FROM A FAMILY LAW PERSPECTIVE – ESPECIALLY FOR BLENDED FAMILIES.

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SNAPSHOT

- The *Forster* case has implications for asset protection in family law.
- The decision is a reminder to consider inheritance widely in family law – including providing appropriate notice of revocation of MWAs and in assessing property division.
- Consider seeking expert advice.

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Introduction

The *Forster* case[1] possibly opens a Pandora's box of family law issues. Although it is not strictly a family law case, it contains some salient lessons for family lawyers particularly as they relate to wealth planning and asset protection, especially in blended family situations and disputes.

A mutual wills agreement (MWA) is an enforceable (but revocable) agreement/contract[2] between two people to make their wills on particular terms and not to alter those terms once one of them has died.

Our experience shows that MWAs are increasingly used as an asset protection/quarantining tool – especially in blended families – where parents want to ensure their children receive the agreed share of the estate. The decision is a useful reminder to ensure that we advise clients to look at arrangements holistically at the commencement or end of a relationship – including, where necessary, properly terminating an MWA on separation.

In this article, we will look at how the decision should be factored into everyday family law situations including drafting/negotiating property settlements/binding financial agreements (BFAs). To avoid the risk of an estate going to an ex-spouse, a party to a family law matter with an MWA should consider addressing the MWA in their documents.

The bottom line is that these are issues that family lawyers need to be cognisant of and build into their advice. Failure to do so could open a different kind of Pandora's box.

Case summary

The decision in *Forster* tests whether a constructive trust arises on the death of a spouse (or someone treated as such in family law) in a situation where parties have entered into an MWA to the effect (most commonly) that, where one of the couple dies, the other inherits the estate and then, when the surviving spouse dies, the combined estate is bequeathed in accordance with the MWA (for example, to the children of the respective parties to the MWA).

In *Forster*, one of the adult children of the deceased (applicant) suspected that the surviving spouse was breaching the terms of the MWA and sought court orders to require the surviving spouse to disclose her financial affairs to the applicant annually. No compelling evidence was presented that the living spouse intended to breach (or had in fact breached) the MWA. The applicant argued that the rules of equity applied to:

- impose a constructive trust over the assets governed by the MWA
- a constructive trust over the assets covered by the MWA arose on the death of his father.

Ryan J (in the Supreme Court of Queensland) held that:

- equity will intervene to prevent fraud by imposing a constructive trust on the property which is subject to an MWA
- in the absence of fraud, property which is the subject of an MWA is not held on trust by the surviving spouse during their lifetime
- even if a constructive trust did exist, the surviving spouse would not be obliged to make the financial disclosure sought.

No appeal was filed.

Background to MWAs

MWAs have a separate legal form from wills and other testamentary documents. They do not arise merely because a couple drafts and/or executes their individual wills together or simultaneously. There must be a formal legal agreement/contract between the parties to the MWA which binds them to treat the assets governed by the MWA in a certain way. The elements of an effective and binding MWA are:[3]

- mutual wills made by two people together in an agreed form
- a contractual agreement governing disposition of property
- one of the parties survives without revoking their (valid) will.

When one of the parties to the MWA dies, the surviving spouse is bound by the terms of the MWA.

MWAs are commonly used between spouses or partners who have remarried and have children from a former marriage/relationship. The MWA guarantees that the property (of the earlier marriage) flows to the agreed beneficiaries (usually the children of the earlier relationship) and will prevent the surviving spouse from disinheriting their step-children or reducing the value of the inheritance following the death of the spouse.

The terms of MWAs will reflect whatever is agreed between the parties but will typically dictate what can and cannot be done with assets covered by the MWA. In *Forster*, the MWA permitted the respondent to use the deceased's estate to maintain her standard of living, but not intentionally substantially diminish it, including by making gifts to her own children (or to others).[4]

The extent to which the surviving party may consume the property left by their deceased partner to the detriment of the eventual beneficiaries depends on the terms of the MWA.[5]

Implications of *Forster*

Effective revocation

When a relationship breaks down, it is appropriate for the parties to seek to limit their obligations to one another. This includes updating or changing wills.

To terminate or unwind the MWA, the proper contractual processes (usually set out in the MWA) must be followed if that is the agreed course of action following relationship breakdown.

Under estates law, a later (valid) will that explicitly revokes an earlier MWA remains the last (and valid) will of a testator (and therefore the will that governs the testamentary treatment of the deceased's assets). However, a failure to provide explicit and direct notice to terminate the MWA in accordance with its terms will likely be regarded as breach of the MWA. Therefore, beneficiaries under the MWA may have a right to sue (in equity) to enforce the contract.

When a party dies and they have previously changed their will without the knowledge of the other party, equity will likely intervene to impose a trust on the deceased's estate for the benefit of the survivor of the MWA.[6]

(i) "The disposition of the property by the first party under a Will in the agreed form and upon the faith of the survivor carrying out the obligation of the contract attracts the intervention of Equity"[7]

(ii) "That intervention is by the imposition of a trust of a particular character".[8]

Birmingham makes it clear that a person who makes a binding promise to dispose of property in a certain manner in a will is liable for damages if there is a failure to keep that promise at law.[9]

The need to explicitly terminate an MWA in accordance with its terms to make that termination valid has been contentious. Ryan J affirmed in *Forster* that MWAs may only be revoked by joint consent or where one party provides notice to the other – notwithstanding any promise made not to revoke it.[10]

In the context of family law, proper revocation of an MWA is important in circumstances where a client seeks a property settlement or one party hopes to re-partner in the future. If notice to revoke the MWA is not provided prior to the death or incapacity of one of the former spouses, a surviving spouse will be bound by the terms of the MWA.[11] This can be a problematic situation in blended families since the MWA takes precedence over any interests they may have inherited.

It is good practice for family lawyers to advise clients to consult with estates lawyers on the need to formally revoke an MWA and to reinforce this intention by noting the said revocation in family law documents, for example, by including a clause in a settlement document.

Treatment of wills and MWAs: Assessing the property pool

MWAs may have a bearing on family law property settlements.

In the seminal High Court case of *Stanford*[12] the Court held that the proper approach to determining an application for property settlement under s79 of the *Family Law Act 1975* (FLA) is for the Court to consider first whether it is "just and equitable" to make the order. In the case of parties who are not separated or are involuntarily separated such as through old age, illness or death, the majority said that the bare fact of involuntary separation does not show that is it "just and equitable" to make a property settlement order. However, there may be circumstances other than a voluntary separation where it is "just and equitable" to make an order under s79 of the FLA.[13]

With an ageing population, there is a growing need for family lawyers to provide advice to the adult children of elderly parties who have separated voluntarily or involuntarily. In this scenario, lessons from the *Forster* case would require a family lawyer to inquire whether the elderly spouses had entered into an MWA. Similarly, with the number of blended families on the increase, *Forster* is a salient reminder of the need for due diligence.

The Full Court authorities of *White*[14] and *De Angelis*[15] provide guidance on when expectation of an inheritance should be taken into account in a family law property settlement claim. Broadly:

- Wills: A future inheritance will not usually be considered a "financial resource" unless the inheritance is sufficiently certain. This is a question of fact. For example, an anticipated inheritance from a party who has lost testamentary capacity is more likely to be considered a "financial resource" because the benefit could reasonably be expected to be forthcoming.[16]
- MWAs: Where one of the parties to the MWA is incapacitated, has died or death is imminent, the future inheritance (due under the MWA) may be a "financial resource" in a family law dispute involving a beneficiary because the surviving party is contractually bound to adhere to the terms of the MWA. Where the MWA is not sufficiently certain (and subject to possible revocation) it could be argued that such inheritance would unlikely be considered a "financial resource" because the MWA can be changed (subject to notice – see above)[17] (applying the principles in the future inheritance authorities).

Section 79 FLA orders

Section 79 of the FLA provides (broadly) that the court may alter the property interests of a party to a relationship to effectively redistribute assets of the relationship where making such an order is "just and equitable". Property in which the eventual beneficiaries have a legal or equitable interest will not be excluded from consideration in proceedings relating to s79 of the FLA.[18]

Ultimately, the classification of an anticipated inheritance under an MWA as property or a "financial resource" will depend on the court's discretion and the facts at hand.

Forster and BFAs

Forster may also have implications for drafting of BFAs as a party may seek to explicitly exclude any interest (or possible interest) that they may gain under a (possibly revocable) MWA from division in the event of separation or relationship breakdown.

As noted, there is currently (in the absence of fraud) unlikely to be any interest in law or equity in any asset under an MWA unless the party to the MWA is incapacitated, dying or dead (in which case there may be a "financial resource").

Potential beneficiaries of an MWA may need to consider disclosure of that potential inheritance to avoid questions about failure to disclose under s90K(1)(a) of the FLA.

Conversely, it is good practice to consider referring your clients to estates lawyers to draft a robust MWA that will protect the children and property (from the earlier relationship), especially when advising on BFAs for blended families.

Circumstances involving fraud

In *Forster* it was held that the respondent did not hold the property that was the subject of the MWA on trust for the applicant in the absence of fraud.[19] A fraud occurs where one party breaches the terms of the MWA by failing to act in accordance with the MWA following their partner's death.

The surviving party cannot be prevented from breaching the MWA – for example, by executing a new will that excludes the original beneficiaries of the MWA. However, equity can likely be used to enforce the MWA.[20] Probate expertise will likely be needed.

The effect of equity intervening is that a constructive trust will be imposed on the surviving party who will be converted into a trustee and must act in accordance with the terms of the MWA and in line with fiduciary duties to the beneficiaries.[21]

Proving fraud could be complex and costly but, if established, could be significant in a family law context.

Conclusion

The existence of MWAs could cause issues in a family law context if you are aware of the risks involved.

It is important for family lawyers to understand how the implications of *Forster* can influence outcomes for clients in the short, medium and long term. Especially for blended families, *Forster* is a reminder to conduct extensive inquiry.

It may be that the existence of an MWA needs to be shared by clients with their adult children as a matter of best practice for their own wealth planning and protection.

The imposition of a constructive trust (if fraud is established) may create a potential asset that needs to be added to every family lawyer's tool kit and client Q&A precedents. ■

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1. The authors note that there is a long history of jurisprudence on MWAs including *Bauer & Ors v Hussey & Anor* [2010] QSC 269.
2. *Birmingham v Renfrew* [1937] HCA 52 per Dixon J at 683.
3. Australian Law Reform Commission, Commonwealth Parliament, "Mutual Wills – An Ancient Doctrine with Modern Teeth" (Presentation, September 2016).
4. *Forster v Forster* [2022] QSC 30, at [17].
5. Note 4 above, at [48].
6. Note 4 above, at [94]-[96].
7. *Birmingham & Others v Renfrew & Others* (1937) 57 CLR 666 at 690.
8. *Barns v Barns and others* (2003) 214 CLR 169, at [85].
9. Note 4 above, at [94]; *Gordon Archibald Bigg v Queensland Trustees Limited* Unreported, No 825 of 1989.
10. Rosalind Croucher, "Mutual Wills: Contemporary Reflections on an Old Doctrine", (2005) 29(2) *Melbourne University Law Review 390; Forster v Forster* [2022] QSC 30, [55], [201]; *Flocas v Carlson and others* [2015] VSC 221, [103].
11. Note 7 above, at 688-690.
12. *Stanford v Stanford* [2012] HCA 52. In *Stanford* a dispute arose (about choice of nursing home) between the husband and the daughters of the wife, who was mentally incapacitated. In 2009, the wife (through her daughters) filed an application for property settlement. The property included, among other assets, the matrimonial home (where the husband lived). The husband continued to provide financially for the wife. The husband and wife had made separate wills in favour of children of their previous marriages. During the court proceedings, the wife died. The Full Court of the Family Court of Australia made an order for alteration of the parties' interests in property. However, this decision was reversed upon the husband's appeal to the High Court of Australia. The High Court held that involuntary separation does not necessarily indicate that it is just and equitable to make a property division order. The wife's application for property settlement was therefore dismissed.
13. Note 12 above; *Family Law Act* 1975 (Cth), s79(2).
14. *White & Tulloch White* (1995) 19 Fam LR 696.
15. *De Angelis v De Angelis* [1999] FamCA 1609.
16. Note 14 above.
17. *Dufour v Pereira* (1769) 1 Dick 419; 21 ER 332.
18. *Holland v Holland* (2017) 57 Fam LR 84; [2017] FamCAFC 166, at [26].
19. Note 4 above, at [9].
20. Note 4 above, at [47].
21. Note 4 above, at [47].