

25-year-old mutual will overturned on grounds of son's undue influence

April 2023

*A pair of mutual Wills drafted by a couple in 1998 have been overturned by the High Court of England and Wales following a claim of undue influence by one of their sons in *Naidoo v Barton*, 2023 EWHC 500 Ch.*

The Wills, made by Dr Govindarajaloo Ramamurthie Naidoo (**Dr Naidoo**) and Mrs Nirmalathevie Naidoo (**Mrs Naidoo**) in November 1998, each left their residuary estate (the balance of an estate after tax, liabilities and any specific personal items or cash gifts have been paid), to the survivor of the two in the first instance, and on the death of the survivor, to their son David Barton (**David**).

What is undue influence?

Undue influence is a term used to describe when someone has forced or coerced a person into making or changing a Will so that it benefits them. Undue influence is one of the grounds under which it might be possible to contest a Will, if there is evidence that the person writing the Will was coerced into doing so.

What are mutual Wills?

Mutual Wills are Wills made by two people - usually, but not always, spouses or civil partners. Typically, mutual Wills are made under the same terms, with the agreement that neither party will alter or revoke their Will without the other's consent, even after the first death. Therefore, as soon as one of the parties to that agreement dies, it becomes impossible for the remaining party to alter the mutual Wills.

Case Background

Dr Naidoo and Mrs Naidoo had seven children. Between them, they owned all of the shares of Choiceclassic Ltd, the holding company for the nursing home business they operated,

In 1992, one of the couple's sons, David, had the other family members transfer their shares to him and proceeded to run the business for his own benefit, paying off his parents' directors accounts – which were overdrawn by nearly £400,000 – in return.

When Dr Naidoo was nearing his demise in 1998, David had his parents execute a pair of Wills which expressly provided for them to be mutual, with each Will appointing their spouse and David as executors. Both Wills further provided that the residuary estate of the first to die should pass to the surviving spouse, and upon the second death, to David absolutely. Less than two months later, on 12 January 1999, Dr Naidoo died and his estate duly passed to his widow, Mrs Naidoo.

In 2015, over 16 years after Dr Naidoo had died, Mrs Naidoo made a new Will and nominated David's younger brother Charan Naidoo (**Charan**) – the claimant in the case – as sole executor and beneficiary.

Mrs Naidoo died the following February, and Charan obtained a grant of probate for this Will in July 2017. David, however, challenged both the validity of the 2015 Will and Charan's appointment as executor.

WE ARE OFFSHORE LAW

BVI | Cayman | Guernsey | Jersey | London

In the meantime, just before Mrs Naidoo's death, a restraint order under the Criminal Justice Act 1988 was made in the Administrative Court, prohibiting David 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 before the High Court in September 2021. At the hearing, Charan requested an order pronouncing the validity of Mrs Naidoo's 2015 Will. He requested rescission of the 1998 Will on two grounds, alleging:

1. mistake on the part of Mrs Naidoo; and
2. undue influence on the part of David.

Charan also brought claims for rescissions relating to the family shares in Choiceclassic Ltd and various other agreements previously made.

David defended this claim mostly by vide, 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.

The challenge on the grounds of undue influence was made not on the basis of improper pressure or coercion, but that Mrs Naidoo was in a vulnerable position by this time, and there was a relationship of trust and confidence between her and David, such that she and her husband relied upon him at the relevant time.

Judgment

HHJ Cadwallader, giving judgment, said the effect of this Will meant that Mrs Naidoo was locked into relying on David to look after the family appropriately following her death, from the point at which Dr Naidoo died. 'The only person to benefit from that... was David himself', said the Judge. 'It left the rest of the family at his mercy.'

HHJ Cadwallader noted that David was responsible for the representation that his parents' had wanted mutual Wills, and that he used his influence to abuse their vulnerability. This was supported by the fact that, at some subsequent meetings, his parents gave instructions where the concept of mutual Wills did not feature.

He went on to say that any benefit to the couple of mutual Wills was far outweighed by the loss of the right to alter their testamentary provisions at any point down the line. He also said the couple received 'no such advice' directed to, or capable of, ensuring that their wish to enter into such an agreement was in the exercise of their own free will, rather than the result of undue influence on the part of David.

HHJ Cadwallader subsequently ordered the rescission of the earlier Will and the admission of the 2015 Will to probate.

Summary

By its nature, undue influence usually happens behind closed doors by people in positions of trust, such as a partner, child or carer. This can make it difficult to prove, and a successful claim will need to show that there's no other reasonable explanation for the Will in question being the way it is.

Undue influence is more than just persuasion, which is generally allowed. When looking at a claim of undue influence the court will look for evidence that the deceased would not have made the gifts in the Will without being subject to influence.

If you think that someone has been pressured or influenced into writing a Will that doesn't reflect their true wishes, then it is important to seek legal advice straightaway.

For more information please contact:

**David Jeffery**

Senior Associate // Guernsey

t:+44 (0) 1481 734243 // e:david.jeffery@collascrill.com

**Jessica Burgess**

Associate // Guernsey

t:+44 (0) 1481 734245 // e:jess.burgess@collascrill.com

**Joanne Seal**

Group Partner // Guernsey

t:+44 (0) 1481 734261 // e:joanne.seal@collascrill.com

WE ARE OFFSHORE LAW

BVI | Cayman | Guernsey | Jersey | London

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.