Explaining the Mutual Wills Doctrine

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1. INTRODUCTION

Although English courts have applied the mutual wills doctrine since the 18th century,[1] it remains difficult precisely to define its operation, the legal principles involved, and its underlying rationale(s). These difficulties have caused many to doubt the usefulness and coherence of the doctrine. Recently, the Law Commission announced its plan to review the law concerning wills in late 2015, with one of the four key areas to be reviewed being mutual wills.[2] The review is said to 'aim to reduce the likelihood of wills being challenged after death, and the incidence of litigation. Such litigation is expensive, can divide families and is a cause of great stress for the bereaved.' This is reminiscent of Mummery LJ's comments in *Olins v Walters*,[3] that the doctrine 'continues to be a source of contention for the families of those who have invoked it. The likelihood is that in future even fewer people will opt for such an arrangement and even more will be warned against the risks involved.' These statements suggest that there is a real possibility that a suggestion might be made to abolish the mutual wills doctrine completely.

This chapter proposes a new way of understanding the mutual wills doctrine which is consistent with orthodox principles. It distinguishes between what will be labelled 'qualified interest' and 'absolute interest' situations, each applying to a different type of mutual wills agreement. From this renewed understanding, it will be seen that the doctrine is underpinned by two distinct rationales, which also form the basis of Equity's intervention in other areas. This indicates that the best way to understand the mutual wills doctrine is not to treat it in isolation, but to pay proper regard to its commonalities with other doctrines which give rise to constructive trusts such as the doctrine in *Rochefoucauld v Boustead*,[4] secret trusts, and proprietary estoppel.

2. DIFFICULTIES IN THE PRESENT UNDERSTANDING

In a typical mutual wills case, two individuals come to an agreement that the first to die (A) will leave her property to the survivor (B), with B promising to leave whatever is left at her death to one or more ultimate beneficiaries, C. In a rarer type of arrangement, A and B agree to make respective wills which benefit C directly. In both cases, B also promises not to revoke her will after A's death, this being indicated by an intention to create legally binding obligations.[5] When A dies while relying on B's promise, that is, by

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[1] *Dufour v Pereira* (1769) Dick 419, 21 ER 332, reported more fully in F Hargrave, *Juridical Arguments and Collections* (1799) vol 2, 304 and 309.

[2] <http://lawcommission.justice.gov.uk/areas/wills.htm> (accessed …).

[3] *Olins v Walters* [2008] EWCA Civ 782, [2009] Ch 212 [3].

[4] *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA).

[5] *Birmingham v Renfrew* (1936) 57 CLR 666, 675; *Re Cleaver (Deceased)* [1981] 1 WLR 939 (Ch) 947; *Re Goodchild (Deceased)* [1997] 1 WLR 1216 (CA) 1225; *Osborne v Estate of Osborne* [2001] VSCA 228 [15]; *Birch v Curtis* [2002] EWHC 1158 (Ch), [2002] 2 FLR 847 [60].

leaving property to B or C as the case may be, a constructive trust[6] binds B to carry out the agreement. Any subsequent volunteer recipient of B's property, such as her personal representative, executor, or heir,[7] is likewise bound to fulfil the mutual wills agreement. The constructive trust arises notwithstanding the informality of the agreement, that is to say, despite the fact that the arrangement may not appear in B's will as would normally be required by s 9 of the Wills Act 1837,[8] and despite non-compliance with s 53(1)(b) of the Law of Property Act 1925[9] where it affects interests in land. As Mummery LJ observed in *Fry v Densham-Smith*,[10] 'if and when [the doctrine] applies, absolute beneficial testamentary dispositions … do not take effect in accordance with their terms.'

Mutual wills agreements are characterised by two distinctive features which make the doctrine unique. First, the constructive trust binds not only A's property but also B's *own* property.[11] Second, B's promise is not to hold some property on trust immediately upon A's death, but to make a *testamentary* disposition in a particular form. These features pose tricky issues for a proper explanation of the mutual wills doctrine, in particular during B's lifetime after A's death. How is it possible to reconcile B's apparent freedom to make use of property in her hands with the fact that she has trust obligations in relation to the property?

Judges and commentators generally take one of three approaches, none of which appears satisfactory. The first views B's obligation as being 'floating', that is, suspended during her lifetime and 'crystallising' either upon B's death or when gifts or settlements made during her lifetime that are 'calculated to defeat the intention of the [agreement]'.[12] This approach, however, does not explain the nature of B's duties and C's rights during B's lifetime. By virtue of what right can B deal with her estate? How does C have a right against a recipient to whom B has left her estate contrary to the mutual wills agreement? The 'floating trust' approach has also been criticised for the lack of certainty of subject matter it entails,[13] which is required for the validity of any trust.[14] Others have suggested that the 'floating trust' should be given legal effect in the same way as the law recognises a floating charge.[15] However, it is difficult to reconcile this analysis with the policy underlying the Bills of Sale Act (1878) Amendment Act 1882, which prevents an individual from granting a floating charge over her personal chattels.[16] After all, 'there is all the difference between a trust and a charge, in their inception.'[17]

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[6] *Birmingham* (n 5) 680 and 683; *Cleaver* (n 5) 947; *Re Newey (Deceased)* [1994] 2 NZLR 590; *Re Dale (Deceased)* [1994] Ch 31 (Ch) 46-7; *Manitoba University v Sanderman* (1998) 155 DLR (4th) 40; *Healey v Brown* [2002] WTLR 849 (Ch) [8]; *Osenton v Osenton* [2004] EWHC 1055 (Ch) [33]; *Olins* (n 3) [39]; *Charles v Fraser* [2010] EWHC Civ 2154 (Ch) [59]; *Shovelar v Lane* [2011] EWCA Civ 802, [2012] 1 WLR 637 [37].

[7] *Dufour* (in Hargrave) (n 1) 309.

[8] Among its requirements, a will must be put in writing and witnessed by two others to be valid.

[9] '[A] declaration of trust respecting any land … must be manifested and proved by some writing signed by some person who is able to declare such a trust'.

[10] *Fry v Densham-Smith* [2010] EWCA Civ 1410, [2011] WTLR 387 [31]. See also *Olins* (n 3) [40].

[11] See *Goodchild* (n 5) 1224.

[12] *Birmingham* (n 5) 689. This analysis has been cited in many English cases, eg *Goodchild* (n 5) 225; *Cleaver* (n 5) 947; *Healey* (n 6); *Birch* (n 5).

[13] P Luxton, '*Walters v Olin*: Uncertainty of Subject Matter – An Insoluble Problem in Mutual Wills?' [2009] Conv 498, 503-4.

[14] *Knight v Knight* (1840) 3 Beav 148, 49 ER 58.

[15] *Barns v Barns* (2003) 214 CLR 169 [152]. See too CJ Davis, 'Floating Rights' (2002) 61 CLJ 423, 429.

[16] See L Gullifer, *Goode on Legal Problems of Credit and Security* 5th edn (London, Sweet & Maxwell, 2013) para 4-01.

[17] *Re Lehman Brothers* [2009] EWHC 3228 (Ch) [178].

The second approach simply treats the doctrine as *sui generis* or anomalous.[18] Based on the view that the mutual wills doctrine is closely related to a contractual action,[19] its perceived anomaly lies in allowing C, a third party, to enforce a contract between A and B. However, the mutual wills doctrine is an equitable doctrine and, at least in the modern law, has nothing to do with a common law contractual action. Thus, it has been said that the doctrine does not involve making a claim for contractual relief such as specific performance because C is not a party to the 'contract';[20] that its principles are not precisely the same as those which apply to contractual disputes;[21] that it arises from the parties' course of conduct and not the contract itself;[22] and that the constructive trust is excepted from any otherwise relevant formality requirements.[23] Indeed, the doctrine has been applied to cases where the agreement is not even certain enough to amount to a contract enforceable at common law.[24] Moreover, to write off the doctrine as *sui generis* is an act of despair which should be avoided until and unless other alternative explanations have been explored and found wanting.

A third approach is to analyse the courts as imposing a remedial constructive trust, where judges are 'shaping the remedy to meet the circumstances'.[25] This approach immediately runs up against the oft-rehearsed view that English law recognises only 'institutional' and does not recognise 'remedial' constructive trusts.[26] There is also little to commend this approach. Remedial constructive trusts are said to reflect the 'crucial features' of judicial discretion and retrospectivity.[27] However, in the mutual wills context, constructive trusts do not appear to be imposed by way of discretion; and even if they were, an explanation for the pre-conditions for doing so is lacking. Furthermore, this approach does not identify the source and extent of B's and C's duties and rights; it merely addresses B's breach of the agreement. It therefore fails to explain why, for instance, C's interest does not lapse if she predeceases B but dies after A.[28]

In view of the inadequacies of the prevailing approaches, a fresh analysis is proposed, by which it is possible to explain B's duties and C's rights which arise upon

[18] *Goodchild* (n 5) 1230; TG Youdan, 'The Mutual Wills Doctrine' (1979) 29 U Toronto LJ 390, 401; H Legge and A Norris, 'Contract and Conscience: The Decline of the Mutual Will' (1998) 6 PCB 332, 336; R Croucher, 'Mutual Wills: Contemporary Reflections on an Old Doctrine' (2005) 19 Melb U L Rev 390; *Parker and Mellows: The Modern Law of Trusts* 9th edn (London, Sweet & Maxwell, 2008) para 10-331.

[19] The case of *Healey* (n 6) is often cited in support of this proposition. There David Donaldson QC, sitting as a deputy High Court judge, held that compliance with s 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 is a prerequisite for the mutual wills doctrine to apply. However, this cannot be sustained as a matter of principle and consistency. After all, it is indisputable that the mutual wills doctrine gives rise to constructive trusts, not merely contractual damages; and s 2(5) of the Act provides that 'nothing in this section affects the creation or operation of … constructive trusts.'

[20] *Olins* (n 3) [36]. See also *Dale* (n 6) 38.

[21] *Re Hobley* (1997) [2006] WTLR 467 (Ch).

[22] *Lewis v Cotton* [2001] 2 NZLR 21 [44], [55].

[23] *Birmingham* (n 5) 680. Latham CJ was speaking in relation to the constructive trust exception to compliance with the formality requirement of section 53 of the Law of Property Act 1925, and the same exception would likewise apply to the Law of Property (Miscellaneous Provisions) Act 1989 by virtue of s 2(5).

[24] *Olins* (n 3); see especially counsel's submission reported at [24] which the Court of Appeal rejected.

[25] C Rickett, 'A Rare Case of Mutual Wills and its Implications' (1982) 8 Adel LR 178, 196. See too eg *Healey* (n 6) [24]; *Newey* (n 6) 593; R Burgess, 'A Fresh Look At Mutual Wills' [1970] Conv 230, 246; AHR Brierley, 'Mutual Wills — Blackpool Illuminations' (1995) 58 MLR 95, 99; Croucher (n 18) 409.

[26] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 714-15; *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch) [273]; PJ Millett, 'Tracing the Proceeds of Fraud' (1991) 107 LQR 71, 81; PJ Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 399.

[27] *Lee* (n 26) [273].

[28] *Re Hagger* [1930] 2 Ch 190 (Ch).

A's death. This analysis not only explains how C obtains the right to the agreed-upon interest when B dies, but also explains why C is allowed only to prevent certain dispositions by B during her lifetime.

3. THE QUALIFIED INTEREST (QI) AND ABSOLUTE INTEREST (AI) ANALYSES

It is necessary first to note a crucial but rarely observed distinction. There are two different cases in which a promisor, B, may promise through an agreement to give an interest in property to another, and which may potentially attract a constructive trust.[29] The first is where B promises to give an interest in property she owns *absolutely*. The second is where B's promise relates to property that she does not yet own: B promises to take a *qualified* interest in the property, for instance, by an obligation to hold it on trust for the other. These cases will be referred to as 'absolute interest' (AI) and 'qualified interest' (QI) analyses.

In practice, these cases are treated differently. When B promises to give away property that is hers to begin with, courts exercise a measure of caution before depriving her of her interest. Consider proprietary estoppel cases where B promises or assures A that B will give A an interest in property B owns. For A to gain a right against B at all, A must act in detrimental reliance on B's promise; yet B is not invariably bound by a constructive trust to perform her promise. The court may choose from a wide range of remedial responses;[30] and being guided by the notion of the 'minimum equity to do justice to the plaintiff',[31] a remedy is imposed which achieves proportionality between A's detriment and B's promise.[32] Although a constructive trust is often imposed, compensatory damages (or 'equitable compensation') may also be awarded.[33] Since the property to which the promise relates is B's in her own right,[34] A's act of reliance does not confer an advantage on B in relation to the acquisition of the property: it does not increase B's chances of acquiring the property in question.

A markedly different approach is taken where B's promise relates to property she does not yet own. In the doctrine in *Rochefoucauld v Boustead*[35] and secret trusts,[36] for instance, B informally promises A that she (B) will hold an interest in property yet to be acquired for the benefit of A or C. Where A acts in reliance on B's promise and confers an advantage on B in relation to the acquisition of the property,[37] that is, by transferring the property in question to B, courts bind B to carry out her promise without considering

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[29] This precludes an outright gift, a declaration of an express trust, or contractually promising to transfer away property.
[30] See *Stack v Dowden* [2007] UKHL 17, [2002] 2 AC 432 [37].
[31] *Crabb v Arun District Council* [1976] Ch 179 (CA) 198.
[32] *Henry v Henry* [2010] UKPC 3, [2010] 1 All ER 988 [65].
[33] *Campbell v Griffin* [2001] EWCA Civ 990; *Jennings v Rice* [2002] EWCA Civ 159; *Ottey v Grundy* [2003] EWCA Civ 1176; *Henry* (n 32).
[34] *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA) 409.
[35] In the typical case, B informally agrees to hold A's land on trust for A; and in reliance A transfers the legal title of the land to B. A constructive trust binds B to her promise.
[36] In the typical case, B informally promises a testator, A, that she will hold any property B receives under A's will for C. A leaves property in her will to B absolutely, and this remains unchanged until her death in reliance on B's agreement to fulfill A's intention. A constructive trust binds B to her promise.
[37] It may be that A's act of reliance on B's promise does not confer such an advantage, for instance where B promises to hold property yet to be acquired on trust for A and A's reliance consists of caring for B's aging mother or making a substantial donation. In such cases, when B acquires the property in question, she does so 'in her own right', and her promise is taken to relate to property she owns absolutely, as in cases reflecting the AI analysis.

whether a lesser remedy would be more appropriate. As Millett LJ (as he then was) observed of such cases, B:[38]

> does not receive the trust property in [her] own right but by a transaction by which both parties intend to create a trust from the outset … [Her] possession of the property is coloured from the first by the trust and confidence by means of which [she] obtained it.

It is suggested that the mutual wills doctrine can be analysed in the light of the distinction between the QI and AI analyses, which reveals what actually goes on in the cases. The following analysis makes a distinction between cases where B receives property from A pursuant to the parties' agreement, and cases where B does not do so.

3.1. B Receives Property from A

Mutual wills agreements typically involve B receiving property from A at A's death. It is clear that at this point B is subject to certain duties and C obtains certain corresponding rights. However, the specific assets in B's hands may well alter during the course of her lifetime. A conceptual distinction might therefore be made between property in B's hands at the time of A's death (which, by definition, includes property acquired from A), and property which B may amass afterwards.

3.1.1. At the Point of A's Death

At the time of A's death, it may be tempting to analyse B's obligations as relating to two distinct sets of property, one belonging to A and another to B. This would, however, misrepresent the true subject matter of the parties' agreement, which is in fact a *fund*.

A fund is 'a set of properties, the identity of which fund or set continues despite a change in the items of property that it comprises.'[39] A fund exists only when certain assets are demarcated, for example, by a declaration of trust, by an executor, or to be treated as security.[40] In specific relation to an interest in a *trust* fund, Roy Goode writes:[41]

> The essential characteristic is that an asset or collection of assets is transferred to a trustee (or declared by a settlor to be held by himself as trustee on stated trusts) to manage on behalf of the beneficiaries, with power to change the assets within the limits, if any, set by the trust instrument or by law.

In the mutual wills context, this is the only explanation of the subject matter of the trust which does full justice to, and avoids a distortion of, the parties' agreement, insofar as the property in B's hands at the point of A's death is concerned.[42] First, in contrast with other doctrines such as secret trusts, the doctrine in *Rochefoucauld v Boustead*, or even proprietary estoppel, B's promise in a mutual wills agreement usually relates not to

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[38] *Paragon* (n 34) 409. Incidentally, in *Paragon*, Millett LJ did not comment on cases reflecting the AI analysis.

[39] JE Penner, 'Duty and Liability in Respect of Funds' in J Lowry and L Mistelis (eds), *Commercial Law: Perspectives and Practice* (London, LexisNexis Butterworths, 2006) para 12.13, developing an idea propounded by Roy Goode: R Goode, 'The Right to Trace and its Impact in Commercial Transactions, Part I' (1976) 92 LQR 360, 384; R Goode, *Commercial Law* 2nd edn (London, Penguin, 1995) 66-7.

[40] Penner (n 39) [12.14].

[41] R Goode, 'The Right to Trace and its Impact in Commercial Transactions, Part II' (1976) 92 LQR 528, 529.

[42] Notably, Lord Camden observed in *Dufour* (in Hargrave) (n 1) 308 that '[t]he property of both is put into a common fund, and every devise is the joint devise of both.'

specifically defined property; it is to leave 'whatever is left' at her death to C.[43] This indicates that the subject matter of the agreement is a fund, since the parties do not intend to create rights and duties in relation to specific assets, but in relation to their combined assets *as a singular entity*. During B's lifetime, the assets are treated not as things, but as wealth,[44] since the parties are only concerned with specific assets as things at the time of B's death when the trust ends. Secondly, it follows that the parties do not intend C to obtain any interest in specific assets during B's lifetime, which reflects the nature of a beneficiary's interest in a trust fund.[45] When a breach occurs, a beneficiary may elect to enforce a proprietary interest in specific assets in the fund,[46] which is consistent with judicial statements in the mutual wills context that C may prevent certain dispositions from being made by B during her lifetime which are calculated to defeat the agreement.[47] Thirdly, like a beneficiary of a trust fund, C has a right to her due share in accretions to the fund,[48] which is expressly stipulated to be at B's death. Fourthly, the subject matter of the mutual wills agreement reflects other features of a trust fund, namely that it does not comprise *merely* of B's assets, and that it is clearly demarcated, that is, at A's death. Fifthly, as in the case of a trust fund, a power is imposed by law[49] which allows B to make changes to the specific assets comprising the fund.

Once the subject matter of the parties' agreement is correctly identified as a fund, the QI analysis can be applied. On this understanding, B promises to qualify the interest she will take *in the fund*. This fund is acquired by B if and only if A completes her act of reliance, which confers an advantage on B in relation to the acquisition of the fund. The relevant advantage B obtains lies not merely in the acquisition of 'A's property' (although this is certainly so) to which a separate basis for the rights and duties over 'B's property' needs to be found. Instead it materialises in the form of a fund in B's hands. Stated in the reverse, without A's reliance, B would not only fail to acquire A's property, but would also never obtain the fund in question. Therefore, upon A's death, a fund is constituted in B's hands, over which a constructive trust attaches.

An objection to the fund analysis might be made by pointing out that a trust fund of an express trust always begins with capital provided by the settlor only, and does not include property belonging to the trustee. However, nothing prevents A and B *as settlors* from creating an express trust with B holding the trust fund on trust for C's benefit. The same can also be said in relation to mutual wills: B, in her capacity analogous to an express trustee, promises to hold the fund on trust, and A and B, in their capacity analogous to joint settlors of an express trust, together supply the assets which constitute the fund in B's hands.

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[43] If the parties specifically identify the property or interest B will leave to C at B's death, then there are three possibilities. If that property or interest was transferred from A to B upon A's death, then the case falls within the secret trusts doctrine, with the result that B obtains a life interest and C obtains an interest in remainder (*Ottaway v Norman* [1972] Ch 698 (Ch)). If the specified property or interest formerly belonged partly to A and partly to B (as in eg *Hagger* (n 28)), then the specification relates to a 'fund' after all, and the analysis discussed in the text would be applicable. If the specified property or interest was not formerly A's at all, but was acquired by B on her own accord, then the appropriate analysis would be that discussed in Section 3.2.

[44] For the distinction between things as 'things' and as 'wealth', see B Rudden, 'Things as Thing and Things as Wealth' (1994) 14 OJLS 81.

[45] See eg Goode (n 41) 530; Penner (n 39) para 12.16.

[46] Penner (n 39) para 12.16.

[47] See text following n 12.

[48] Goode (n 41) 530.

[49] See Section 4.1.2.

3.1.2. After A's Death

It is more difficult to determine the appropriate analysis in relation to property B amasses on her own accord after A's death, that is, any accretion to B's estate which is not a traceable proceed of the assets in B's hands at the time of A's death. One major difficulty is that no case specifically affirms that such 'after-acquired' property is capable of being bound.[50] It is often presumed that it is indeed so,[51] although this view is not unanimous.[52] If such 'after-acquired' property is bound, an explanation is required.

It might be thought that an explanation can be found the equitable maxim 'equity considers as done that which ought to be done'.[53] This relies on the line of authorities which provides that, where valuable consideration is given, equity will enforce a declaration of trust over future property as a contract to assign the property,[54] and a constructive trust attaches to the property immediately the property is acquired. However, this explanation attracts a number of insurmountable difficulties. First, the mutual wills doctrine is not based on a contractual analysis of the parties' agreement.[55] Secondly, this cannot account for any after-acquired property subject to the trust which is not land or a unique chattel, for instance, B's salaries or pension pay-outs, since an order of specific performance is generally not available against such assets.[56] Finally, it is A, not C, who provides the consideration, therefore making it difficult to justify the imposition of a constructive trust in C's favour.[57]

One possibility is to extend the 'fund' analysis to cover after-acquired property, and to analyse such property by way of the QI analysis. This approach is plausible if we understand B's contribution to the trust fund as being 'her estate' instead of merely 'her assets at the time of A's death'. That is to say, B's promise is understood as relating to a fund which comprises properties received from A as well as B's own estate, the second of which includes after-acquired property. The great attraction of this explanation is the consistency it achieves in the law's approach to mutual wills arrangements which involve B receiving property from A.

Treating B's 'estate' as a proprietary entity in this manner is not free from controversy, however. In the first place, nowhere else in English law is one's estate treated as an entity of property capable of subjecting its owner to *inter vivos* obligations.[58] The closest idea to this conception found in the civilian 'patrimony', which

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[50] See A Braun, 'Revocability of Mutual Wills' in KGC Reid, MJ de Waal, and R Zimmermann (eds), *Exploring the Law of Succession: Studies National, Historical and Comparative* (Edinburgh, Edinburgh University Press 2007) fn 64. Note, though, that in *Re Gillespie* (1968) 69 DLR (2d) 368 [18] Stark J in the Ontario High Court construed the parties in that case as having agreed to *preclude* such after-acquired property from being subject to the trust.

[51] See eg LA Sheridan, 'The Floating Trust: Mutual Wills' (1977) 15 Alta LR 211, 235; J McGhee QC (Ed), *Snell's Equity* 32nd edn (London, Sweet & Maxwell, 2010) para 24-036.

[52] See S Hudson and B Sloan, 'Testamentary Freedom: Mutual Wills Might Let You Down' in Wa Barr (ed), *Modern Studies in Property Law, Vol 8* (Oxford, Hart Publishing, 2015) 166.

[53] *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1, 16.

[54] *Ellison v Ellison* (1802) 6 Ves Jun 656, 31 ER 1243; *Holroyd v Marshall* (1862) 10 HLC 191, 210; 11 ER 999, 1006; *Tailby v Official Receiver* (1888) 13 App Cas 523 (HL) 530; *Re Lind* [1915] 2 Ch 345 (CA). See also *Williams v IRC* [1965] NZLR 395.

[55] See text following n 18.

[56] *Sky Petroleum Ltd v VOP Petroleum Ltd* [1974] 1 WLR 576, 578; *R Griggs Group Ltd v Evans* [2005] Ch 153 [36].

[57] G Virgo, *The Principles of Equity and Trusts* (Oxford, OUP, 2012) 154–5.

[58] Penner (n 39) para 12.14; FH Lawson and B Rudden, *The Law of Property* 3rd edn (Oxford, OUP, 2002) 171. Although, of course, one's estate can be made the subject matter of a testamentary disposition.

is the sum total of one's assets minus liabilities.[59] Even so, this concept is neither here nor there for the purposes of the present discussion. It is most commonly employed for the purpose of explaining why each person is liable to her own creditors,[60] and how a civilian 'trustee' administers and manages another's 'patrimony' and is therefore not liable to the latter's creditors.[61] It has not been used to the effect that that one may subject oneself to *inter vivos* obligations in relation to one's own patrimony.[62]

Moreover, an objection might be made to the analysis on policy grounds. In the context of the law of assignment,[63] courts have suggested that the assignment by an individual of her entire estate, both real and personal, present and future, is unenforceable as being contrary to public policy, since it renders her destitute or a quasi-slave of the assignee.[64] The same might be said about the present analysis. However, those statements made in the assignment context are strictly *obiter*, and so the issue remains an open one. Moreover, the fact that B remains capable of making use of the capital assets of the mutual wills fund during her lifetime militates against that policy concern.

Ultimately, it seems plausible to extend the 'fund' analysis to cover B's entire 'estate', at least where the trust fund does not *merely* comprise of B's estate' *alone*, but includes contributions from A. The fact that A too contributes to the fund means that there is a clear demarcation[65] as to what properties make up the fund, as in the case of any ordinary trust fund.

Alternatively, the after-acquired property could be analysed by way of the AI analysis. On this approach, such property is not treated as being part of the trust fund; instead, as in a case of proprietary estoppel, B is treated as absolute owner of any after-acquired property, and C potentially gains a right to that property due to A's detrimental reliance on B's promise to leave the property to C. This places the analysis of B's after-acquired property within the discussion immediately below, which concerns the situation where B does not receive property from A. It is argued there that, on the AI analysis, if a court deems that a constructive trust is not an award proportionate to A's detrimental reliance, then C would have no claim, since monetary compensation would be awarded in favour of A or A's estate. This is, however, not necessarily a cause for concern, since it would appear intuitive that B should be free to dispose of property she acquired on her own accord if A's detrimental reliance was relatively minor – for instance, if A was destitute at the time of her death. The availability of judicial discretion to test the appropriateness of a constructive trust award in C's favour against the degree of A's detrimental reliance in relation to B's after-acquired property is therefore a plausible development of this area of law.

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[59] L Smith, 'Trust and Patrimony' (2008) 38 Revue Générale de Droit 379, 383; although it has been suggested that this concept is helpful in an English law context: Lawson and Rudden (n 58) 46. In this regard, see the English case of *Mannox v Greener* (1872) LR 14 Eq 456, where the language of 'patrimony' was employed.

[60] M Raczynska, 'Parallels between the Civilian Separate Patrimony, Real Subrogation and the Idea of Property in a Trust Fund' in L Smith (ed), *The Worlds of the Trust* (Cambridge, CUP, 2013) text to n 17.

[61] G Gretton, 'Up There in the *Begriffshimmel*?' in L Smith (ed), *The Worlds of the Trust* (Cambridge, CUP, 2013) 531ff; Raczynska (n 60) nn 6 and 7, text to n 8; RG Anderson, 'Words and Concepts: Trust and Patrimony' in A Burrows, D Johnston, and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, OUP, 2013) 347, 351–8.

[62] As Raczynska (n 60) 472 argues, a civilian patrimony is not an entity to which a proprietary interest can be asserted.

[63] See AG Guest and YK Liew, *Guest on the Law of Assignment* 2nd edn (London, Sweet & Maxwell, 2015) para 4-21.

[64] *Re Clarke* (1887) 36 Ch D 348, 354, 355; *Tailby* (n 54) 530 and 535; *King v Michael Faraday and Partners Ltd* [1939] 2 KB 753; *Syrett v Egerton* [1957] 1 WLR 1130.

[65] Penner (n 39) para 12.14.

3.2. B Does Not Receive Property from A

In a less common category of mutual wills cases, B does not receive any property from A. The most well known case of this sort is *Re Dale*,[66] where it was held that the doctrine can apply where A and B agree to make respective wills which benefit C *directly*.[67] A variation of this situation is where, pursuant to the supposition that B will be the first to die, B makes a will leaving her estate to A absolutely and A makes a will leaving her estate to C absolutely. A then dies first, leading to the creation of a substitutionary gift in B's will in C's (or another's) favour. So too if (i) A relies on B's promise by acting in a way other than transferring property to B; or (ii) the parties agree that A will make a testamentary disposition of Property 1 to B, and B will make a testamentary disposition of Property 2 to C, where Properties 1 and 2 are distinct assets which do not together make up a fund. In all these cases, B does not receive any property from A pursuant to the parties' mutual wills agreement.

It is clear that these cases can only be analysed by way of the AI analysis. B does not promise to take a qualified interest in property that will be acquired; B's promise relates to property which she already owns absolutely at the time the promise is made. Moreover, A's reliance consists of acts which do not confer any advantage on B in relation to the acquisition of the property to which B's promise relates. While it might not be immediately obvious, some support for the AI analysis of the relevant mutual wills cases can be gleaned from case law.

3.2.1. Re Dale

Re Dale appears to be the only reported case where the facts did not involve B receiving property from A. In that case, a husband (A) and wife (B) entered into a mutual wills agreement where each executed identical wills leaving their estate directly to their son and daughter (C1 and C2) equally. A died without revoking his will, but B made a fresh will altering the proportions that C1 and C2 were to obtain. A preliminary issue arose as to whether B should have had to receive a personal financial benefit for the mutual wills doctrine to operate. Morritt J held that 'such mutual benefit is a sufficient but not a necessary condition',[68] and B was compelled to perform her part of the agreement.

On close inspection, counsel framed the preliminary issue narrowly. It was assumed that B would incur no obligation at all if the mutual wills doctrine did not operate. Thus the only question was whether a personal financial benefit was required for B to be duty-bound.[69] In giving a negative answer, the judgment goes so far as to hold that B did in fact incur a duty. Notably, in the course of his judgment, Morritt J justified his conclusion by observing that 'certain cases of proprietary estoppel may be regarded as species of constructive trust, but in those cases the factor which gives rise to its imposition is not the receipt of property.'[70] Analytically, this is a crucial statement. It indicates that Morritt J recognised proprietary estoppel as the doctrine by which a constructive trust can be imposed where B's promise relates to property she owns

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[66] *Dale* (n 6).

[67] And, to the same effect, if the agreement contemplates that A will make a testamentary disposition to C1 and B a testamentary disposition to C2: see *Olins* (n 3) [38].

[68] *Dale* (n 6) 43.

[69] *Dale* (n 6) 33.

[70] *Dale* (n 6) 47.

absolutely. This exemplifies the AI analysis, and indicates that the case was treated differently from other typical mutual wills cases where B receives property from A.

It appears that Morritt J did not think it necessary to draw an explicit distinction between the QI and AI analyses because he thought that the overarching aim of the mutual wills doctrine was simply 'to prevent [A] from being defrauded.'[71] Such 'fraud' would occur if B were permitted to renege on the arrangement because A had performed her part of the bargain 'on the faith of the promise of [B]'.[72] However, the idea of 'fraud' as a justification for the imposition of a constructive trust is confusing and imprecise.[73] In particular, it fails to explain why B should be bound to give effect to her promise when, in general, a promise does not necessarily give rise to a trust even if the promisee gives consideration or acts in reliance on the promise. It also fails fully to explain the significance of A's testamentary disposition. In contrast, the AI analysis explains the constructive trust which arises upon A's death as being a proportionate response to A's detrimental reliance on B's promise. In *Re Dale*, A left all his real and personal property – valued at £18,500 – by will to C. There is no doubt that a proportionate response would have been to impose a constructive trust in order to give effect to A's expectation, thus explaining the decision in that case.

4. EXPLAINING THE OPERATION OF THE ANALYSES

The discussion thus far has identified two distinct analyses which make up the mutual wills doctrine. Where B does not receive property from A, B promises to give away property which she owns absolutely, and a court has the ability to award a remedy which is proportionate to the detriment A suffers in relying on B's promise. B will often, but will not necessarily, be bound to perform her promise though the imposition of a constructive trust. On the other hand, where B receives property from A, B promises to take a qualified interest in the trust fund yet to be acquired, and upon acquiring the fund a constructive trust is invariably imposed that binds B to carry out her promise. It was also seen that both analyses provide plausible explanations for B's obligations over property she acquires on her own accord after A's death. This section explains how the QI and AI analyses operate within the mutual wills doctrine.

4.1. The QI Analysis

4.1.1. An Orthodox Explanation

Unlike the 'floating trust' analysis which entails 'a floating obligation, suspended, so to speak, during the lifetime of the second testator [which] descend[s] upon the assets at [her] death and crystallize[s] into a trust',[74] the analysis of B as having acquired a fund implies that a constructive trust arises upon B's receipt of the fund, and that the rights and duties arising under the trust arise at that point.[75] The existence of a fund means that there

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[71] *Dale* (n 6) 49. Indeed, Morritt J (at 42) thought that the 'essence of the decision' in *Dufour* (in Hargrave) (n 1) related to A's fraud. See further text following n 160.

[72] *Dale* (n 6) 48-9.

[73] See discussion in YK Liew, 'Rochefoucauld v Boustead (1897)' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Oxford, Hart Publishing, 2012).

[74] *Birmingham* (n 5) 689.

[75] *Olins* (n 3) [42]. As Lewison J observed in *Thomas and Agnes Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch), [2008] Ch 395 [27], the trust is brought into effect upon A's, and not B's, death.

is a manager – a trustee – who holds the assets which constitute the fund.[76] Explained by way of orthodox principles, B immediately becomes a trustee under a constructive trust for the benefit of C upon acquiring the fund at A's death.

As for the content of B's obligations under the trust, this is determined by the parties' agreement. By promising to leave 'whatever is left' at B's death to C, B implicitly accepts that the traceable proceeds of any asset in the fund in her hands will be held upon the same trust. This is because the subject matter in B's hands is treated as a fund, which entails that B has the power to sell and replace individual items in the fund.[77] Moreover, the parties also agree that (i) B will not have an absolute interest in the fund, (ii) B will have latitude to use the capital assets, and (iii) C will not have an absolute interest in the fund during B's lifetime. The first point is deduced from the fact that B has an obligation to make a testamentary disposition of the fund to C; the second is reflected by the fact that the parties are interested in determining the specific assets to be left to C only at the time of B's death; and the third follows from the fact that the parties' agreement is inconsistent with an intention to allow C to exercise her *Saunders v Vautier*[78] rights to collapse the trust for herself during B's lifetime.[79] The upshot is that, through interpretation[80] or by necessary implication[81] of the parties' agreement, they intend that B will obtain the life interest and C the remainder of the fund,[82] and that B should have a general, personal power by which she may appoint the capital assets in favour of anyone including herself.

4.1.2. Explaining 'Crystallisation'

This analysis accounts for the so-called 'crystallising' of C's rights, both when B makes dispositions calculated to defeat the agreement and when B dies, without attracting the conceptual difficulties inherent in the idea of a 'floating trust'. Writing in relation to rights under a trust fund, Roy Goode observes:[83]

> the beneficiaries … cannot bring an end to the management functions prescribed by the trust instrument, so as to have the fund distributed among themselves, except where so provided by the trust instrument or where all of them, being *sui juris* and collectively entitled to the fund, terminate the trust.

Because the 'trust instrument' – that is, the mutual wills agreement – provides that B will make a testamentary disposition to C, the prescribed event which brings the trust to an end is B's death, and this allows C to call for distribution of the trust assets. During B's lifetime, C may not unilaterally exercise her *Saunders v Vautier* rights to collapse the trust for herself because B has a life interest in the fund. Thus, in *Olins v Walters*,[84] where the dispute concerned C's interest during B's lifetime in what was formerly A's property which was left to B pursuant to a mutual wills agreement, the Court of Appeal merely

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[76] Lawson and Rudden (n 58) 171.
[77] Lawson and Rudden (n 58) 171.
[78] *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282.
[79] *Gartside v IRC* [1968] AC 553 (HL) 606.
[80] A technique used in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL) 580.
[81] See G Thomas, *Thomas on Powers* 2nd edn (Oxford, OUP, 2012) paras 3.01 and 3.46.
[82] See Sheridan (n 51) 211; JE Penner, *The Law of Trusts* 9th edn (Oxford, OUP, 2014) para 7.52.
[83] Goode (n 41) 530.
[84] *Olins* (n 3).

made a declaration[85] that the trust was immediately binding on B in relation to that property: there was no hint that C was able immediately to demand the transfer of the property.[86]

In relation to rights under a trust fund, James Penner has also written that 'when certain events occur – the most obvious example being a breach of trust – the beneficiary may elect to enforce a direct proprietary interest in individual items of the fund.'[87] This explains C's rights during B's lifetime. Because C is a beneficiary under the constructive trust, it is clear that B owes C, and not any potential objects of the power, a duty not to misuse her power.[88] One of the incidences of that duty is that B must not exercise her power in such a way that would amount to a fraud on a power, as this would constitute a wrong against C.[89] The typical facts concerning the doctrine of a fraud on a power involve the donee of the power making what appears to be a *prima facie* legitimate appointment, but in fact doing so to allow the appointee to make use of the property in such a way which runs counter to the terms on which the power was granted. However, judicial statements have not limited that doctrine to such facts, the focus instead being on B's motive or intention in exercising her power. Thus, in *Vatcher v Paull*,[90] Lord Parker famously observed that in this context 'fraud' 'merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.' It is crucial that there is, 'at least, a deliberate defeating of what the donor of the power authorized and intended'[91] — an exercise of power with an 'ulterior object to be accomplished.'[92] An execution of a power for a corrupt purpose or a purpose foreign to the power is fraudulent and void.[93]

These statements explain why, in the mutual wills context, the courts have focused on B's motive or intention where she makes an *inter vivos* disposition out of the fund. For instance, in *Healey v Brown*,[94] the transfer of a flat by B to himself and his son as joint tenants was held to run 'directly and fully counter to the intention of the mutual will compact that the flat should pass to [C] on [B's] own death.'

It is important to stress that B's power is a 'bare' power conferred on B in her personal capacity, and not a 'fiduciary power' conferred on her by virtue of her status *qua* trustee.[95] This means that C cannot complain if B exercises the power for her own enjoyment. Thus, to the question some commentators have posed as to whether B may spend part of the trust fund on a world cruise, the analysis here entails an affirmative answer,[96] provided that B does so without any intention of defeating the mutual wills agreement. Indeed, it is immaterial that B might exhaust the entirety of the trust fund, provided that B's dispositions do not amount to a fraud on a power.[97] This ought not to be

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85 *Olins* (n 3) [23].
86 Admittedly, a declaration was the remedy C asked for: *Olins* (n 3) [16]. But if C had wanted to collapse the trust and claim the property before B's death, this would surely not have been allowed.
87 Penner (n 39) para 12.16.
88 *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1613.
89 *Mettoy* (n 88) 1613.
90 *Vatcher v Paull* [1915] AC 372 (PC) 378.
91 *Re Dick* [1953] Ch 343 (CA) 360.
92 *Duke of Portland v Topham* (1864) 11 HLC 32, 55; 11 ER 1242, 1251.
93 *Cloutte v Storey* [1911] 1 Ch 18. See Thomas (n 81) paras 9.21-9.36.
94 *Healey* (n 6) [14].
95 Thomas (n 81) para 1.50.
96 As suggested by Davis (n 15) 425 and n 25.
97 *Barns* (n 15) [152].

disconcerting, given that the exercise of any power of appointment necessarily diminishes the interest of the beneficiary of the gift over in default.[98] Nevertheless, it remains the case that B cannot make any appointment with the motive of defeating the mutual wills agreement, because the application of the fraud on a power doctrine does not depend on the donee of the power being a fiduciary.[99]

4.1.3. Protecting B[100]

It might be thought to be unnecessary for B to have a life interest in the fund: B could hold the fund for C absolutely, subject to a general power in B's favour. However, the analysis set out above is to be preferred, as it provides adequate protection to B in at least two aspects. First, it remains possible for B and C collectively to collapse the trust by exercising their *Saunders v Vautier* rights.[101] In view of the fact that much could potentially change in B's and C's circumstances after A's death, this possibility is crucial. Suppose that C is comfortably well off, but B remarries and has another child (X). C may wish to allow B to reallocate her testamentary dispositions in order to make provision for X. The proposed analysis makes this possible. This does not mean, however, that C has an all-or-nothing choice, in that she must either choose to keep the trust intact *or* collapse the trust with B and C as joint tenants, no more and no less. Instead, C is free to secure an informal promise from B that B will dispose of the fund in a pre-determined form before agreeing to exercise their collective *Saunders v Vautier* rights in B's favour. For instance, C may make it a condition that B will make a testamentary disposition of the fund in favour of both C and X in equal shares. Because *this* promise by B is to the effect that B will qualify the interests she obtains in the fund after B's and C's *Saunders* rights have been exercised in B's favour, a constructive trust would arise to compel B to hold the fund in favour of C and X.[102]

Secondly, the trust fund will very often include a family home, and the parties would normally intend for B to live in it during her lifetime. The Trusts of Land and Appointment of Trustees Act 1996, however, provides only for beneficiaries (as opposed to objects of a power) to have a right to occupy trust land, subject to certain conditions.[103] As a beneficiary under the trust, B's right to occupy the family home can easily be accounted for. As the 1996 Act provides, among the matters trustees are to consider when deciding upon which of two or more beneficiaries are entitled to occupy the land, they are to look to 'the intentions of the person or persons … who created the trust'.[104] In the mutual wills context, this compels B to give effect to A's and B's intentions when creating the mutual wills agreement.

4.1.4. Remedies

Mutual wills disputes characteristically come to light only after the death of both parties, and so it is largely a matter of speculation what remedies are available to C if B makes

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[98] See eg *Re Ryder* [1914] 1 Ch 865 (Ch).
[99] See eg *Lane v Page* (1754) Amb 233, 27 ER 155; *Re Crawshay (Deceased)* [1948] Ch 123 (CA); *Dick* (n 91).
[100] I thank Ian Williams for the invaluable discussion which led to much of this subsection.
[101] *Stephenson v Barclays Bank* [1975] 1 WLR 88 (Ch).
[102] In a highly similar vein to the facts and decision in *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 FLR 1240 and *Ottaway* (n 43).
[103] Trusts of Land and Appointment of Trustees Act 1996, ss 12, 13.
[104] Trusts of Land and Appointment of Trustees Act 1996, s 13(4)(a).

(or attempts to make) a disposition with an improper motive during her lifetime. In what is probably the only decided case where B was alive and denying the mutual wills agreement,[105] C merely asked for and was granted a declaration that the arrangement amounted to an effective mutual wills agreement.[106] It remains unclear, therefore, whether remedies traditionally available to a beneficiary following an unauthorised disposition of trust property are available to C. It is submitted that C, as a beneficiary under the trust, is able to invoke the assistance of a court in order to ensure B's proper exercise of her powers,[107] for instance by requesting an injunction to prevent a purported disposition made with an improper motive. Of course, in practice C would rarely have the necessary foreknowledge to prevent such dispositions. Nevertheless, because a disposition amounting to a fraud on a power renders the transaction void, orthodox principles dictate that C may assert a proprietary claim against B or a third party recipient (D) pursuant to the evidentiary process of tracing and/or following, or may alternatively bring a personal claim for substitutive performance or reparation.

Consider first the possible claims against B. Where a trustee uses trust assets (money, for example) to purchase a new asset without authority, the beneficiary is normally able to trace into that new asset and either assert an equitable ownership over that asset or enforce an equitable charge or lien for the repayment of the value of the original trust asset dissipated.[108] In the mutual wills context, the analysis would depend on whether assets acquired by B after A's death are considered as part of the trust fund.[109] If they are, then all the property owned by B will constitute the trust fund. Therefore, there is no need to make a claim for equitable ownership against the new asset, since any traceable proceeds coming into B's hands immediately forms part of that fund. Similarly, obtaining an equitable charge or lien would merely mean that the monetary value of the new asset is restored to the trust fund out of the trust fund itself, and the claim would be superfluous. If, however, B's after-acquired property is considered not to be part of the trust fund, then C might wish to enforce an equitable charge or lien against the traceable proceeds to compel B to repay the value of the original trust asset out of B's after-acquired property. The same analysis would apply in relation to a substitutive performance or reparation claim against B. If B's after-acquired property is analysed as part of the trust fund, then such claims are superfluous, since B would be restoring or compensating the trust fund with money from the trust fund; but if B's after-acquired property is deemed not to be part of the fund, then B may be compelled to restore the trust fund or compensate for losses out of B's after-acquired property.

Consider next the possible actions C could have against D, a volunteer recipient of dispositions made by B pursuant to a fraud on a power. In line with orthodox principles,[110] C would have no claim if D were a bona fide purchaser for value without notice of B's fraud, but would be able to follow or trace, and then claim the trust property or its proceeds in D's hands if D were a volunteer. Alternatively, it may be that D is a purchaser for value but does not act in good faith. In such a case, whether D would be

[105] *Olins* (n 3) [4].
[106] *Olins* (n 3) [16].
[107] Goode (n 41) 530.
[108] *Foskett v McKeown* [2001] 1 AC 102 (HL) 131.
[109] See discussion in Section 3.1.2.
[110] *Re Diplock* [1948] Ch 465 (CA).

liable to a claim by C would depend on whether D had sufficient knowledge[111] of B's fraud on a power while the trust assets or traceable proceeds remained in her hands, and this would be determined according to the law concerning knowing receipt.[112] Finally, D would incur a personal liability if she dishonestly assisted in B's fraudulent exercise of his power.[113]

4.2. The AI Analysis

4.2.1. An Orthodox Explanation

Since proprietary estoppel is the only orthodox doctrine by which B might be compelled to fulfil an informal promise to give away an interest in property which she owns absolutely, the enquiry is whether proprietary estoppel principles may explain mutual wills agreements which reflect the AI analysis.

It is first necessary to observe an interesting and important debate concerning whether proprietary estoppel remedies enforce a duty which B incurs from the moment A relies on B's promise, or whether they enforce a wrong-based duty which arises when B reneges on her promise which has been relied upon. The former analysis resembles an action for a debt due under a contract[114] whereby the creditor can require the debtor to perform his primary payment obligation without asserting a breach of contract;[115] the latter analysis resembles an action for compensatory damages for a breach of contract[116] where 'the remedy is calculated by reference to the claimant's loss', provided such loss is shown to have been factually caused by the defendant's breach.[117]

It appears that the latter analysis is the more compelling of the two. In the first place, there is little doubt that compensatory damages may be awarded in proprietary estoppel, and the availability of damages where B's breach causes a loss is a 'sure test'[118] and a 'powerful indicator'[119] that the remedy is wrong-based. Indeed, the notion of the 'minimum equity to do justice to the plaintiff' and the idea that the remedy should be proportionate reflects an approach of calculating the remedy by reference to A's loss. Moreover, it is difficult accurately to explain the law using the former analysis. Just as in the case of an action for a contractual debt, the former analysis would entail holding B to her promise (or, which amounts to the same thing, giving effect to A's expectations generated by B's assurance) in every successful proprietary estoppel case. However this is clearly not what we find in the law, given that the cases – at least since 1999 – have moved the law away from giving primacy to expectation relief.[120]

In support of the wrong-based analysis, Michael Spence defines the primary duty B breaches as a 'duty to ensure the reliability of induced assumptions'.[121] This helpfully explains the cases which reflect the AI analysis. B's promise in a mutual wills agreement

[111] *Westdeutsche* (n 26) 707.
[112] See *Baden, Delvaux v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 (Ch); *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437 (CA).
[113] See *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC); *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476.
[114] *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 (HL).
[115] See C Mitchell, 'Stewardship of Property and Liability to Account' [2014] Conv 215, 223.
[116] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 349.
[117] See Mitchell (n 115) 222-3.
[118] A Burrows, *The Law of Restitution* 3rd edn (Oxford, OUP, 2010) 622.
[119] J Edelman, 'Equitable Torts' (2002) 10 Torts LJ 64 (between fn 56 and 57).
[120] S Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 LQR 492.
[121] M Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Oxford, Hart Publishing, 1999) 2.

always induces A to assume that B will, at her death, leave property to C. When A relies on the mutual wills agreement, B incurs a primary duty to ensure that she acts reliably in order not to harm A. More specifically, A's reliance arises at some point while she is alive, because there will always be a point in time during A's lifetime at which it will be too late for A to change her will.[122] Thus, A obtains a substantive right[123] which corresponds to B's primary obligation during A's lifetime. At this point, however, A's act of reliance is just that – an act of reliance; it does not yet constitute a *detriment*,[124] since B will not yet have breached her duty by acting unreliably. If B ultimately fulfils her promise by leaving her estate as agreed, she would not have to account for any of her ordinary dealings with or dispositions of her property during her lifetime.

There are, however, two ways in which B may breach her duty to be reliable, which makes A's act of reliance a detriment. Most obviously, B may amend her testamentary disposition, for example, by executing[125] a new will which directs some or all of the property subject to her promise to a different recipient. Alternatively, B may deal directly with the property subject to the mutual wills agreement in a way which constitutes a breach, such as by making a disposition contrary to the agreement, or executing a charge over the property which undermines the reliability of her induced assumption.

Where a breach occurs, all the ingredients of a proprietary estoppel claim — promise or assurance, reliance, and detriment — are fulfilled. Although A has now died, the content and nature of B's promise indicate that A's substantive right is not one which is personal to A,[126] and therefore any potential proprietary estoppel claim against B does not disappear with A's death.[127] And because B's promise was to the effect that C would obtain the benefit of B's testamentary disposition, there is good reason to think that, when B commits a breach of his primary duty, C obtains an 'equity by estoppel' against B. This 'equity' requires liquidation by a court. Pursuant to this, a proprietary or personal remedy may be awarded. It is thus open to C to argue that it would be a proportionate response to A's detriment to enforce B's promise. If the court agrees, then the promised interest in B's property would be subject to a constructive trust in favour of C, giving effect to A's expectation. Since the 'equity' is 'capable of binding B's successors in title',[128] the proprietary effect of such an award is backdated 'by virtue of some doctrine of relation

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[122] S Gardner, 'Reliance-Based Constructive Trusts' in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart Publishing, 2010) 66-7. See too [X-ref to McFarlane chapter].
[123] See B McFarlane, *The Law of Proprietary Estoppel* (Oxford, OUP, 2014) para 8.165.
[124] Or, as Spence calls it, 'harm': Spence (n 121) 2.
[125] It is sufficient for B to indicate that she will carry out a transaction in the future which is tantamount to a breach: *Bradbury v Taylor* [2012] EWCA Civ 1208, [2013] WTLR 29.
[126] McFarlane (n 123) paras 8.162 ff.
[127] The contractual parallel is that any contract (which does not contain 'an implied condition of the continued existence of the life of the contractor': *Taylor v Caldwell* (1863) 3 B&S 826, 836; 122 ER 309, 313) may be breached by one party after the death of the other, which gives the latter's executors or estate the right to pursue a breach of trust claim against the former. See too observation in Gardner (n 122) 66. Moreover, the maxim *action personalis moritur cum persona* 'never extend[s] to personal actions founded on any obligation, debt, covenant, or other duty to be performed' (*Wheatley v Lane* (1668) 1 Wms Saund 216a; 85 ER 228), but is instead 'always understood of a tort' only (*Sollers v Lawrence* (1743) Willes 413, 421; 125 ER 1243, 1247).
[128] Section 116(a) of the Land Registration Act 2002 provides that an 'equity by estoppel ... has effect from the time the equity arises as an interest capable of binding successors in title'. This section did not aim to create a new rule, but meant merely to confirm the existing state of the law: Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No 271, 2001) 000.

back'[129] to the time of B's breach. So, for example, if in breach of the mutual wills agreement B executes a new will in favour of D and then dies, D as a volunteer will similarly be bound by the constructive trust in favour of C. If, however, the court deems that a proportionate response to A's detriment would be to award compensatory damages, then these would be awarded for the benefit only of A's estate, since it was A who personally incurred detrimental reliance.

4.2.2. Potential Objections

The AI analysis of mutual wills cases where B does not receive property from A is not entirely free from difficulties. Four potential objections might be raised, which require close examination.

First, it may be objected that there is no proprietary estoppel case which allows one party (C) to succeed based on another's (A's) detrimental reliance. In the vast majority of cases, the claimant is A who *personally* incurs detrimental reliance. However, no judicial statement has conclusively ruled out the possibility that C might bring such a claim. In particular, there seems nothing to prevent C (as opposed to A where, for instance, A has died) from attempting to establish that A's detrimental reliance on B's *promise to grant C an interest* was so substantial that a proportionate remedy to A's loss would be an award of a proprietary remedy in C's favour. In reply, one might cite *Lloyd v Dugdale*[130] as authority for the requirement that a claimant must have suffered personal detriment. One question which arose for consideration in that case was whether A had a proprietary estoppel claim where B's representation to A that A would personally acquire[131] B's property was detrimentally relied on, not by A, but by C.[132] The Court of Appeal held that 'it remained necessary for [A] to show some detriment incurred by him personally as a result of [B]'s representations.'[133] However, *Lloyd v Dugdale* is different because B did not promise to benefit C but *A*; and so the case indicates only that the *promisee*, A, must personally incur detrimental reliance. It says nothing about the possibility that *C* may rely on proprietary estoppel where B promises to give *C* an interest in B's property, and where A, as promisee, has personally suffered detrimental reliance. Therefore, neither case law nor principle rules out this possibility where C is the object of B's promise or assurance. As Kevin Gray and Susan Francis Gray point out,[134] much can be said for allowing the benefit of an equity by estoppel to pass to a third party, and this possibility must be taken seriously.[135]

The second potential objection is that proprietary estoppel arises only where B's promise or assurance relates to an interest in land.[136] Although most decided cases have concerned land, it would be arbitrary if the success of a proprietary estoppel claim rises

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[129] K Gray and SF Gray, *Elements of Land Law* 5th edn (Oxford, OUP 2009) para 9.2.89.

[130] *Lloyd v Dugdale* [2001] EWCA Civ 1754, [2002] 2 P&CR 13 [35]. See McFarlane (n 123) paras 4.107-4.112.

[131] *Lloyd* (n 130) [29]-[30].

[132] Although C was a company owned by A, it was held that C was a separate and distinct legal entity from A: *Lloyd* (n 130) [48], [58].

[133] *Lloyd* (n 130) [35].

[134] Gray and Gray (n 129) para 9.2.90.

[135] Alternatively, of course, one could say that C's right to enforce B's promise based on A's detrimental reliance gives rise to a *sui generis* claim that is akin, but not identical, to proprietary estoppel. However, this seems unnecessary, given that the variable factors affecting such a case — B's assurance or promise, A's detrimental reliance and A's expectation — are identical to claims by way of proprietary estoppel.

[136] See eg *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [61].

and falls with the subject matter of B's promise. In fact, the decision in *Re Basham*[137] suggests that the claim is not so confined.[138] In that case, A made a successful proprietary estoppel claim where B promised to leave his residuary estate to A. Crucially, B's residuary estate included not only real property — a cottage[139] — but also cash, furniture and other chattels.[140] The applicability of proprietary estoppel to personalty was not held to be objectionable by the judge in that case; and later cases[141] which have considered *Re Basham* have not taken issue with this aspect of the case. There have also been judicial suggestions that proprietary estoppel can apply to beneficial interests under a trust,[142] copyright interests,[143] and patents.[144] It is clear, therefore, that a proprietary estoppel claim may extend to personalty. This is particularly relevant in the mutual wills context, since it allows cases where B does not receive property from A to be considered by way of the AI analysis even though B's promise may not relate exclusively to land.

A third potential objection is that B's promise may relate to after-acquired property, that is, property B acquires after reaching the agreement with A. This does not appear to be an issue, however, since if A has completed her acts of reliance — at A's death in the mutual wills context — a proprietary estoppel claim may be made against B as soon as B acquires the asset in question.[145] A related objection may be that proprietary estoppel requires A's expectation to relate to specific items of property;[146] and it is difficult to determine, at the time the agreement is made, what specific items of property B may acquire after A's death. However, in *Re Basham*,[147] where B promised to leave to A all of B's property in his will, A succeeded in a proprietary estoppel claim against B although B's assets remained unspecified until B's death. Similarly, in *Thorner v Major*,[148] a proprietary estoppel claim was successful where the parties 'knew that the extent of the farm was liable to fluctuate'. It is therefore possible to say that, in principle, non-specification of items in a testamentary context is no bar to a proprietary estoppel claim.

Finally, it may be objected that the constructive trust which arises to bind B in the mutual wills context appears not to be awarded through an exercise of remedial discretion, but is awarded invariably, much like the QI cases. In reply, it can be said that the dearth of authorities dealing with cases where B does not receive any property from A

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[137] *Re Basham (Deceased)* [1986] 1 WLR 1498 (Ch).

[138] See also S Wilken QC and K Ghaly, *Wilken and Ghaly: The Law of Waiver, Variation, and Estoppel* 3rd edn (Oxford, OUP, 2012) para 11.127 and cases cited therein; McFarlane (n 123) para 10.61. Cf C Davis, 'Estoppel: An Adequate Substitute for Part Performance?' (1993) 13 OJLS 99, 103-04, who suggests that proprietary estoppel can extend to property other than land, but not where the subject matter is purely money.

[139] In fact, the cottage made up only less than half the total value of the residuary estate which was granted to A by way of a trust pursuant to her proprietary estoppel claim.

[140] *Basham* (n 137) 1500. Similarly, see eg *Jennings* (n 33) [2] (land and furniture); *Thorner* (n 136) [7], [13] and [48] (land, live and dead stock, chattels, and money).

[141] See eg *Jiggins v Brisley* [2003] EWHC 841 (Ch), [2003] WTLR 1141 [80]; *Shovelar* (n 6) [38]; *Thorner* (n 136) [20] and [63]. The decision in *MacDonald v Frost* [2009] EWHC 2276 (Ch), [2009] WTLR 1815 [13]-[16], which doubted *Basham*, says nothing about the applicability of the claim to personalty.

[142] *Strover v Strover* [2005] EWHC 860 (Ch).

[143] *Fisher v Brooker* [2009] UKHL 41, [2009] 1 WLR 1764 .

[144] *Yeda Research and Development Co Ltd v Rhone-Poulenc Rorer International Holdings Inc* [2007] UKHL 43, [2008] 1 All ER 425 [22].

[145] *Watson v Goldsbrough* [1986] 1 EGLR 265 (CA). See Wilken and Ghaly (n 138) para 11.130.

[146] *Layton v Martin* [1986] 2 FLR 22 (Ch) 238.

[147] *Basham* (n 137). See discussion in Wilken and Ghaly (n 138) paras 11.131-11.132.

[148] *Thorner* (n 136) [62].

provides no support for the proposition that no remedial discretion is exercised. But the AI analysis would remain plausible even if there were a high number of cases in which a constructive trust was awarded. Because in mutual wills cases A's reliance usually consists of the making of a testamentary disposition, it is difficult to conceive of a situation whereby a court might deem it disproportionate to bind B to his promise, since A's committing to a particular form of testamentary disposition is quite obviously a substantial detrimental reliance, thus justifying a constructive trust award. However, it is less obviously the case where A's reliance consists of *inter vivos* actions, for example, where A sells property or makes a gift in reliance on B's promise to leave B's estate to C upon B's death. Remedial discretion in such a case is crucial, since a court would then be able to determine the appropriate level of remedy according to the degree of detriment A suffered. So, it would hardly be objectionable to deny C the benefit of a constructive trust where, for instance, A relied on B's promise by making an *inter vivos* donation of £100 to charity.

5. TWO DISTINCT RATIONALES

The award of a constructive trust in all mutual wills cases creates a deceptive impression that the cases are united by a single principle. The reality is that different types of agreement give rise to different types of claim. In cases where B does not receive property from A, remedial discretion is exercised by way of the AI analysis where a breach of a primary obligation is shown to have caused compensable loss; in cases where B receives property from A, B is invariably bound to her promise through a constructive trust pursuant to the QI analysis. The paucity of cases reflecting the AI analysis means that courts have not found occasion to clarify what goes on in such cases and how they differ from the more common cases reflecting the QI analysis. Nevertheless, distinguishing the two classes of case enables us to understand them more clearly.

It also follows from the distinction between the QI and AI analyses that two distinct rationales underlie the mutual wills cases. The QI analysis concerns preventing the taking of an advantage; the AI analysis concerns compensating for harm caused.

5.1. The QI Analysis: An Advantage-Based Aim

In cases reflecting the QI analysis, the enforcement of B's promise can be understood as an application of the norm against taking an advantage for oneself that has been conferred by another, and which both parties have intended should not be taken. This is a specific application of a more general norm which dictates that one should not take for oneself an advantage that is not meant for one's absolute enjoyment. From this general norm, four cumulative elements can be deduced that lead to the conclusion that B ought *never* to take the advantage that she obtains from A for her own unqualified use, provided that all four elements are satisfied.[149] First, A must confer on B an advantage. This is because the case for preventing B from taking an advantage for herself is strongest when that advantage is conferred by A rather than being obtained by B on her own accord. Secondly, both parties must agree that B should not to take the advantage for herself, instead of this being A's unilateral intention. This is because the norm is more obviously

[149] Most of these points are discussed in the context of the doctrine in *Rochefoucauld v Boustead* in YK Liew, 'The Wider Ambit of the *Quistclose* Doctrine' (2015) 9 J Eq 1, 10-11.

applicable where B *herself* has promised to qualify her own use of the property. Thirdly, B's promise must have induced A to act. This ensures that B's promise is indeed the basis of A's actions. Finally, B's promise must be to the effect that she will qualify her interest in the advantage which she obtains from A. This ensures that B is never intended to take the unqualified use of that advantage. The last-mentioned point is found only in constructive trust doctrines reflecting the QI analysis: B is not meant to make use of the advantage for her unqualified use because B promises to qualify her interest *in the property she acquires with A's participation*. In the mutual wills context, B acquires the fund with A's participation, the fund being made up of assets originating from both A and B. Thus, it is indubitably clear that B ought never to take the absolute benefit of the property for herself.

Notably, the relevant norm is triggered by B's promise and A's reliance upon A's death, and not by B's receipt of A's property. The importance of A's reliance is reflected in the fact that, if A makes a testamentary disposition to B, then B is bound to carry out her promise even if she elects to disclaim the benefits left to her by A.[150] On the other hand, the importance of B's promise in inducing A to act is reflected in the fact that the promise need not be a but-for cause of A's reliance. Although this point has never been explicitly considered in the mutual wills context,[151] it can be deduced from other constructive trust doctrines which reflect the QI analysis.[152] All that is required is for B's promise to 'form part of the basis on which [B] receives the property'.[153]

A question might arise as to why B is always compelled to perform her promise instead of equity merely reversing the transaction. One might reason that returning the property to A's estate would cause a *dis*advantage to A since A will already have died and so will no longer be able to exercise her testamentary freedom to give the property to the person she wished to be the ultimate recipient.[154] However, a more compelling explanation lies in the courts' consistent emphasis on the parties' agreement as the source of their legal obligations. This provides good reason to suppose that the parties' respective rights and liabilities are determined by their agreement and not by the fact of whether A is alive or dead. Indeed, the importance of B's promise in the parties' agreement is reflected in the 'qualified interest' label: the parties intend that B should not take the fund for her own unqualified enjoyment *precisely* because B promises to qualify her interest in the fund; and when A confers the relevant advantage on B which leads B to acquire the fund in question, B is bound to fulfil her promise in order that she does not have the unqualified use of the fund.

5.2. The AI Analysis: A Loss-Based Aim

In cases reflecting the AI analysis, B incurs a primary obligation when A acts in reliance on an assumption induced by B. Because the inducement of A's assumptions is an intentional act of will by B through the making of a promise, it is hardly objectionable to say that, once the inducement is relied upon, B has a primary duty to *ensure* that A is not

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[150] *Hagger* (n 28) 195, which can be read as overruling the contradictory dicta in *Lord Walpole v Lord Orford* (1797) 3 Ves Jun 402, 417-188; 30 ER 1076, 1084.
[151] Cf passing remark in *Dufour* (in Hargrave) (n 1) 308.
[152] B McFarlane, 'Constructive Trusts Arising on a Receipt of Property *Sub Conditione*' (2004) 120 LQR 667, 686-7; Liew (n 149) 10.
[153] McFarlane (n 152) 687.
[154] JD Feltham, 'Informal Trusts and Third Parties' [1987] Conv 246, 248.

harmed. No harm will befall A if B does act reliably by carrying out her promise; otherwise, equity may step in to compensate A through a remedy which achieves proportionality between A's detriment and B's promise. In Spence's words:[155]

> The primary obligation is that the inducing party must, in so far as he is reasonably able, prevent harm to the relying party. 'Harm' consists in the extent to which the relying party is worse off because the assumption has proved unjustified than he would have been had it never been induced. The secondary obligation is that, if the relying party does suffer harm of the relevant type, and the inducing party might reasonably have prevented it, then the inducing party must compensate the relying party for the harm he has suffered.

In the AI analysis, the focus is on the detriment A suffers in reliance on B's promise because B's promise relates to her own property. Such cases reflect the norm that 'the law ought to correct reliance losses'.[156] Unlike cases relating to the QI analysis where B ought *never* to take unqualified use of the property she acquires, here it is less obvious that B should be compelled to part with the promised interest whenever A suffers a reliance loss. This is particularly so given that there can be various degrees of detriment that A may suffer and different kinds of expectation that she may form. By 'seek[ing] to react to multiple considerations',[157] therefore, it is unsurprising that the AI analysis allows for the exercise of remedial discretion in order to compensate A's reliance loss by way of a remedy proportionate to A's detriment.[158] In the mutual wills context, a constructive trust will almost always be the appropriate award which reflects the 'minimum equity to do justice to [A]', given that A's detrimental reliance is often undoubtedly substantial. This should not, however, obscure the fact that the constructive trust award is compensatory in nature.

5.3. Subsuming the QI Analysis within the AI Analysis?

The logic of the QI/AI dichotomy means that it is possible to treat cases which reflect the QI analysis by way of the AI analysis. If B purports to qualify her interest in property yet to be acquired, it is logically possible to treat B as the absolute owner of that property when it is acquired, thus engaging the AI analysis. The reverse, however, is not possible: if B's promise relates to property she already owns absolutely, B's promise cannot be treated as purporting to qualify an interest in a property acquired with A's participation.

It follows that it might be asked whether *all* mutual wills cases should be analysed by way of the AI analysis. On this approach, even in cases where B receives property from A, the fund B obtains would be treated as being acquired of B's own accord, and A's act of transferring property to B would be considered an act of reliance which, if B does not perform her promise, will constitute a detriment for which B must compensate. In favour of this approach, it might be suggested that it is presently:[159]

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[155] Spence (n 121) 2.
[156] Gardner (n 122) 79. See also *Wilken and Ghaly* (n 138) para 11.94: 'The prime aim of the discretion [in proprietary estoppel] should be to prevent detriment.'
[157] Gardner (n 120) 507.
[158] S Bright and B McFarlane, 'Proprietary Estoppel and Property Rights' (2005) 64 CLJ 449, 453-54; Wilken and Ghaly (n 138) para 11.94.
[159] Hudson and Sloan (n 52) 170.

> normatively questionable … that the parties are able *conclusively* to decide for themselves what property is subject to a mutual wills arrangement without judicial intervention, while the property forming the subject of an estoppel representation might ultimately be considered a disproportionate remedy when a claim is litigated.

It is submitted that this analysis should be resisted. In the first place, it cannot explain and justify the crucial role which the parties' agreement plays. If A transfers property to B pursuant to an agreement which leads B to acquire a trust fund to be held for C's benefit, enforcing the agreement entails holding B to her promise, no more and no less. An AI analysis would add an unnecessary, superficial layer of reasoning: that B will be held to her promise *provided that this proportionately compensates A's detrimental reliance*. While this approach is not technically unsound, it would attribute too little importance to the parties' agreement. Such an approach is, however, necessary where A does not transfer property to B, as in such cases the compensatory aim of the AI analysis provides a justification for holding B to her promise in relation to property she owns absolutely, where a constructive trust award is deemed to be the appropriate response.

It can also be observed that the mutual wills doctrine, like many other constructive trust doctrines,[160] is concerned with identifying the true nature of the parties' dealings. This can be seen from the fact that 'fraud', which is often used to justify the imposition of a constructive trust in the mutual wills context,[161] is in fact merely a *description* of the state of affairs which the constructive trust prevents.[162] The true nature of B's promise in the case where A transfers property to B is precisely to qualify the interest in the trust fund that B obtains, according to the parties' agreement. If B's promise is then treated as relating to property she owns absolutely, this introduces an element of fiction into what has hitherto been recognised as an agreement-based doctrine. This is not to deny that there could be advantages in treating all mutual wills case by way of the AI analysis;[163] however, to do so would tantamount to overhauling most of what presently constitutes the mutual wills doctrine, which seems uncalled for.

6. MUTUAL WILLS AND OTHER CONSTRUCTIVE TRUSTS DOCTRINES

Apart from the mutual wills doctrine, there are also other constructive trust doctrines which reflect either the QI or AI analyses.[164] It is therefore important to appreciate how the mutual wills doctrine relates to these other doctrines. Two particular issues will be evaluated: whether the doctrine of secret trusts provides a fallback for an unsuccessful mutual wills claim, and, in the light of the doubts which have recently been expressed about the usefulness of the mutual wills doctrine, whether it is desirable to abolish the doctrine in view of its relationship with other closely related constructive trust doctrines.

6.1. Secret Trusts as a Fallback?

On a number of occasions it has been suggested that the secret trusts doctrine may provide a fallback where a mutual wills claim is unsuccessful. Thus, in *Healey v*

[160] See eg discussion in Liew (n 73) 447 in relation to the doctrine in *Rochefoucauld v Boustead*.
[161] See eg *Dufour* (in Hargrave) (n 1) 310; *Dale* (n 6) 42; *Olins* (n 3) [38].
[162] Liew (n 73) 448.
[163] Hudson and Sloan (n 52) 171.
[164] See text following nn 29 and 35.

Brown,[165] David Donaldson QC said that, in cases where a mutual wills claim fails, an award may nevertheless be justified 'by reference to the separate case-law on so-called secret trusts'. This suggestion relates only to cases reflecting the QI analysis, since A must transfer property to B for it to be possible to analyse B as secret trustee of A's property. The question arises whether in such cases the secret trusts doctrine can be relied upon to compel B to hold (only) *A*'s property on trust for C if the attempted mutual wills agreement does not evince the necessary intention to create legally binding and irrevocable obligations with respect to the fund.[166]

The QI analysis suggests a negative answer to that question. Consider the fact that the parties' intentions are solely determined with reference to their agreement. Apart from that agreement, there are no enforceable intentions, since the mutual wills agreement indicates that the parties' intentions are interdependent. That is to say, they do not have individual, independent intentions which merely happen to coincide at a point in time. Because B's intention is formed with the knowledge that *both* parties' estates will be affected, the agreement is wholly irrelevant to a consideration of what she *might* have promised if only A's estate comprised the subject-matter of the agreement. Similarly, the transfer of A's property to B is done in reliance on B's promise, and so it is impossible to conclude that A would have dealt with her property in the same way if the intended agreement could not be given legal effect. Therefore, an intention in relation to *A's property alone* cannot be derived from the parties' agreement, which is reached in relation to what B will do with 'whatever is left' at her death.

This conclusion is fortified by the fact that B's promise relates to a fund and not to specific property. B's promise to qualify her interest in a fund is different from, and unrelated to, a promise to qualify her interest in specific assets which constitute the fund. Because in the mutual wills doctrine there is no requirement of segregation or separate accounting in relation to what was formerly A's property, it seems wrong even to speak of B's obligations as relating to 'A's property'; at most, it is an historical observation that A contributed to the fund. Thus, it cannot be suggested that B's acquisition of 'A's property' is qualified by a promise to hold it on trust for C. This would not only fail to take into account the true nature of B's promise, but would also fail to reflect the fact that B's obligation in the mutual wills doctrine differs from the obligation that arises in the secret trusts context.

All these considerations point to the fact that the distinction between mutual wills and secret trusts lies in the different *types* of agreement they enforce, and not in the different *degrees* of their reach — whether they cover 'A's property' only or 'A's and B's property'. The parties are, of course, free to choose one type of agreement or another; but a different type of agreement cannot be inferred from the agreement which they actually attempted to make.[167]

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[165] *Healey* (n 6) [28].

[166] See n 6.

[167] Although certain obiter statements in *Goodchild* (n 5) 1224 and 1229-30 might seem to suggest that a secret trusts agreement can indeed be derived from a failed mutual wills agreement, the ultimate result in that case is consistent with the point made in the text. The finding that there was lacking a sufficiently firm agreement between the parties to engage the mutual wills doctrine lead to the result that B (and hence his heir) was not bound by *any* constructive trust. This can be explained on the basis that the Court of Appeal was looking for a particular *type* of agreement; its absence meant that only one conclusion was appropriate — that B was free to dispose all of the property she owned.

6.2. Abolishing the Mutual Wills Doctrine?

In recent times, many commentators have concluded that mutual wills agreements are not 'sensible',[168] and thus should be 'avoided'[169] or even 'abolished'.[170] In view of the Law Commission's impending review of the mutual wills doctrine, it is not implausible that a recommendation might be made to abolish the mutual wills doctrine completely.

It is submitted, however, that such a move would be undesirable. It is impossible to make a principled distinction between the mutual wills doctrine and other related constructive trust doctrines. This point is best made by observing that many situations which fall within the mutual wills doctrine can also be analysed in terms of other QI or AI constructive trust doctrines, and therefore it would be a messy — and certainly arbitrary — task to refuse to give legal effect only to mutual wills agreements.

Consider first the following three cases which fall to be analysed by way of the QI analysis. In the first case, A and B come to an informal, *inter vivos* agreement that A will transfer land to B, with B promising to leave 'whatever is left' at her death to C. In the second case, the *inter vivos* agreement is that A will transfer land to B, with B promising to hold all the property at A's time of death for herself for life and for C in remainder, with B having a general power of appointment during her lifetime. In the third case, A (a testator) comes to an informal agreement with B that, if A leaves a specific property to B absolutely in A's will, B will leave 'whatever is left' of that property at B's death to C. The first two cases can be analysed as falling within the ambit of the rule in *Rochefoucauld v Boustead*,[171] and the third as falling within the ambit of the doctrine of secret trusts.[172] At the same time, they arguably also fall within the ambit of the mutual wills doctrine. In relation to the first two cases, it has been recognised that the mutual wills doctrine is applicable if the agreement entails an *inter vivos* transfer of property from A to B, with B promising to make a particular testamentary disposition.[173] Moreover, all three cases reflect one of the two distinctive features of mutual wills agreements,[174] *viz* a promise by B to make a testamentary disposition in a particular form, as opposed to holding property on trust immediately upon receiving A's property. So even if the mutual wills doctrine were abolished, relief in these cases could still be obtained by application of the other QI constructive trust doctrines. Indeed, because QI constructive trust doctrines aim to prevent an advantage from being taken by B in specific situations, a principled distinction cannot be drawn between an advantage conferred by A in an *inter vivos* context and an advantage conferred by A in a testamentary context, nor between cases where B's promise relates only to A's property and those where it relates to a fund consisting of A's and B's property. Like cases should be treated alike.

Consider next cases falling within the AI analysis. A striking similarity exists between mutual wills cases where B does not receive property from A, and many proprietary estoppel cases:[175] they all involve B promising to make a particular form of testamentary disposition of property she owns absolutely. Abolishing the mutual wills

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[168] R Kerridge, *Parry and Kerridge: The Law of Succession* 12th edn (London, Sweet & Maxwell 2009) para 6-41.
[169] R Hughes, 'Mutual Wills' (2011) 3 PCB 131, 136. See too Braun (n 50) 221 n 65.
[170] N Richardson, 'Legislation for Mutual Wills in New Zealand' (2010) 24 Tru LI 99, 109.
[171] *De Bruyne* (n 102) indicates that the doctrine can apply to three-party cases.
[172] Specifically, *Ottaway* (n 43).
[173] *Lewis* (n 22) [45]-[46].
[174] Noted at text following n 10.
[175] See eg *Wayling v Jones* (1995) 69 P & CR 170 (CA); *Gillett v Holt* [2001] Ch 210 (CA); *Jennings* (n 33).

doctrine would therefore not prevent the law from providing compensation for detrimental reliance incurred by A as a result of such a promise by B. It would also be impossible to draw a principled distinction in terms of the nature of A's reliance. Why should the law refuse to provide compensation if A's reliance takes the form of a testamentary or *inter vivos*[176] disposition to C, as opposed to the more common proprietary estoppel cases where A provides services to B? If anything, there would be a stronger argument for compensating A in the former case, since A would no longer be alive to undo what has been done.[177]

The upshot is that the mutual wills doctrine cannot cleanly be hived off from other doctrines such as the rule in *Rochefoucauld v Boustead*, the doctrine of secret trusts, and the doctrine of proprietary estoppel, in order to justify abolishing the mutual wills doctrine. Instead, it is submitted that it would be better for the Law Commission to clarify that the doctrine reflects an amalgamation of the QI and AI analyses, as set out in this chapter. Recognising this renewed understanding not only allays the concerns which judges and commentators have expressed about the doctrine, but also indicates how the doctrine works alongside and consistently with other equitable doctrines in order to provide compensation for reliance losses or prevent an undue advantage from being taken. So long as it continues to be possible to make wills without legal advice, there will be a variety of arrangements testators might attempt to enter, and these will need to be addressed in a way that is consistent with the courts' approach to the situations that fall within the ambit of the other related doctrines.

7. CONCLUSION

On a proper understanding, the broad label of 'mutual wills' encompasses two distinct analyses which apply to different facts. On the one hand, where the mutual wills agreement entails A transferring property to B, B's promise to make a testamentary disposition to C qualifies the interest in the trust fund which consists of both A's and B's assets. A constructive trust always binds B to fulfil her promise; but B also obtains a power to make use of the assets which constitute the trust fund during her lifetime, which may not be used with the intention of defeating the agreement. On the other hand, where the agreement does not entail B receiving A's property, B's promise to make a testamentary disposition to C relates to property that B owns absolutely. Where a constructive trust is awarded, it compensates A for the detriment she suffers in reliance on B's promise. B is able to make use of any assets which constitute the trust fund, provided that she does not breach her duty to ensure that she acts reliably in order not to harm A.

That the 'mutual wills' doctrine reflects an amalgamation of two analyses is not surprising at all. Because both QI and AI cases commonly involve a mutuality of wills, they obviously fall within the 'mutual wills' label.[178] Moreover, the constructive trust response is usually the appropriate remedy even by way of the AI analysis. Indeed, the courts have not found it necessary to distinguish the two cases because they can both

[176] *Lewis* (n 22) [45]–[46].
[177] On this point, cf *Thorner* (n 136) [63], where Lord Walker suggested that it is inappropriate to rely on mutual wills authorities in relation to proprietary estoppel because mutual wills 'are arguably a special case'. This chapter suggests the contrary, insofar as mutual wills cases which reflect the AI analysis are concerned.
[178] See eg the loose definition of 'the doctrine of mutual wills' in *Dale* (n 6) 37.

loosely be described as preventing A from being ‘defrauded’. Nevertheless, analytical clarity requires a distinction to be drawn between the QI and AI analyses. Accepting this distinction not only allays the common concerns judges and commentators have about the mutual wills doctrine, but also encourages a proper appreciation of its relationship with other constructive trust doctrines.