SUPREME COURT OF QUEENSLAND

CITATION:	*Masci v Masci & Anor* [2015] QCA 245
PARTIES:	**ELIZABETH MASCI** (appellant) **v** **GRAHAM SILVINO MASCI** (first respondent) **SUSAN ELIZABETH DAY** (second respondent)
FILE NO/S:	Appeal No 12234 of 2014 SC No 494 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2014] QSC 281
DELIVERED ON:	27 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	25 June 2015
JUDGES:	Gotterson and Morrison and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. There be no order as to costs of the appeal unless any party files written submissions in support of a different costs order within 10 days of the date of pronouncement of these orders.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – OTHER MATTERS – where there was a will executed by a husband and wife, Fernando Masci and Elizabeth Masci, the appellant – where Fernando died on 7 February 2012 – where Fernando is survived by the appellant – where both Fernando and the appellant had children from earlier marriages who also survived Fernando – where there are no children of their marriage – where the will was executed in accordance with s 10 of the *Succession Act* 1981 (Qld) – where the will was prepared at the couple's home and they both participated in the preparation of it – where the pre-printed form was filled out in handwriting, apparently that of the appellant, and then executed – where the will bequeathed the whole of the estate to Fernando upon the appellant's death and to the appellant upon Fernando's death – where the will bequeathed,

upon the death of both Fernando and the appellant, 50 per cent of the estate to the appellant's daughter and 50 per cent of the estate to Fernando's children – where the will appointed Fernando's son Graham and the appellant's daughter as the executors – where Graham commenced a proceeding in the Supreme Court of Queensland by way of an Originating Application – where the learned primary judge ordered that probate of the will be granted to Graham and declared that the will is a mutual will – whether the learned primary judge erred in fact and in law in finding that the will constituted a mutual will

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – OTHER MATTERS – where the learned primary judge declared that the joint tenancy was severed at least from the death of Fernando – whether the learned primary judge erred in fact and in law in finding that the joint tenancy had been be severed at or prior to the death of Fernando

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – OTHER MATTERS – where the learned primary judge declared that the appellant had a life interest in the land and all monies held jointly with Fernando – whether the will was of such uncertainty as to fail to have effect as a disposition of Fernando's estate

Succession Act 1981 (Qld), s 10, s 33K
Trusts Act 1973 (Qld), s 96

Baird v Smee [2000] NSWCA 253, distinguished
Bigg v Queensland Trustees Ltd [1990] 2 Qd R 11, considered
Birmingham v Renfrew (1937) 57 CLR 666; [1937] HCA 52, cited
Dufour v Pereira (1769) 1 Dick 419; (1769) 21 ER 332; [1769] EngR 63, cited
Flocas v Carlson [2015] VSC 221, considered
Re Hagger [1930] 2 Ch 190, cited
Re Oldham [1925] Ch 75, cited
Scott v Scott [2009] NSWSC 567, cited
Sprott v Harper [2000] QCA 391, cited
Williams v Hensman (1861) 70 ER 862; [1861] EngR 701, cited

COUNSEL: A P J Collins for the appellant
The first respondent appeared on his own behalf
No appearance for the second respondent

SOLICITORS: Roberts Law for the appellant
The first respondent appeared on his own behalf
No appearance for the second respondent

[1] **GOTTERSON JA**: This appeal concerns a will executed by a husband and wife, Fernando Masci and Elizabeth Masci, on 2 April 2006.[1] They had married on

1 AB123-124.

30 September 1984. Fernando Masci died on 7 February 2012 aged 79 years. He is survived by Elizabeth Masci. Both had children from earlier marriages who also survived Fernando Masci. There are no children of their marriage.

[2] The will which is accepted by the parties to have been executed in accordance with s 10 of the *Succession Act* 1981 (Qld), is in a pre-printed form. According to Elizabeth Masci, the will was prepared at their home on 2 April 2006. They both participated in the preparation of it.[2] The pre-printed form was filled out in handwriting, apparently that of Elizabeth Masci, and then executed.

[3] The will is as follows:

> "This is the last Will and Testament of me, *Fernando Masci & Elizabeth Masci* (name) of *1 Iceland Court, Merrimac* (address) in the State of *Queensland 4226.*
>
> 1. I revoke all Wills and other documents of testamentary intent previously made by me; this is my last Will and Testament.
>
> 2. I appoint *Mrs Susan Elizabeth Camm and Graham Silvano Masci* (name) of *4 Hero's Drive Gembrook, Victoria* to be Executor or Executrix and Trustee of this my Will.
>
> I *give Fernando Masci my husband is to stay in the house above and to handle all monies untill his demise. (death) Elizabeth Masci is to stay in the house above and handle all monies if Fernando Masci is deceased before her. On the death of both Mrs Susan Camm of 4 Hereo's Drive, Gembrook. Victoria 3783 Ph: 0359681831 and Graham Silvano Masci of Suite 2 155 Canterbury Rd, Kilsyth. VIC. 3137 are to sell all possessions and 50% is to go to Mrs Susan Camm and 50% to Diane Collins, daughter of Fernando Masci, Ricky Fernando Masci son of Fernando Masci and Graham Silvano Masci son of Fernando Masci. This is to be reversed if either is deceased first. This is the last will and testament of Fernando Masci and Elizabeth Masci.*"
>
> (The words in italics are handwritten in the will. The other words were pre-printed. The name "Silvino" is misspelt in the will.)

[4] The executors appointed by the will are Susan Elizabeth Camm, a daughter of Elizabeth Masci from her former marriage, and Graham Silvino Masci, a son of Fernando Masci from his former marriage. Administration of the estate was protracted on account of interpretational issues with the will. Matters were brought to a head when, in December 2013, Elizabeth Masci took steps to sell a residential property at 1 Iceland Court, Merrimac. She and Fernando Masci had acquired the property as joint tenants in about 2003. They were residing in the property when he died.

[5] On 14 January 2014, Graham Masci commenced a proceeding in the Supreme Court of Queensland by way of an Originating Application, in his capacity as executor and trustee of the will. The named respondents were Elizabeth Masci as first respondent and Susan Camm in her capacity as executor and trustee of the will, as second respondent. The relief sought by Graham Masci included an order for removal of

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[2] Affidavit of E Masci sworn 7 February 2014 paras 17-20; Affidavit of E Masci sworn 7 May 2014 paras 7-9: AB211-212.

Susan Camm as executor and trustee and declarations or orders pursuant to s 96 of the *Trusts Act* 1973 (Qld) to the effect, firstly, that the will is a mutual will; secondly, that the joint tenancy of the Merrimac property had been severed; thirdly, that the estate of Fernando Masci and Elizabeth Masci owned that property as tenants in common in equal shares, subject to a life interest in favour of Elizabeth Masci; and fourthly, that the words "all monies" in the will mean only monies jointly held by Fernando Masci and Elizabeth Masci at the date of his death.

[6] Elizabeth Masci filed an application within the proceeding on 11 February 2014 in which she applied for a range of orders including an order for removal of Graham Masci and Susan Camm as executors and trustees and the appointment of an administrator and trustee to be granted Letters of Administration with the will annexed.[3]

[7] The applications were heard over two part-days in April 2014. The parties were represented by counsel. The two other children of Fernando Masci's first marriage, Diane Terese Collins and Ricky Fernando Masci, participated in the hearing but were unrepresented. Owing to an evidential issue raised by Ms Collins, the hearing was not resumed until 22 September 2014.

[8] The learned primary judge made the following orders and published reasons for them on 25 November 2014.

> "1. Probate of the Will of Fernando Masci dated 2 April 2006 is granted to Mr Graham Silvino Masci as Executor, subject to the formal requirements of the Registrar.
>
> 2. Declaration that the joint Will of Fernando and Elizabeth Masci dated 2 April 2006 is a mutual Will.
>
> 3. Declaration that the joint tenancy in which Fernando and Elizabeth Masci held the land situated at 1 Iceland Court, Merrimac in the State of Queensland, was severed, at least from the death of Fernando Masci.
>
> 4. Declaration that the joint Will of Fernando and Elizabeth Masci dated 2 April, 2006 operated to give Elizabeth Masci a life estate in the land situated at 1 Iceland Court, Merrimac in the State of Queensland, and all the monies of Mr Fernando Masci whether held in his own name or jointly with her.
>
> 5. The costs of the proceeding of the applicant, first respondent and second respondent are to be paid from the estate on an indemnity basis."[4]

[9] On 19 December 2014, Elizabeth Masci filed a notice of appeal against these orders.[5] The respondents to the appeal are Graham Masci as First Respondent and Susan Camm as Second Respondent. Orders in lieu thereof sought in the notice of appeal include declarations that the will is not a mutual will; that the joint tenancy of the Merrimac property had not been severed upon or prior to the death of Fernando Masci; and, in the alternative, that Fernando Masci had died intestate or partially intestate.

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3 AB272-274.
4 AB280; Reasons: AB281-292.
5 AB301-304.

Findings at first instance

[10] The learned primary judge was of the view that despite its apparent drafting shortcomings, the will was capable of being interpreted such that it might be admitted to probate. Her Honour discerned from the will and the respective family circumstances, a broad intention that "the survivor of Fernando and Elizabeth was to be looked after during their lifetime but, on their death, the property of both testators was to be equally divided so that it went half to Mr Masci's children and half to Mrs Masci's children."[6]

[11] Her Honour was of the view that the first two substantive sentences of the dispositive provisions in the will establish a life estate in property, including the residential property, for the survivor of Fernando and Elizabeth. This view was informed by the following considerations set out by her:

> "[10] … Both the verbs 'to handle' and 'to stay' give the clear impression that something short of an absolute interest is being given[7]. Further, the provision that on the death of both, which must mean both Fernando and Elizabeth, the executors are to sell "all possessions" also tends to indicate that what was being given to the survivor of Fernando or Elizabeth for their lifetime was not absolute ownership but a life estate – ie., the will disposes of property after the death of the survivor.[8] This result is consistent with s 33K of the *Succession Act*.
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> [11] The sentence at the end of the will, 'this is to be reversed if either is deceased first', only makes sense if it is read as relating to those first two sentences of the will. I construe that sentence as relating to the first two sentences. It seems to me that the sentence is strictly unnecessary but was added, perhaps prophylactically, given the difficulty the testators had in expressing the concept that whichever of the two survived, the situation was to be the same: the survivor would have a life interest and the residue would be shared equally between the two previous families."[9]

[12] The learned primary judge rejected arguments that the words "stay in the house" gave a mere right to reside there and that the words "and all monies" imposed a trust to preserve the monies for the adult children.[10] She also thought that the word "all" made it clear that the life interest of the survivor was in all the monies both of Fernando Masci and Elizabeth Masci whether held in joint accounts or otherwise.[11]

[13] Adopting what McPherson J had said in *Bigg v Queensland Trustees Ltd*,[12] the learned primary judge proceeded on the basis that it is essential for a finding of a mutual will to be made that there be proof that Fernando and Elizabeth made an agreement to execute the will in that form and that, expressly or by implication, they contracted not to revoke it.[13] Her Honour accepted as accurate a statement in *Lee's Manual of Queensland Succession Law*[14] that "usually, but not necessarily, a [joint

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6 Reasons [9]: AB285.
7 See *Lee's Manual of Queensland Succession Laws* [17.100], and the cases cited there.
8 See *Lee's Manual of Queensland Succession Laws* [17.160], and the cases cited there.
9 AB285.
10 Reasons [12]: AB285.
11 Reasons [13]: AB285-286.
12 [1990] 2 Qd R 11 at 13.
13 Reasons [14], [15]: AB286.
14 7th ed at [2.301].

will] is the product of an agreement and is therefore mutual as well as joint". For this statement, the learned author cites the decision of Clauson J in *Re Hagger*[15] and several Canadian cases as authority. The statement also finds support in the judgment of Lord Camden in *Dufour v Pereira*,[16] a case concerning a joint will to which McPherson J had referred.

[14] In *Bigg*, there were two wills with reciprocal provisions. This feature is common to two other decisions considered by her Honour, *Birmingham v Renfrew*[17] and *Baird v Smee*,[18] and also to *Re Oldham*.[19]

[15] In *Baird v Smee*, a husband and wife, each with children from a former marriage but no children together, made separate reciprocal wills. It was held that they were not mutual wills. The New South Wales Court of Appeal was not prepared to imply an agreement not to revoke from the making of the wills alone. Such an agreement; it was held, was not to be implied from the terms of the wills themselves.

[16] The learned primary judge gave detailed consideration to this decision. She regarded the terms of the wills as important for the result and for comparative purposes, noting:

> "[27] … The wills (allowing for a 30 day survivorship) essentially benefitted the surviving spouse; it was only if there was no surviving spouse that there was an intention to benefit the two families of children equally. As Mason P put it at [10], 'the main concern of each [testator] was for the other'. He commented, 'a gift of this nature does not preclude a contract not to revoke mutual wills, but it does mean that (if such contract existed) the 'absolute' beneficiary of the first operative will would be recognised as entitled to substantially full enjoyment of the fruits of the gift in favour of the survivor (cf *Re Oldham* at 87, *Birmingham* at 689)'."[20]

[17] Her Honour distinguished *Baird v Smee* and reached her conclusion on the issue as follows:

> "[28] In my view this is a point of considerable distinction between *Baird v Smee* and the present case. In this case the joint will gave a life interest to the survivor of Elizabeth or Fernando Masci, but the main dispositive intent was that the assets of the couple pass equally to the two families, ie., Mr Masci's children on the one hand and Mrs Masci's daughter, Susan, on the other. That this is an important circumstance in considering whether the wills are mutual is recognised in the following passage in *Birmingham* at p 675. In that case the mutual wills made an absolute gift to the surviving spouse and it was said of that:
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> > 'Further, it is conceded by those seeking to enforce the agreement that it does not have the effect of preventing the husband from dealing during his lifetime with property which he received from his wife, so that any trust which was created can only be a kind of floating trust which

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15 [1930] 2 Ch 190.
16 (1769) 1 Dick 419; 21 ER 332.
17 (1937) 57 CLR 666, esp. per Dixon J at 683-684.
18 [2000] NSWCA 253.
19 [1925] Ch 75.
20 At AB289.

> finally attaches to such property as he leaves upon his death. Prima facie, where property is given by will or otherwise to a person and he can do what he likes with it, a gift by the testator or donor of what that person shall happen to leave at his death does not limit or qualify the absolute gift to him which is the effect of such a disposition …'
>
> [29] The case with which I am dealing contrasts. In this case, having regard to the family circumstances of both Mr and Mrs Masci at the time they made the 2006 joint will; the fact that the will is a joint will, and the substance of the provisions of the will – to benefit the couple's respective families equally, I am prepared to imply a term that this joint will was not to be revoked by either Fernando or Elizabeth Masci without giving notice to the other. The consequence is that Fernando having died without revoking the will, Mrs Elizabeth Masci's conscience is bound."[21]

[18] With regard to severance of the joint tenancy, the learned primary judge, relying on the decisions in *Williams v Hensman*[22] and *Sprott v Harper*,[23] did not consider that the making of the joint will itself severed the joint tenancy. Those authorities indicate severance depends on the existence of an agreement between joint tenants to dispose of jointly owned property in a way which is inconsistent with the continued existence of a joint tenancy.

[19] Her Honour concluded the joint tenancy of the residential property was severed, at the latest, upon Fernando Masci's death. She reasoned to that conclusion as follows:

> "[32] … In this case there is a joint will where both parties together, obviously pursuant to an agreement, make provisions that after the death of either one of them, the survivor was only to have a life interest in the property which they hold as joint tenants. That was inconsistent with the continued existence of the joint tenancy.[24]
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> [33] A will is always revocable during a testator's lifetime. Even a mutual will is revocable, the agreement between the parties is enforced as a matter of contract law, or in equity, not by preventing revocation of the will.[25] It may well be then that the joint tenancy was not severed until Mr Fernando Masci's death. It does not matter to the outcome of this case; there was a severing at least from Mr Masci's death."[26]

[20] Finally, her Honour decided that Graham Masci alone should be the executor and trustee of the will given that by the time of the hearing, the residential property had been sold by Elizabeth Masci. Her Honour's assessment was that, in the circumstances, he is more likely to be able to act independently.[27]

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21 AB290.
22 (1861) 70 ER 862 at 868.
23 [2000] QCA 391 at [7]-[8].
24 Cf *Scott v Scott* [2009] NSWSC 567 at [100].
25 See eg., *In the Estate of Heys* and *Birmingham v Renfrew*.
26 AB291.
27 Reasons [35]: AB291-292.

Grounds of Appeal

[21] The Notice of Appeal sets out the following grounds of appeal:

> "1. That the learned Judge erred in fact and in law in finding that the testamentary instrument executed on 2 April 2006 ('the joint will') constituted a mutual will as between Fernando Masci (the deceased) and the appellant.
>
> 2. That the learned Judge erred in fact and in law in finding that the joint tenancy held by the appellant and the deceased in respect of the property more properly described as Lot 20 on Registered Plan 222084 County of Ward Parish of Gilston had been be severed at or prior to the death of the deceased.
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> 3. Further or in the alternative, that the learned Judge erred in fact and in law in finding that the joint will was sufficiently certain to have effect as a testamentary instrument to dispose of the entirety of the estate of the deceased when the Court ought to have found the deceased had died intestate or there was a partial intestacy.
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> 4. In the event any of the grounds of appeal aforesaid are upheld, that the learned Judge erred in fact and in law in ordering that the second respondent be removed as executor."[28]

[22] At the hearing of the appeal, Elizabeth Masci was represented by counsel who had not appeared for her at first instance. Her counsel appeared on the instructions of new solicitors who also were engaged after the Notice of Appeal had been filed. Graham Masci appeared for himself and sought to rely on written submissions which had been prepared and filed by his former solicitors who had acted for him at first instance. Dianne Collins was present at the hearing and indicated to the court that she would rely on her brother's submissions. As had happened below, there was no appearance by or for Susan Camm.

[23] Written and oral submissions for Elizabeth Masci were not presented in a way which followed the grounds of appeal as listed. They were directed towards findings which, it is contended, ought to have been made by the learned primary judge, namely:

> (a) that the will was of such uncertainty as to fail to have effect as a disposition of Fernando Masci's estate;
>
> (b) that, notwithstanding, the will take effect to revoke any previous wills made by him;[29]
>
> (c) that, therefore, Fernando Masci died intestate; and
>
> (d) that the will did not take effect as a mutual will or sever the joint tenancy and, in consequence, the residential property passed to Elizabeth Masci by survivorship.

Ground 5 was not separately addressed in the submissions.

[24] In order to do justice to the appeal, it is, I think, appropriate to deal with the topics as they were presented in submissions made on behalf of Elizabeth Masci.

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28 AB302.

29 There was evidence that Fernando Masci had made a will on 29 June 2004 with the assistance of the Public Trustee of Queensland: AB225-227.

Uncertainty

[25] In written submissions, counsel for Elizabeth Masci submitted that her Honour strained the language of the will beyond reason to a point of imposing words not found in it.[30] The situation was not one of mere ambiguity in meaning but absence of intelligible meaning. Counsel's submissions focused upon the provisions for staying in the house and handling all monies. These, it was said, did not necessarily give rise to a life tenancy in the residential or other property.[31]

[26] To my mind, it is significant that the husband and wife evidently thought it necessary to provide for rights in relation to the residential property after the death of the first of them to die. The provision that they did make is premised upon a notion of the estate of the first to die having an interest in the ownership of that property after the death such that there was a need to make it clear that, notwithstanding that interest, the survivor was assured of being able to reside in the property thereafter. Had they envisaged and intended that ownership of the residential property pass to the survivor of them, then the provisions they did make would have been entirely unnecessary. The survivor, as owner of the entirety of that property, could have done as he or she wished with it. No need to give any assurance to the survivor with respect to his or her staying in the residential property would have been perceived.

[27] As a rationale for the first two sentences in the dispositive provisions, it is suggested for Elizabeth Masci that they are consistent with survivorship on death of the first of them to die, the words "to stay in the house" being no more than an expression of intent, if not comfort, by the one to the other, that as owner of the residential property, they would continue to live there.[32] In my view, this suggestion is quite unpersuasive. It is not at all clear why the Mascis would have thought it necessary to express such a sentiment and then go to the trouble of making a document as solemn as a will to express it.

[28] Further, there is a criticism of her Honour's approach for regarding the short sentence "This is to be reversed if either is deceased first" as applicable only to the first two sentences in the dispositive provisions. The criticism is, I think, groundless. The short sentence is evidently inapplicable to the third sentence because that sentence does not provide for a regime for disposition of property which is referenced to the sequence in which Fernando Masci and Elizabeth Masci die. By contrast, the first two sentences are so referenced. The short sentence is clearly applicable to them. A criticism may fairly be made that the sentence itself is superfluous because the alternative circumstances of Fernando Masci dying first and Elizabeth Masci dying first are dealt with in the first two sentences in the dispositive provisions.[33] However, the superfluity is of no consequence. It does not impair the validity of the will. The sentence may be ignored just as the redundant words "I give" at the beginning of the dispositive provisions may also be ignored.

[29] I am quite unpersuaded that it has been established by any of these arguments that her Honour erred in finding that the dispositive provisions in the will were capable of having an ascertainable meaning and, in particular, that the will operated to create

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30 Appellant's Amended Outline of Argument, paragraph 10.

31 Appeal Transcript 1-15 ll17-20.

32 Appeal Transcript 1-16 ll35-41. At the hearing of the appeal, counsel appropriately disavowed a proposition that the words operated as a mandatory direction that the survivor reside in the house for the rest of his or her life; Appeal Transcript 1-34 l32 – 1-35 l15.

33 This is so upon the basis that the first sentence is read, by implication, to apply to the circumstance of Fernando Masci surviving Elizabeth Masci, as I think it should be.

a life interest in the property to which it applies, upon the death of the first to die and in favour of the survivor.

Revocation

[30] The joint will, by clause 1 thereof, operated to revoke any previous will that Fernando Masci or Elizabeth Masci may have made. Given that the joint will in its entirety is capable of being interpreted and admitted to probate, it follows that clause 1 took effect according to its terms. It is therefore unnecessary to consider whether clause 1 might have taken effect if the dispositive provisions in clause 2 fail for uncertainty.

Intestacy

[31] Two other consequences also follow. One is that Fernando Masci did not die intestate. The other is that there is no partial intestacy in respect of the residential property or the monies.

Is there an agreement for a mutual will?

[32] In written submissions, counsel for Elizabeth Masci conceded that the learned primary judge had correctly identified the requirements for the existence of mutual wills.[34] At the hearing of the appeal, counsel provided the court with a copy of the recent decision of McMillan J of the Supreme Court of Victoria in *Flocas v Carlson*[35] which concerned the wills of a brother and sister executed at the same time, and in which the United Kingdom and Australian cases on mutual wills are considered in detail. Counsel accepted that there was no material difference between the principles distilled by McMillan J from the cases and the principles applied by the learned primary judge here.[36]

[33] The thrust of the challenge to the finding of an agreement for a mutual will is an insufficiency of evidence to permit it to be made. The "heavy burden of proof" borne by those who undertake to establish an agreement for mutual wills of which Latham CJ spoke in *Birmingham v Renfrew*,[37] was not discharged.

[34] In developing the challenge in oral submissions, counsel for Elizabeth Masci contended that the only evidence of an agreement for mutual wills was the joint will itself.[38] That submission cannot be sustained. The matters on which her Honour relied for the implied agreement not to revoke without notice to the other are set out in paragraphs 28 and 29 of the reasons. They extend beyond the circumstance of the joint will having been made and include the respective family circumstances when the will was made and the provisions of the will itself.

[35] Next, it was submitted that the Mascis could not have intended an agreement not to revoke without notice because the residential property was jointly owned. The parties, conscious that the survivor would take the residential property, could not have intended such an agreement, at least so far as that property was concerned. This submission is troubling. It is premised upon an assumed shared intention that the residential property should pass by survivorship and, in that respect, is self-justifying. Yet, the very terms of the will put in question the validity of such a premise.

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34 Appellant's Amended Outline of Argument, paragraph 15. This was, in effect, confirmed at the hearing of the appeal: Appeal Transcript 1-7 l22 – 1-9 l29.

35 [2015] VSC 221.

36 Appeal Transcript 1-7 ll9-12.

37 At 674-675.

38 Appeal transcript 1-24 ll12-14.

[36] A further criticism is that the learned primary judge did not refer to "unchallenged evidence" of Elizabeth Masci. In her affidavit sworn 7 February 2014, she deposed:

> "We did not completely understand what might happen when one of us died, so we both made it as clear as we could that we were each to remain in full control of the other's property, and that it was only that when we had both passed that the joint executors would sell all possessions, whatever they be at the time, and split the proceeds from the sale equally between Susan, on the one hand, and Fernando's three children, on the other hand."[39]

Her Honour may not have referred to this evidence out of a concern for its reliability. No objection was taken to its admissibility. Whatever the reason, what is significant, to my mind, is that the implied agreement found by her Honour is quite consistent with the notion conveyed by this evidence, namely, that the survivor should have the benefit of the property for life, but not absolute ownership of it.

[37] None of the criticisms made have persuaded me that the learned primary judge erred. The circumstances to which her Honour referred, especially those at paragraphs 28 and 29 of her reasons, provided an ample evidentiary basis for the binding agreement that she found had been made.

Severance

[38] As to the finding of severance of the joint tenancy of the residential property, again it is not submitted for Elizabeth Masci that the learned primary judge incorrectly identified relevant principles.[40] In written submissions, an admittedly theoretical proposition was advanced to the effect that the fact that the learned primary judge did not make a definitive finding as to when the severance occurred was itself indicative of an insufficiency of evidence to find a severance.[41] A second proposition is that any severance that did occur, must have occurred when the joint will was made because if the residential property remained jointly owned thereafter, "the parties were free to deal with it in that capacity during their lifetime".[42] The propositions were not elaborated in oral submissions.

[39] The first proposition is little more than rhetoric. It does not expose error in articulation or application of principle on her Honour's part. The second proposition is of dubious significance. It is true that the Mascis, as joint tenants, would have been free to dispose of the residential property during their joint lifetimes had the joint tenancy not been severed when the joint will was made. Had they disposed of it jointly, then the provisions of the will as they applied to that specific property would thereafter have been incapable of taking effect. There is no point in speculating what substitute testamentary provision they might thereafter have made.

Disposition

[40] None of the submissions in support of this appeal has succeeded. It follows that the appeal must be dismissed. At the hearing of the appeal, counsel for Elizabeth Masci sought the opportunity to make submissions on costs once the decision of the Court had been published. My present view is that there should be no order as to costs, given that the respondents are not legally represented.

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39 At paragraph 18.
40 Appellant's Amended Outline of Argument, paragraph 24.
41 *Ibid*, paragraph 26.
42 *Ibid*, paragraph 27.

Order

[41] I would propose the following orders:

1. Appeal dismissed.

2. There be no order as to costs of the appeal unless any party files written submissions in support of a different costs order within 10 days of the date of pronouncement of these orders.

[42] **MORRISON JA:** I agree with the orders proposed by Gotterson JA and with the reasons given by his Honour.

[43] **PHILIPPIDES JA:** I have had the advantage of reading the draft reasons of Gotterson JA. I agree with those reasons and the orders proposed.