2012 IL App (5th) 110028-U

NO. 5-11-0028

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JOAN SIMS, as Executor of the Estate of Howard S. Morrison, JOAN SIMS, as Trustee of the Howard S. Morrison Revocable Trust, and MARY BETH PRICE, as Sole Heir of Howard S. Morrison,	)	Appeal from the Circuit Court of Madison County.
Plaintiffs-Appellees,	)	
v.	)	No. 04-CH-718
LISA BRICKER, Individually and as Trustee of the Mildred M. Morrison Irrevocable Trust,	)	
Defendant-Appellant,	)	
and	)	
PEGGY L. REYNOLDS, Individually,	)	Honorable Clarence W. Harrison II,
Defendant.	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court ordering the defendants to transfer disputed real estate to the residual beneficiary of a 1987 will is against the manifest weight of the evidence because there was no evidence to show that the testator agreed that her will was not revocable or that she was restricted from conveying the real estate before her death.

¶ 2 This case involves a dispute concerning mirror-image wills executed on August 14, 1987, by husband and wife, Howard Morrison and Mildred Morrison, and a deed conveying a portion of Howard's real estate to Mildred, which Howard executed on the same date. One

of the defendants, Lisa Bricker, who is one of Mildred's granddaughters, appeals from the amended judgment of the Madison County circuit court, entered on December 20, 2010, wherein the court set aside Mildred's 2004 conveyance of real estate to her trust, which she executed on April 13, 2004. In the amended judgment, the court ordered Lisa and her mother, codefendant Peggy L. Reynolds, to take all necessary steps to transfer the disputed real estate to the plaintiffs. On appeal, Lisa argues that the trial court's judgment is against the manifest weight of the evidence. We reverse and remand.

¶ 3 PROCEDURAL BACKGROUND

¶ 4 On August 30, 2004, Howard filed a petition to quiet title against Lisa, as the trustee of Mildred's 2004 trust, and individually against Mildred. In the petition, Howard alleged that, on August 14, 1987, he had conveyed real estate that he owned individually to his wife, Mildred. Howard alleged that he conveyed the real estate to Mildred "pursuant to a contract between the two, and specifically for the sole purpose of estate planning." Howard identified three parcels of real estate that were included in the estate plan: (1) "the marital residence, commonly known as 7111 State Route 140, Edwardsville," Illinois (7111 State Route 140); (2) "a residence, located at 7119 State Route 140, Edwardsville" (7119 State Route 140); and (3) "farm ground, acreage with legal description as follows"[1] (the farm ground). Howard

[1]"Parcel 1: The Southwest Quarter (1/4) of the Northeast Quarter (1/4) and the East half (½) of the Northwest Quarter, all in Section 12 in Township Five (5) North; Range Eight (8) West of the Third Principal Meridian, containing one hundred and twenty (120) acres more or less. ***

Parcel 2: All that part of each of two tracts of land in the East ½ of the East ½ of Section 12 in Township 5 North , Range 8 West of the Third Principal Meridian, lying West of the center line of the present diversion channel of Paddock Creek as cut, constructed and diverted by Johan Friedrick Weise across said two tracts, which are more particularly

alleged that his conveyance of the real estate was not a gift, that he believed Mildred had conveyed the property to a trust, and that any gift of that real estate from Mildred to a trust was invalid because Howard had not granted his permission for the conveyance. Howard also alleged that the conveyance violated his will contract with Mildred.

¶ 5 While the case was pending, Mildred died on June 25, 2006, and Howard died on March 18, 2007. On May 31, 2007, the court substituted Lisa and Peggy as the defendants and Joan Sims and Mary Beth Morrison Price as the plaintiffs. Lisa is the trustee of Mildred's April 13, 2004, trust. Joan is the trustee of Howard's March 12, 2004, trust and the executor of his will which he executed on the same date. Mary Beth is Howard and Mildred's daughter.

¶ 6 On June 14, 2007, the substituted plaintiffs (hereinafter plaintiffs) filed a first amended complaint, which the substituted defendants (hereinafter defendants) answered on June 27, 2007. On April 24, 2008, the plaintiffs filed a second amended complaint asking the court to void Mildred's conveyance to her trust, to order Lisa to account for all of the trust assets and expenditures since her appointment as trustee, and to find that Mary Beth was the owner of the real estate described in the complaint. The case was finally tried as a bench trial on July 6, 2010.

¶ 7 Bench Trial

¶ 8 At the beginning of the bench trial, the plaintiffs' attorney began making arguments

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described as follows, to-wit:

The Southeast 1/4 of the Northeast 1/4 of said Section 12, and all that part of the East ½ of the Southeast 1/4 of said Section 12 lying North of the centerline of the Alton and Greenville Road as located across the same ***."

concerning allegations of undue influence exerted by Lisa over Mildred. The court specifically explained to the parties that it would not consider the plaintiffs' allegations of undue influence during the bench trial since no cause of action for undue influence had yet been properly pled. The court stated, "As counsel and I have discussed, the two cases would have to be determined in sequential order ***[and] I would only get to the undue influence allegations in the event that I deny relief under the breach of the mutual wills Complaint." Both parties agreed to this procedure. After the close of the evidence in the bench trial, the plaintiffs filed a third amended complaint setting forth their allegations of undue influence against Lisa.

¶ 9 Howard and Mildred were married in 1964. Howard had no children when he married Mildred, but Mildred had two children from her first marriage, Peggy Reynolds (one of the defendants in this case) and Earl Fines, Jr., who died in the late 1990s. Howard and Mildred adopted Mary Beth shortly after her birth in 1970. In 1985, Howard and Mildred sought the advice of an attorney, Gary Coffey, in order to develop an estate plan. In 1985, Mildred's daughter Peggy had four daughters, and her son Earl had one son and one daughter.

¶ 10 Attorney Coffey sent a letter to Howard and Mildred on July 17, 1986. In that letter, he proposed an estate plan that would avoid the impact of federal estate taxes, which he estimated would be $51,300 if the couple did not make changes in the ownership of Howard's real estate. According to a worksheet prepared by attorney Coffey, in 1985, Howard was the sole owner of more than 330 acres of land valued at over $575,000. Howard acquired this real estate before his marriage to Mildred. Howard's real and personal estate had a value of approximately $690,850. Howard and Mildred also jointly owned a one-half interest in a one-acre parcel improved with a residence, and the value of their share was approximately $17,500. Attorney Coffey estimated that Mildred's real and personal estate was worth $47,800.

¶ 11 Attorney Coffey testified that he used the financial information he received from Howard and Mildred to make calculations regarding federal estate taxes and that he set forth those calculations in his July 17, 1986, letter to them. He explained the purpose of those calculations:

> "Well, the purpose of the calculations at that time we were very–in estate planning our primary concern was federal [e]state tax. And so, most estate planning was done in order to minimize the effect of federal estate tax on–on their deaths."

According to attorney Coffey, it would not matter which testator died first because they would each have the benefit of all of the real estate owned by both of them because they would each receive a life estate in the real estate owned in the other's name alone. Coffey testified that the wills "were tailored to benefit Mary Beth because both of them wanted their estates to go to her or that she have the benefit of them at the second dead."

¶ 12 Attorney Coffey testified that Howard and Mildred executed mirror-image wills on August 14, 1987, and on the same date, Howard executed a deed conveying to Mildred 137.53 acres improved with a residence. The real estate conveyed to Mildred in 1987 included the two parcels Howard described in his petition to quiet title as the farm ground, but it did not include 7111 or 7119 State Route 140. The deed included no language limiting or restricting Mildred's ownership or title to the real estate. Attorney Coffey testified that both of the wills and the deed were executed "all at one closing conference or will execution conference," which he characterized as "all one transaction." He explained, "It took all three documents [the two wills and the deed from Howard to Mildred] to implement the estate plan." He also testified that the estate plan, set forth in the two wills and the deed to Mildred, was based on the premise "that they would be married until they died and that these wills would control the distribution of the property on their death."

¶ 13 In their 1987 wills, Howard and Mildred left all of their personal property to each

other, left a life estate in their real estate to each other, and left the residue of their estates to each other. On the death of both Howard and Mildred, the residue passed to their daughter, Mary Beth. Mary Beth was 17 years old when they executed these wills, and Howard and Mildred each established a testamentary trust to administer the property she would inherit under the wills. Section two of Howard's 1987 will provided in pertinent part as follows:

> "I now own real estate in Fort Russell Township in Madison County Illinois. If I own this real estate at my death [and]:
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> ***
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> 2. If my wife is living at my death, she shall be entitled during her life to the use of the real estate and to all the income therefrom, and shall pay the expenses of maintenance and protection thereof.
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> 3. Prior to the death of my wife, my wife and daughter, Mary Beth Morrison, acting together, shall have the power to sell the real estate, and to receive the proceeds of such sale. If my daughter shall die before my wife, my wife shall have no power of sale after her death. In the event of any such sale, my wife shall be entitled during her life to the income from the proceeds, and shall pay the expenses of the management of such proceeds.
>
> 4. Upon the death of my wife, or upon my death, if she dies before me, the real estate (or the proceeds thereof) shall pass outright to The Bank of Edwardsville, or its successor, as trustee of the 'Mary Beth Morrison Trust.' "

Section two of Mildred's 1987 will included the same provisions, but the words "my wife" were substituted with the words "my husband." In both 1987 wills, under the testamentary trust provision for Mary Beth, the remainder of the trust was to pass to Mary Beth's descendants on her death, but if she died without descendants, one-half of the remainder was to pass to Howard's sister, Elinor Keys or her living descendants, and one-half to Mildred's

grandchildren or their living descendants.

¶ 14 There is also a second deed in the record, dated December 10, 1991. Although this deed was admitted into evidence, there is no testimony or argument to explain it. The 1991 warranty deed evidently conveyed real estate located at 7119 State Route 140, Edwardsville, Illinois, to Mildred, from Howard and Mildred, as husband and wife.[2] The 1991 warranty deed to Mildred does not include any language that would limit Mildred's full and unrestricted ownership of the property. There is no other evidence in the record with any additional terms of any agreement between Howard and Mildred regarding the estate plan. There is nothing in writing except attorney Coffey's 1986 letter and his office notes to explain Howard's conveyances of his real estate to Mildred. There is no evidence showing whether the 1987 wills were to be construed together or whether Howard and Mildred agreed that their 1987 wills were irrevocable.

¶ 15 Mildred suffered a stroke in 2003. In December 2003, after Mildred was released from the hospital, Lisa took Mildred to Lisa's home to live with her.

¶ 16 On March 12, 2004, Howard executed a new will which specifically revoked "all prior wills and codicils" and under which he bequeathed all of his property to the trustee under his trust, dated the same day. The attorney who prepared the new will and trust for Howard was

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[2]The 1991 deed conveyed: "A tract of land in the East Half of the Southeast Quarter of Section 12, Township 5 North, Range 8, West of the Third Principal Meridian, *** more particularly described as follows:

> Commencing at a concrete monument at the intersection of the West line of the East Half of the Southeast Quarter of Section 12, Township 5 North, Range 8 West with the northerly right of way line of Illinois Route 140; [metes and bounds description], containing 1.00 acre. Commonly known *** as 7111 State Route 140, Edwardsville, Illinois."

attorney Coffey's son, who worked at his father's law firm. Howard reserved the right to amend or revoke his 2004 trust, and Mildred was to receive the balance of the trust if she survived him. If Mildred did not survive Howard, then Mary Beth or her descendants were to receive the remainder of Howard's 2004 trust. If Mildred, Mary Beth, and Mary Beth's descendants did not survive Howard, then one-half of Howard's 2004 trust was bequeathed to Howard's sister or her descendants and the other half was bequeathed to Mildred's grandchildren or their descendants.

¶ 17 On April 13, 2004, Mildred executed a new will which bequeathed her estate to her trust, which she also executed on the same date. Also on April 13, 2004, Mildred executed a deed in trust conveying to Lisa, as the trustee of her trust, the same real estate that Howard conveyed to her in 1987 as part of the estate plan and will execution, as well as the real estate he conveyed to her in 1991. Also on April 13, 2004, Lisa executed a trustee's deed conveying all of the real estate that Mildred had conveyed to her trust to "Peggy L. Reynolds and Lisa G. Bricker, as tenants in common and not as joint tenants." Lisa's trustee deed was not recorded until April 12, 2007, after the deaths of both Mildred and Howard. Attorney Jeffrey Mollet drafted all of these documents. Under the terms of Mildred's trust, she made specific monetary bequests to her grandchildren, and she noted that she had provided for Mary Beth with an annuity that was to pass outside of her trust. To Howard, Mildred bequeathed "a life estate in the residence located at 7111 State Route 140, including the surrounding yard but specifically excluding any timber, pasture or agricultural land, all of which the trustee shall hold" in trust for Howard. Mildred bequeathed the residue of her estate, including all of her real estate, to her daughter Peggy and her granddaughter Lisa.

¶ 18 During Lisa's testimony, the plaintiffs' attorney asked her how she happened to take Mildred to attorney Mollet, to which Lisa responded as follows:

"A. My grandfather had come to the house and said he had spoke to Mr.

> Coffey about a trust, and that she was to go see–go to have a trust prepared. I asked her to see Mr. Coffey, you know, to make an appointment with Mr. Coffey and she told me, no, to find another attorney. So, I honestly just looked through the phone book at attorneys in Edwardsville, and that's how I found him."

Lisa also testified that Howard knew that Mildred was preparing a new will because he "told her to." There was no testimony or other evidence tending to contradict this testimony from Lisa.

¶ 19 Mildred died on June 25, 2006, and Howard died less than nine months later on March 18, 2007.

¶ 20 On October 25, 2010, the court entered a judgment finding, in relevant part, as follows. In 1987, Howard and Mildred executed mutual and reciprocal wills "in which they agreed and provided that the survivor would receive a life estate" in the decedent spouse's real estate, and upon the death of the survivor, the residue would pass to their daughter, Mary Beth. The court determined that Howard executed a deed on August 14, 1987, which transferred the disputed real estate to Mildred in consideration "of the mutual and reciprocal wills and without other consideration." The court stated that the "execution of mutual and reciprocal wills and [the] deed was specifically for the sole purpose of estate planning benefitting their mutual daughter." The court found that the will Mildred executed in 2004 was in breach of her agreement with Howard and was contrary to the 1987 mutual and reciprocal wills. The trial court made no findings regarding the 1991 deed or Howard's 2004 will and trust.

¶ 21 The court concluded that equity demanded that Mildred's transfer of the disputed real estate be set aside, but the court did not differentiate between the real estate Howard conveyed to Mildred in 1987 and the real estate he conveyed to her in 1991. The court stated, "Regardless of whether the transfer of the real estate created a constructive trust,

resulting trust, or express trust, the credible evidence indicates that Howard Morrison transferred the property to his wife for the ultimate benefit of their mutual daughter." The court determined that any presumption of gift had been overcome by clear and convincing evidence that the intended beneficiary of the real estate transfer from Howard to Mildred was their daughter Mary Beth. The court entered a judgment in favor of Mary Beth and ordered the defendants to "take all necessary steps to execute the appropriate documents to transfer the disputed real estate" to Mary Beth. The court specified that the "disputed real estate" was the same as described in the third amended complaint, which set forth the legal descriptions of the farm ground conveyed in 1987 and the property located at 7111 State Route 140 conveyed in 1991.

¶ 22 In the October 25, 2010, judgment, the trial court also made findings regarding allegations of undue influence exerted by Lisa over Mildred while Lisa was acting as a fiduciary for Mildred under a power of attorney. At the beginning of the bench trial, however, the court severed the allegations of undue influence and specifically explained that it would not consider those allegations during that trial. The parties agreed to this procedure. After the bench trial, both parties filed closing arguments, and the plaintiffs filed their third amended complaint with count II alleging that Lisa had exerted undue influence upon Mildred.

¶ 23 On November 17, 2010, the defendants filed a motion pursuant to section 2-1203 of the Code of Civil Procedure (735 ILCS 5/2-1203 (West 2010)), arguing that the court should not have ruled on the undue influence claim because it had been severed from the bench trial. The defendants argued that the plaintiffs had failed to prove entitlement to relief under their quiet title claim and that the trial court had incorrectly found the 1987 wills to be mutual and reciprocal. They argued that, even if the 1987 wills were mutual and reciprocal, they were revocable until Mildred's death in 2006. Since Mildred and Howard had both executed new

wills before they died, the defendants maintained that the court could not make the terms of the earlier wills binding on Mildred.

¶ 24 On December 20, 2010, the trial court entered an amended judgment that once again set aside Mildred's conveyance of the disputed real estate to her trust. In the amended order, the court again found that the "execution of the Will, Deed and Irrevocable Trust by Mildred Morrison was a result of undue influence" by Lisa, who had a fiduciary relationship with Mildred. The court noted that, because Mildred's estate was not before it, the presumption of undue influence was not actionable. The court stated that it had not relied upon the presumption of undue influence in its analysis. Lisa appeals from the court's December 20, 2010, amended judgment.

¶ 25 ANALYSIS

¶ 26 Lisa argues that the trial court's order should be reversed on the basis of five claimed errors: (1) that Howard's and Mildred's 1987 wills should not be construed as joint and mutual wills; (2) that when Howard executed a new will and an irrevocable trust in 2004, he revoked his 1987 will; (3) that Mildred was free to revoke or change her 1987 will at any time before Howard's death in 2007; (4) that the court erred in finding that Lisa exerted undue influence upon Mildred since it barred that evidence at the beginning of the trial; and (5) that there was insufficient evidence to support a quiet title judgment in favor of the plaintiffs.

¶ 27 When a party challenges the trial court's ruling after a bench trial, the standard of review is whether the court's judgment is against the manifest weight of the evidence. *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001). The court's judgment is against the manifest weight of the evidence only if the opposite conclusion is apparent or if the findings are unreasonable, arbitrary, or not based on the evidence. *Buckner v. Causey*, 311 Ill. App. 3d 139, 143 (1999). As the trier of fact, the trial judge is in a superior position

to judge the credibility of the witnesses and to determine the weight to be given to their testimony. *Id.* at 144. "A reviewing court may affirm the circuit court's judgment on any basis which appears in the record, regardless of the basis relied upon by the circuit court." *In re Estate of Bontkowski*, 337 Ill. App. 3d 72, 78 (2003). The real issue on appeal is not whether the reasoning stated by the circuit court is correct but whether the ultimate outcome is correct. *Id.*

¶ 28 We need only consider the court's finding, in both its original and amended judgments, that, in 1987, Howard and Mildred "executed mutual and reciprocal wills."

¶ 29 The supreme court has defined mutual wills as follows:

> "The terms 'joint wills' and 'mutual wills' are sometimes inaptly used interchangeably. A joint will is a written instrument executed and published by two or more persons disposing of the property, or some part of the property, owned jointly or in common by them or in severalty by them. On the death of the testator first dying it is subject to record and probate as his will, and on the death of the surviving testator it is subject to probate as his will. A joint will may or may not be mutual or reciprocal. Mutual or reciprocal wills are the separate instruments of two or more persons, the terms of such wills being reciprocal, and by which each testator makes testamentary disposition in favor of the other. [Citation.] A will that is both joint and reciprocal is an instrument that is executed jointly by two or more persons with reciprocal provisions and shows on its face that the bequests are made one in consideration of the other." *Curry v. Cotton*, 356 Ill. 538, 543 (1934).

The trial court correctly labeled the 1987 wills as mutual and reciprocal because they are separate instruments, the terms are reciprocal, and both testators made testamentary dispositions in favor of the other.

¶ 30 However, even though the 1987 wills qualify as mutual and reciprocal, that does not

necessarily mean that they were irrevocable. The trial court also found that Howard and Mildred "agreed and provided that the survivor would receive a life estate in [the] decedent's estate, and upon the death of the survivor, the decedent's estate would pass to their daughter, Mary [Beth] Morrison Price." From that finding and the court's order that the defendants transfer the disputed real estate to Mary Beth, we believe the court implicitly found that Howard and Mildred intended for their 1987 wills to be irrevocable.

¶ 31 "Mutual and reciprocal wills may or may not be revocable at the pleasure of either party, depending on the circumstances and understanding upon which they were executed." *Felson v. Scarpelli*, 165 Ill. App. 3d 869, 871-72 (1987). "One of the main attributes of a will is that the will is ambulatory and may be revoked at any time by the testator during his or her lifetime. Thus, mutual wills which deprive the parties of that right to revoke must be established by clear and satisfactory evidence of a contract not to revoke." *Estate of Maher*, 237 Ill. App. 3d 1013, 1020 (1992). Mutual wills, standing alone without other evidence, are not typically sufficient evidence of an agreement that the wills are not revocable. *Monninger v. Koob*, 405 Ill. 417, 422 (1950).

> "Courts of equity look with jealousy upon the evidence offered in support of such a contract and will weigh it in the most scrupulous manner. [Citation.] It is also clear that, while a person owning property may make a contract to dispose of it by will in a particular way [citations], such contracts do not stand on especially favored footing, and a court will be more strict in examining into the nature and circumstances of such agreements than with other contracts." *Id.* at 422-23.

Each case involving joint and mutual wills must be decided on its own facts and merits. *In re Estate of Edwards*, 3 Ill. 2d 116, 119 (1954) (quoting *Frazier v. Patterson*, 243 Ill. 80, 84-85 (1909)).

¶ 32 In the case before us, there was no evidence to show that Howard and Mildred agreed

that their 1987 wills were intended to be irrevocable. The evidence showed, at most, that they agreed to the estate plan suggested by attorney Coffey. The primary purpose of that estate plan was to avoid the impact of federal estate taxes, which was evidently accomplished by Howard's conveyance of a portion of his real estate to Mildred on the same date in 1987 that the wills were executed. Since there is no evidence to show that the 1987 wills were intended to be irrevocable, the trial court's implicit finding that the 1987 wills were irrevocable is against the manifest weight of the evidence. Hence, when Howard executed a new will and trust in 2004, he revoked his 1987 will. Howard specifically stated in his 2004 will that he was revoking all prior wills. 755 ILCS 5/4-7(a)(2) (West 2004) (execution of a later will by the testator declaring the revocation revokes the earlier will).

¶ 33 The trial court also found that the "execution of mutual and reciprocal wills and deed was specifically for the sole purpose of estate planning benefitting their mutual daughter." However, there was very scant evidence that the purpose of the estate plan was to benefit Mary Beth. Attorney Coffey testified about the estate plan, but that plan was primarily developed to avoid payment of federal estate taxes, and that part of the plan was accomplished by Howard's 1987 conveyance of part of his real estate to Mildred. Since there is no explanation in the record for the 1991 deed, that conveyance adds no support to the trial court's order. Because Howard did not convey that property until *after* he and Mildred executed their 1987 wills, it cannot be part of any agreement they reached in 1987. There was virtually no evidence in support of the plaintiffs' claim that the central purpose of the 1987 wills and the 1987 deed from Howard to Mildred was to benefit Mary Beth. Although the wills did in fact benefit her as the primary residuary beneficiary and gave her power over the sale of the real estate passing under the wills, there was no testimony or documentary evidence indicating that the benefit to Mary Beth was the purpose of the estate plan. Rather, from the letter that attorney Coffey sent to Howard and Mildred before they executed the

wills and before Howard executed the deed to Mildred, the primary purpose of the estate plan was to avoid federal estate taxes.

¶ 34 Attorney Coffey testified that the 1987 wills "were tailored to benefit Mary Beth because both of them wanted their estates to go to her or that she have the benefit of them at the second dead." He stated that the wills and deed were all signed on August 14, 1987, "all at one closing conference or will execution conference" and that it took both of the wills and the deed to implement the estate plan. When asked whether the 1987 estate plan contemplated that Mildred would later convey property to an irrevocable trust, attorney Coffey testified that he had no firsthand knowledge about that and that the documents would speak for themselves. He said that the "[c]ontemplation was that they would be married until they died and that these wills would control the distribution of the property on their death." That evidence merely shows that, in 1987, Howard and Mildred each decided to bequeath their property after both of their deaths to Mary Beth. The evidence does not indicate that they agreed for their 1987 wills to be irrevocable.

¶ 35 Additionally, the fact that Howard conveyed a portion of his real estate to Mildred as part of the 1987 estate plan provides no support for the trial court's ruling either. The 1987 warranty deed of the farm ground to Mildred does not contain any language to limit Mildred's full and unrestricted ownership of the property. The terms of the 1987 wills specifically contemplate that the testators had the right to sell or convey their real estate before their deaths. Each will provided that the testator owned real estate in Fort Russell Township but added the clause, "If I own this real estate at my death." If Howard and Mildred had agreed that Mildred could not sell or otherwise convey the real estate Howard conveyed to her in 1987, then they would not have included a provision that specifically addressed the possibility that Mildred might not own the property at her death. Also, under Howard's 1987 will, the real estate that he conveyed to Mildred would not pass under his will if he were to

die first because he conveyed that land to Mildred in her name alone. Therefore, the provisions in Howard's will granting Mildred a life estate in *his* real estate and restricting her from selling the real estate without Mary Beth's permission did not apply to the real estate he conveyed to her. During the bench trial, there was no evidence presented to show that Mildred's use or ownership of the real estate was restricted in any way.

¶ 36 Moreover, even if the evidence had established that the 1987 wills were mutual and reciprocal and made pursuant to an agreement that they are irrevocable, they were not irrevocable except "as to the survivor upon the death of the first testator." *Ernest v. Chumley*, 403 Ill. App. 3d 710, 713 (2010). If the circumstances establish that mutual and reciprocal wills were executed pursuant to a contract that they are intended not to be revoked, "then they become irrevocable upon the death of one of the testators." *Estate of Maher*, 237 Ill. App. 3d at 1020. In the instant case, neither testator had died when this lawsuit was commenced, and Mildred was the first testator to die. Therefore, even if Howard and Mildred had agreed that their 1987 wills were not revocable, any agreement embodied in those wills would not have been enforceable until after Mildred's death. Since Mildred conveyed the disputed real estate to her trust in 2004 before her death, the laws regarding joint and mutual wills do not apply under the unique facts and circumstances of this case.

¶ 37 The party asserting a contract not to revoke mutual wills bears the burden of proof to show the existence of the contract and that the wills are contractual as well as testamentary. *Jacoby v. Jacoby*, 342 Ill. App. 277, 283 (1950). "This burden is not sustained by proof that permits an inference either way." *Id.* In order for mutual wills to be found irrevocable, the terms of the contract under which they were executed must be certain and definite, mutual, based upon adequate consideration, and established by the clearest and most convincing evidence. *Id.* If there is insufficient proof that the mutual wills were not made pursuant to a contract, the right of the testator to revoke his or her will is beyond question. *Id.* at 290.

Since there was no evidence to show that the 1987 wills were not revocable or that Mildred was restricted from conveying her real estate as she saw fit, the trial court's judgment ordering the defendants to "take all necessary steps to execute the appropriate documents to convey the disputed real estate to Plaintiff" is against the manifest weight of the evidence and must be reversed.

¶ 38 Finally, we agree with Lisa that the court's gratuitous findings regarding undue influence are improper. The parties agreed with the court before they began presenting evidence that any claims regarding undue influence would not be considered. The court ordered the plaintiffs to file a third amended complaint in order to plead a cause of action for undue influence. We make no findings regarding the sufficiency of the third amended complaint to state any cause of action, and we remand this case for further proceedings.

¶ 39 CONCLUSION

¶ 40 For all of the reasons stated, we reverse the trial court's judgment entered on December 20, 2010, and we remand for further proceedings consistent with this order.

¶ 41 Reversed and remanded.