

Son overturns parent's 25-year-old mutual Will on grounds of brother's undue influence

Synopsis: The England and Wales High Court has ordered the rescinding of mutual Wills made by a Dr and Mrs Naidoo in November 1998, leaving each spouse's residuary estate, if the other spouse did not survive them, to their son David Barton.

Date published: 15.03.2023

Mutual Wills

A mutual Will is one that covers a married or legally bound couple rather than a single individual. It is a Will drawn up between two people who agree between them that at no point in the future will they revoke (that is, cancel) or amend their Will without the consent of the other party.

In a mutual Will, the terms remain binding for the remaining party after the first partner dies. The purpose of this type of Will is often to ensure that assets pass to children rather than a new spouse/civil partner if the living partner remarries/enters a new civil partnership.

The case

Dr and Mrs Naidoo had seven children, of whom David Barton (Barton) was third-eldest and his brother Charan Naidoo (the claimant) sixth-eldest. Between them, the family owned the entire share capital of Choiceclassic Ltd, the holding company for the nursing home business they operated.

The shares were divided widely between family members until 1992, when Barton induced the others to transfer the entire share capital to him and afterwards ran the business for his own benefit. He claimed that, in return, he paid off his parents' overdrawn director's accounts in full to the sum of £390,000.

By November 1998, it was clear that Dr Naidoo would not live much longer and Barton organised the drafting and writing of new Wills for his parents. Each Will referred to the other, expressly providing that they were intended to be mutual Wills.

Both Wills appointed the other's spouse and Barton as executors, and provided that the residuary estate of the first to die should pass to the surviving spouse, and then on the second death to Barton absolutely. Less than two months later, on 12 January 1999, Dr Naidoo died and his estate duly passed to his widow.

In July 2015, Mrs Naidoo made a new Will nominating Barton's younger brother as executor and sole beneficiary. She died the following February and a grant of probate was obtained for this Will in July 2017.

Barton, however, denied the validity of the 2015 Will and the appointment of the other executor. He asserted the validity of the mutual Wills agreement, relied on

solicitors' advice at the time that mutual Wills should be drawn up, and the involvement of a law firm in drafting those Wills.

Just before Mrs Naidoo's death, a restraint order under the Criminal Justice Act 1988 was made in the Administrative Court prohibiting Barton and his wife from disposing of, dealing with or diminishing the value of his assets. That order was still in place when the Wills dispute came to the England and Wales High Court (EWHC) in September 2021.

Barton defended this claim, mostly by video as he was serving a 17-year prison sentence for dishonesty and fraud offences relating to elderly residents at his nursing home – a fact which the judge considered highly relevant to the dispute concerning the validity of the mutual Wills.

It was claimed that Dr and Mrs Naidoo misunderstood and believed that entering into a mutual Wills agreement would leave the survivor free to alter their Will and to make alternative testamentary provision should their intention to leave their estate to Barton change. Also, that Mrs Naidoo was in a vulnerable position by this time, and there was a relationship of trust and confidence between her and Barton, such that she and her husband relied upon him at the relevant time. A claim of undue influence was made against Barton over his parents.

The outcome

Judge Cadwallader said the effect of this Will was to leave Mrs Naidoo locked into having to trust Barton to look after the family appropriately following her death, from the point at which Dr Naidoo died, and whatever Barton might do or suffer thereafter. *'The only person to benefit from that ... was Mr Barton himself,* said the judge. *'It left the rest of the family at his mercy.'*

Cadwallader concluded that Barton had been responsible for his parents' giving instructions that the Wills be mutual, and that they could only have done so as the result of his abusing their vulnerability and his influence upon them.

The result was that the mutual Wills were set aside due to undue influence.

Comment

Care should always be taken where dealing with vulnerable individuals even where family members are involved. Making sure clients are fully aware of what they are entering into and any restrictions applying is essential. You can read the full case details [here](#).

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