Naidoo v Barton: undue influence and the risks of mutual wills

Before looking at the recent case of Naidoo v Barton [2023] EWHC 500 (Ch), and what it tells us about the use of mutual wills and the risks inherent in such arrangements, it's probably worthwhile taking a look at mutual wills in general, examining how they operate and why some people might choose to make a mutual will. The creation of a mutual will is something which normally occurs within married couples or civil partnerships, and they are sometimes confused with Mirror Wills, which are actually a completely different legal instrument, meaning that any mix-up between the two is likely to have serious and potentially costly ramifications. In simple terms a mutual will is an agreement drawn up between two parties which states that neither will revoke or in any way amend their will at some point in the future without gaining consent from the other party involved. Mirror wills, on the other hand, are simply wills which reflect the contents of each other, but each of which can be altered on an independent basis as and when the party responsible for writing the will chooses. Creating mirror wills and expecting them to apply in the long term calls for a large degree of trust between the parties concerned, as the reality is that each individual could, if they wish, alter their will so that it no longer mirrors the contents of the other, without being under any obligation to let the other party know what they have done. If one partner marries again following the death of the other party, for example, they will be free to write a new will which supersedes anything previously written to leave the assets from what was a joint estate to the new spouse rather than any children. Alternatively, having written mirror wills you may find yourself in the position of dealing with the estate of a deceased spouse or civil partner and discovering that a new will they have written leaves their half of the estate to another party, rather than it automatically passing to you as their spouse or civil partner. Mutual wills, on the other hand, offers no such flexibility. Following the death of one of the parties to the mutual wills the other is legally forbidden from making any change to the agreement. In this respect, the concept of a mutual will runs in complete opposition to the standard approach taken to wills, which is that any party still equipped with the mental capacity to make a will also has the freedom to amend or replace that will as and when they choose. Given that there is a strong possibility that a party's life will change – they may remarry at least once, for example, or find themselves with new children or grandchildren they would like to be able to mention in their will – the creation of mutual wills completely inhibits the ability to change an existing will in order to better reflect shifting circumstances. In some cases an individual may opt to write a new will anyway, having previously been party to mutual wills, but in such cases any new beneficiaries arising from changes made to the original mutual will are deemed, in legal terms, to simply be holding the assets left to them on trust, prior to meeting the obligations set out in the original mutual wills. These limitations, and the way in which a mutual will lacks the capacity to reflect the complexities of real life, mean that creating a mutual will is a relatively rare undertaking, but the case of Naidoo v Barton [2023] EWHC 500 (Ch) shows that it does still happen sometimes, as well as underlining the risks inherent when it does.

The case deals with mutual wills written by Dr and Mrs Naidoo, owners of a successful nursing home business which they ran with several other members of the family. In 1992 Dr and Mrs Naidoo, along with other members of the Naidoo family, were persuaded to transfer the entire share capital in the business to their second eldest son David Barton. This involved Dr and Mrs Naidoo and two of their other sons resigning the directorships they held while David Barton took over as director, running the business for his own benefit.

In 1998 Dr and Mrs Naidoo drafted mutual wills in which they left their estates to each other and, on the death of the last surviving spouse, to David Barton, or his wife if he died before her. The mutual wills also named David Barton as the executor. Dr Naidoo died in January 1999 and in 2015, a few months prior to her death, Mrs Naidoo made a new will. This new will appointed a different son, Charan Naidoo, as executor of the will and sole beneficiary. Following the death of Mrs Naidoo, David Barton challenged the 2015 will on the grounds that the existing mutual will could not be revoked following the death of Mr Naidoo. Proceedings were issued in the High Court in which Charan Naidoo sought an order pronouncing the 2015 will valid and for the 1998 mutual will to be rescinded on the grounds that they were written by mistake and under undue influence. David Barton defended this claim, drawing largely upon the fact that the mutual wills had been drafted with help and advice from solicitors. When analysing the conclusion which the court ultimately came to it's useful to bear in mind that the evidence presented to the court by David Barton took the form of video evidence, due to the fact that he was at the time serving a prison sentence for a range of offences including fraud perpetrated against the vulnerable residents of a care home in which he worked. During the case, Charan Naidoo argued that Mrs Naidoo had believed she would be able to alter the will written in 1998 following the death of her husband, in order to reflect any change in her intentions, and that therefore the 1998 mutual will was invalid on the grounds of having been drafted mistakenly. The court rejected this argument, finding that Mrs Naidoo had a clear understanding of the limitations imposed by the drafting of mutual wills. The other argument presented by Charan Naidoo was that the 1998 will should be rescinded on the grounds of undue influence. The case to which the court referred when determining whether undue influence had been used against Mr and Mrs Naidoo in order to force them to make mutual wills was that of Royal Bank of Scotland Plc v Etridge (No.2) [2002] 2 AC 773. The principles set out in this particular case mean that undue influence is presumed to have been exerted on a party in circumstances in which the defendant has either applied coercion or improper pressure on that party, or developed a relationship in which a measure of influence has been gained over the party in question and, having developed that relationship, uses it in order to take unfair advantage of the party. Under common law as it applies to undue influence, on the other hand, the evidential burden is such that undue influence through coercion or fraud needs to have been demonstrated, something which is extremely difficult to prove. The lower evidential bar set in this case was such that the confidence Mrs Naidoo placed in her son's advice was taken to be such that he was able to effectively instruct her to draft mutual wills on terms he set out. As such, the court found that there was 'no satisfactory explanation' for the drafting of mutual wills as the sole beneficiary to the restriction it placed on the handling of the estate following the death of Mrs Naidoo would be David Barton. With this in mind, the court found that the only reasonable explanation for the drafting of mutual wills was a degree of undue influence exerted and unfair advantage taken by David Barton. To reflect these findings, the court ordered that the 1998 will be rescinded and Mrs Naidoo's estate admitted to probate on the basis of the 2015 will.

In this particular case, the pragmatic approach to the question of undue influence taken by the court – judging that an understanding of the relationships around which the case revolved and the character of the defendant negated any requirement for concrete evidence such as a record, written or aural, of undue influence being applied – meant that the claimant was able to achieve a favourable outcome. Had this not been the outcome, however, the case would have served as a stark reminder of the limitations placed on an individual by the

drafting of mutual wills and the time and expense that can arise when any attempt to escape the restrictions thus imposed and reflect changing circumstances or intentions is made. It should be borne in mind that several cases have shown that mutual wills do not need to state explicitly that they are mutual in order for them to be judged as such in legal terms, which merely serves to underline the care which needs to be taken when drafting a will, particularly if, as a married couple or civil partners, the parties in question create wills which strongly reflect one another.